

IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
O'Brien, PJ, and Gleicher and Stephens, JJ

THE COUNTIES OF INGHAM, JACKSON, and
CALHOUN, Municipal corporations and bodies
politic and corporate,

Plaintiffs-Appellees,

v

THE MICHIGAN COUNTY ROAD COMMISSION
SELF-INSURANCE POOL, an unincorporated
voluntary association,

Defendant-Appellant.

Supreme Court Docket No. _____

Court of Appeals Docket No. 334077

Ingham County Circuit Court
Case No. 15-432-NZ

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**APPLICATION FOR LEAVE TO APPEAL
OF DEFENDANT MICHIGAN COUNTY
ROAD COMMISSION SELF-INSURANCE POOL**

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STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction to consider this Application for Leave to Appeal under MCR 7.303(B)(1). The Application is timely because it is filed within 42 days after the July 25, 2019 Opinion issued by the Court of Appeals. MCR 7.305(C)(2)(a).

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JUDGMENT AND ORDER APPEALED
AND RELIEF SOUGHT

This is the second time this case is before this Court. Previously, the Michigan County Road Commission Self-Insurance Pool (“Pool”) filed for leave to appeal because, in reversing the dismissal of the plaintiff Counties’ case (based on the trial court’s conclusion that they were not successors in interest to their former road commissions nor were their former road commissions entitled to such distributions by contract, in any event), the Court of Appeals erroneously concluded that the Counties were (i) “successors in interest to their former road commissions when they exercised their statutory right to dissolve the road commissions,” (ii) “eligible for Pool membership by virtue of the statutory reference to county road commissions in the Pool’s by-laws,” and thus (iii) “entitled to refunds of surplus premiums reflecting their former road commissions’ prior-year contributions through the date listed in each withdrawal agreement.” *County of Ingham v Michigan County Road Commission Self-Insurance Pool*, 321 Mich App 574, 584-585; 909 NW2d 533 (2017) [*Ingham County I*] (**Exhibit 1**), remanded, 503 Mich 917; 920 NW2d 135 (2018) [*Ingham County II*] (**Exhibit 2**), rev’d, ___ Mich App ___; ___ NW2d ___, 2019 WL 3366174 (Mich App, July 25, 2019) [*Ingham County III*] (**Exhibit 3**). But the Pool’s governing documents provide that road commissions that choose to withdraw from the Pool may be treated “differently and less favorably than” members who choose to continue in the Pool. (**Exhibit 4**, Declaration of Trust at p. 5, Article VI, Sec. 9(f)); **Exhibit 5**, Inter-Local Agreement at p. 4, ¶3H). And its related July 19, 1990 Memorandum to Members specifically informed its constituency that withdrawing members would “forefeit[] any and all rights to dividends, credits, and/or accumulated interest . . . paid or . . . payable after the date of the member’s withdrawal from the Pool.” (**Exhibit 6**, Memorandum to Members). In *Ingham County I*, the Court of Appeals did not address the implications of those provisions.

In lieu of granting leave, this Court in *Ingham County II* remanded the case to the Court of Appeals to consider whether, even if the Counties were successors in interest to their former road commissions, the Pool could nonetheless “decline to issue . . . refunds of surplus premiums from prior-year contributions” since those former road commission members withdrew from the Pool. 503 Mich at 917. In undertaking that review, this Court directed the Court of Appeals to consider the impact of the Pool’s Declaration of Trust, By-Laws, Inter-Local Agreements, Pool Refund Overview and a July 19, 1990 Memorandum issued to Pool members. *Ingham County II*.

On remand, the Court of Appeals allowed the parties to file supplemental Briefs, but then decided the case without oral argument. It issued its published Opinion following remand on July 25, 2019. *Ingham County III*. The Court of Appeals again reversed the trial court’s dismissal of the Counties’ case. Since this Court’s Order made no mention of the Court of Appeals’ analysis of the successor-in-interest issue and its related conclusions in *Ingham County I* regarding Pool membership and eligibility, the panel concluded that the law-of-the-case doctrine prevented it from revisiting those issues. *Ingham County III* at 3-5. In terms of the documents it was directed to consider, the panel concluded on remand that all them – including the July 19, 1990 Memorandum to Members but excluding the Refund Overview – were “the documents” that comprised the parties’ agreement. *Ingham County III* at 7. Since the panel concluded that Jackson County’s former road commission never withdrew from the Pool, the panel held that the contract forfeiture language in the Pool’s governing documents did not extinguish Jackson County’s entitlement to a distribution. As to the other two Counties (Ingham and Calhoun), the panel held that the Pool’s governing documents regarding distributions were “unenforceable . . . as against public policy,” *Ingham County III* at 10. In the panel’s view—*though no party ever raised or briefed the issue*—enforcement of the governing documents would concentrate rather than spread risk, allow the Pool to penalize “counties for exercising their rights to dissolve their road commissions” under MCL

46.11(s) and MCL 224.6(7), and otherwise “undermine the public purposes that the Pool is required to serve under MCL 124.5(6)” by allowing the remaining members to realize a windfall.

Id.

This is an extraordinary holding. Courts should be loath to hold contract documents unenforceable as a matter of public policy. And enforcing the Pool’s documents here would neither penalize withdrawing members nor be a windfall to remaining members. When a party to an insurance pool pays a premium, it receives insurance coverage, including claims processing and payment on claims when appropriate. The pool member has no right to a distribution of surplus. Period. And by granting the *withdrawing* Counties (on behalf of their former road commissions) a windfall by awarding them a distribution while those Counties’ former road commissions left their risk behind with the Pool, the Court of Appeals effectively took money away from remaining road commissions and the taxpayers those commissions represent.

The panel also erred in holding that Jackson County was a Pool member because its former road commission never withdrew from the Pool. It is undisputed that the Pool’s governing documents allow only road commissions to be members, not counties. And the Court of Appeals had no business telling the Pool who it had to insure.

Accordingly, the Pool seeks leave to appeal. Alternatively, the Pool requests summary reversal or, at a bare minimum, oral argument on the application.

STATEMENT OF QUESTIONS PRESENTED

I. Whether it violates public policy for an insurance pool’s governing documents to provide that withdrawing members forfeit the right to future distributions of any surplus.

Plaintiff Counties have never addressed this question but will presumably say, “Yes.”

The Defendant Pool says, “No.”

The Circuit Court was never presented with this question.

The Court of Appeals was not presented with this question and did not address it in its first decision, but now on remand, the Court has raised the issue *sua sponte* and decided, “Yes.”

II. Whether Jackson County’s former road commission’s withdrawal from the Pool was effective upon Jackson Counties’ dissolution of that road commission, even in the absence of a signed withdrawal agreement.

Plaintiff Counties will say, “No.”

The Defendant Pool says, “Yes.”

The Circuit Court said, “Yes.”

The Court of Appeals said “No” in its first decision, followed by this panel on remand as the law of the case.

III. Whether counties are eligible for membership in a road commission insurance pool when the pool’s governing documents restrict membership solely to road commissions.

Plaintiff Counties say, “Yes.”

The Defendant Pool says, “No.”

The Circuit Court said, “No.”

The Court of Appeals in its first decision said, “Yes.”

The Court of Appeals in this decision on remand has not answered the question.

**INTRODUCTION AND REASONS FOR
GRANTING THE APPLICATION**

The Michigan County Road Commission Self-Insurance Pool (“Pool”) is governed by its controlling documents which include the Trust that created it, its By-Laws, the Inter-local Agreements signed with its members and the Pool’s July 19, 1990 Memorandum to Members. Taken together, these documents specifically provide that members who choose to withdraw from the Pool forfeit any claim to future discretionary Pool distributions. The Court of Appeals in its post-remand Opinion concluded that, as to Ingham and Calhoun Counties at least, those forfeiture provisions were legally unenforceable as against public policy and should thus be excised from the Pool’s governing documents, an issue that the parties never raised or briefed, and the trial court was never asked to address.

Respectfully, the Court of Appeals just got that wrong. Public policy favors enforcement of the Pool’s governing documents as written – not the other way around. With a stroke of the pen, the Court set aside clearly written language designed to further the Pool’s and its members’ interests and, in the process, rewrote the relationship between the Pool and its members, all under the guise of a misguided public policy analysis. Review by this Court is necessary to right that wrong and those other wrongs embedded in *Ingham County I* and *III*, including whether the Counties are successors in interests to their former road commissions, and whether they are eligible for Pool membership and entitled to greater distribution rights than their former road commissions ever had.

MCL 124.5, the statute that enables group self-insurance pools like the Pool to exist, articulates why they are necessary. It says this:

“The legislature hereby finds and determines that insurance protection is essential to the proper functioning of municipal corporations; that the resources of municipal corporations are burdened by the securing of insurance protection through standard

carriers; that proper risk management requires spreading risk to minimize fluctuation in insurance needs; and that, therefore, all contributions of financial and administrative resources made by a municipal corporation pursuant to an inter-governmental contract authorized under this act are made for a public and governmental purpose, and that those contributions benefit each contributing municipal corporation.” MCL 124.5(6).

The Legislature recognized that municipal entities are unable to meaningfully and affordably indemnify themselves through commercial insurance. As such, it empowered them to join together – in whatever arrangement, and by whatever number they desire – to better protect against the risks of the outside world. In this very real sense, then, inter-governmental risk pools serve an important societal function.

Decades ago, when the Pool was formed, its Board of Governors made a collective decision to limit membership to county road commissions, not any other kind of public or private entity. The reason was simple: those municipal entities are unique – they own property, employ personnel, and undertake certain governmental activity all their own. Their risks are also unique, and are not shared by a public library, a sheriff’s department, a civic theater, or a municipal land bank. By joining together and underwriting those unique elements of risk, county road commissions all over Michigan could obtain affordable, dependable, and meaningful insurance coverage. And the provision of that coverage was exactly the reason why MCL 124.5 was enacted. As such, any judicial determination that undermines the integrity of the Pool, like the appellate opinion in *Ingham County III*, is contrary to Michigan’s public policy.

The Michigan Court of Appeals’ decision took several existential swipes at the Pool. First, it ignored the Pool’s ability to define its own membership – specifically, when it ruled that Jackson County—which is not a road commission—is somehow still a member of the Pool after dissolving its road commission. Second, the Court invalidated the withdrawal forfeiture provisions in the Pool’s governing documents. Those provisions—which define what happens when a Pool member

leaves its risk but tries to take the contribution insulating other members from being stuck with that risk— are of actuarial significance. They help maintain the Pool’s long-term stability and allow it to meet the underlying public purpose of inter-governmental cooperation. When the Court rewrote that aspect of the Pool’s bargain with its members, it upset those actuarial considerations. No risk pool can survive very long if its members are allowed to leave willy-nilly and take a piece of the Pool’s equity with them. The Court’s decision, which harms the Pool’s long-term stability, is contrary to Michigan public policy for this reason, too.

This Court should grant leave to appeal for several reasons. First, the issues presented are of significant public interest, since they concern claims amongst state subdivisions, counties, and an insurance pool of county road commissions, respectively. MCR 7.305(B)(2). The effect of the Court of Appeals’ published Opinion is to strip pools like the Pool of their right to self-governance and compel a potential illegal transfer of millions of dollars from the Pool to the three plaintiff Counties.

Second, the issues presented are of major significance to the State’s jurisprudence. MCR 7.305(B)(3). The lower court’s voiding of certain provisions of the Pool’s and its members’ foundational documents and agreements have the potential to affect innumerable associations and other organizations, contrary to what they have understood to be the rights and liabilities amongst them.

Third, if the Court of Appeals’ published Opinion is left undisturbed, it will cause material injustice and prejudice to the Pool and its dozens of county road commission members. MCR 7.305(B)(5)(a). The Court of Appeals has dictated who may be members and voided the Pool’s specific rules for members that withdraw from the Pool, rules that the three dissolved road commissions were not only aware of, but to which they had voluntarily agreed as well. This Court

must intervene to stop an illegal transfer of many millions of dollars from taxpayers in many rural and suburban road-commission jurisdictions to three large, urban counties.

This case involves significant issues related to self-governance by municipal entities and pits counties against road commissions and the Pool, which provides them with liability protection from claims. Left undisturbed, it will pave the way for Road Commission members to leave the Pool at-will, without the consequence of forfeiting potential future refunds. A risk pool is set up to spread risks. Through risk-sharing, no one member is faced with potentially devastating losses. The effectiveness of the risk-sharing is always dependent on the size of the Pool. If Pool membership shrinks, the spreading of the risk is diminished, and the Pool and its members cannot effectively achieve the desired results for which the Pool was established.

Moreover, the Court of Appeals decision could destroy the Pool. The Panel had it exactly backwards. The purpose of the withdrawal provisions is not to “punish” or “penalize” withdrawing members, but to encourage them to *remain* Pool members. Continued membership promotes a better risk-sharing arrangement which protects the financial viability of the Pool for all road commission members on a going-forward basis. The Court of Appeals decision undermines the Pool’s self-governance and threatens the continuing existence of the Pool itself. It will allow Pool members to leave and perhaps rejoin at will and by whim. This decision of the Court of Appeals is contrary to the public interest in the stability that the Court of Appeals itself acknowledged to be the public policy purpose of risk sharing pools.

This Court should grant the Application for Leave, affirm the agreements that the Court of Appeals has voided here, and, on full review, it should reinstate the trial court Judgment in favor of the Pool. Alternatively, the Court should summarily reverse and enter Judgment for the Pool or, at minimum, order argument on the application.

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. THE MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL

The Pool is just that – an insurance pool. See MCL 124.5(1). The Pool, and its relationship with its members, is governed by (i) a Declaration of Trust, (ii) By-Laws, and (iii) Interlocal Agreements signed by each member. **(Exhibits 4, 7 and 5)** (Tr. Exs. 2 - 4, respectively, of the Pool’s Response to Summary Disposition.)¹ Every member executed the Trust and Inter-Local Agreement or “otherwise agree[d] to become bound by and comply with the By-Laws, rules and regulations of the Pool.” **(Exhibit 5)** (Tr. Ex. 4 at 2, ¶1). And, every member agreed to make “contributions” each year that were set aside by the Pool for the payment of claims, operating and administrative expenses, and other enumerated things. **(Exhibit 5)** (Tr. Ex. 4 at 2-4).

The Declaration of Trust “created” the Pool, and it vests the Directors of the Pool with authority to supervise and operate the Pool, and to “conduct the business and activities of the [Pool] in accordance with [the]... Trust, the By-Laws..., rules and regulations adopted by the Trustees,” and applicable laws. **(Exhibit 4)** (Tr. Ex. 2). Among other things, the Trust authorizes the Pool Directors to adopt By-Laws that govern “the operation and administration of the [Pool]” **(Exhibit 4)** (Tr. Ex. 2, Trust at 3, Article IV, Sec. 1) and gives the Directors broad discretion in determining whether to distribute surplus equity, *including the right to treat former members “differently and less favorably” than they “treat members who continue in the trust for future years.”* **(Exhibit 4)** (Tr. Ex. 2, Trust at 5, Article VI, Sec. 9(f) (emphasis added)).²

¹ Each of the “Tr. Ex.” references are to Exhibits attached to “Defendant Michigan County Road Commission Self-Insurance Pool’s Response to Plaintiffs’ Motion for Partial Summary Disposition as to Liability and County’s Request for Summary Disposition Pursuant to MCR 2.116(I)(2)” as filed with the Circuit Court. They were likewise attached earlier and filed in the Court of Appeals as an Appendix to briefing there. They are each attached to this Application with new consecutive numeral designation, for ease of reference.

² The relevant portion of the Declaration of Trust (Art. VI, §9) **(Exhibit 4)** (Tr. Ex. 2) reads:

The By-Laws also address issues relating to “contributions and refunds” (**Exhibit 7**) (Tr. Ex. 3, By-Laws at 14, Article X). Specifically, they authorize the Board to “develop procedures for addressing accumulated equity, if any, or [any] accumulated funding deficienc[ies].” (**Exhibit 7**) (Tr. Ex. 3, By-Laws at 15, Article XII).³ The Inter-Local Agreements also address the surplus equity issue, and vest the Pool Board with the express authority *to treat withdrawn members “differently and less favorably” than those that stay members of the Pool.* (**Exhibit 5**) (Tr. Ex. 4 at 3-4, ¶3H (emphasis added)).⁴ Importantly, surplus equity distributions are only available to

The Board of Directors shall set aside from the premiums collected during each fiscal year a reasonable sum for the operating expenses or administrative expenses of the Trust for that year. All remaining funds coming into its possession or under its control with respect to that fiscal year of the Trust shall be set aside and should be used only for the following purposes:

* * *

(f) distribution among the members during that fiscal year in such manner as the Members of the Board of Directors shall deemed to be equitable...*The Board of Directors may treat members who withdraw from future Trust Years differently and less favorably than they treat members who continue in the trust for future years.*

³ By-Laws (Article XII) (**Exhibit 7**) (Tr. Ex. 3):

Any Member may withdraw from the Pool by giving at least sixty days written notice to the Pool Board of its desire to so withdraw. *The Pool Board shall develop procedures for addressing accumulated equity, if any, or accumulated funding deficiency.* The Pool Board shall determine the short rate cancellation penalty for terminating prior to the annual renewal date. A Member may be terminated from membership by a two-thirds vote of the Members present at an annual or special meeting of the Members... (emphasis supplied).

⁴ Inter-Local Agreement (paragraph 3H) (**Exhibit 5**) (Tr. Ex. 4):

The Member agrees to pay contributions which shall be calculated according to the method determined by the Pool Board. ...The Pool shall set aside from the premiums collected during each fiscal year a reasonable sum for the operating expenses or administrative expenses of the Pool for that year. All remaining funds coming into the possession of the Pool with respect to that fiscal year of the Pool shall be set aside and shall be used only for the following purposes:

* * *

current members,⁵ and such distributions are never guaranteed. **(Exhibits 4, 7 and 5)** (Tr. Exs. 2-4). Each County was aware of these rules from the Pool's inception.

II. INGHAM COUNTY

A. Ingham County dissolved its Road Commission.

As early as December 12, 2011, Ingham County planned to dissolve its Road Commission if the Legislature enacted then-pending legislation that allowed the County to do so. **(Exhibit 9)** (Tr. Ex. 5). Its reasons had nothing to do with future refunds from the Pool. As explained in the Resolution, it was due to a history of problems between the County and the Road Commission. **(Exhibit 9)** (Tr. Ex. 5). Ingham County examined its insurance options if it dissolved its Road Commission, and the County knew it would not be able to continue as a Pool member without a bylaw amendment. **(Exhibits 10, 5, 7, 11)** (Tr. Exs. 6, 4, 3, Ex. 7, p 6). The County continued evaluating the issue throughout the winter of 2012. **(Exhibits 12, 13 & 14)** (Tr. Exs. 8 – 10). As of the Spring of that year, the County planned to insure with the Michigan Municipal Risk Management Authority (“MMRMA”), the County's general insurer, and inquired about their surplus distributions. **(Exhibits 15, 16, 17, 18)** (Tr. Exs. 11, 12, 13, 14). As early as April 2012,

H. Distribution among the members during that fiscal year in such manner as the Pool shall deem to be equitable, of any excess monies remaining after payment of all claims and expenses and after provision has been made for open claims and outstanding reserves and a reserve for claims incurred but not reported; provided, however, that no such distribution shall be made earlier than twelve (12) months after the end of each Pool Year; and provided, further, that undistributed excess funds from previous Pool Years may be distributed at any time if not required for loss funding and if approved for distribution by applicable boards and authorities. *The Pool may treat members who withdraw from future Pool Years differently and less favorably than the Pool treats members who continue in the Pool for future years.* (Emphasis supplied).

⁵ See the Pool's twelve-factor methodology announced by the Board in 1990 and followed thereafter. **(Exhibit 8)** The Court of Appeals said this was not properly introduced, and it is not to be considered.

Ingham County knew that if the Ingham County Road Commission was not a member of the Pool, “[it would] not receive any refunds for previous years which the pool may close out in the future with savings refunds distributed back to the members.” **(Exhibit 19)** (Tr. Ex. 15.) Notwithstanding, on April 24, 2012, Ingham County passed a resolution that dissolved⁶ its Road Commission effective June 1, 2012. **(Exhibit 20)** (Tr. Ex. 16). A second resolution passed on that same date authorized the County Board to “take whatever steps are prudent and necessary to withdraw from the existing ICRC insurance carrier, the Michigan Road Commission Self Insurance Fund [sic].” **(Exhibit 21)** (Tr. Ex. 17).

B. The Ingham County Road Commission withdrew from the Pool.

On Friday, May 25, 2012, the Pool’s Administrator, Gayle Pratt, advised William Conklin, the Ingham County Road Commission’s Managing Director, that the Pool would not insure the County after June 1 (which did not harm the County since it had already secured coverage through MMRMA).⁷ Ms. Pratt forwarded insurance Cancellation and Termination Agreements that, in Ingham County’s⁸ own words, “basically spell[ed] out the reimbursement of pre-paid premium and continuation of handling currently open claims.” **(Exhibit 23)** (Tr. Ex. 19). Ingham County forwarded the Agreements to their attorneys, the same ones who represent them here, stating: “We

⁶ Plaintiffs admitted that each Road Commission was *dissolved*. See Complaint, ¶12.

⁷ Perhaps anticipating more dissolutions (which would undermine the stability of the pool if counties could not be members), on May 29, 2012, the Pool sent a letter to its Members stating that the Board unanimously recommended allowing counties with road responsibilities to become members of MCRCSIP. **(Exhibit 22)** (Tr. Ex. 18.) The MCRCSIP Board sent Supplemental Information to its members, including (i) the impact of attrition, (ii) the impact on the development of the law, (iii) cost of doing business, (iv) increased competition (including a specific reference to MMRMA providing a competitive rate to Ingham County). *Id.*, Supplemental Information. But, this was only a recommendation. The ultimate decision was made by the members.

⁸ When the Road Commission was dissolved, Mr. Conklin became the head of the new County Road Department.

added the Department of Transportation and Roads to our MMRMA policy effective June 1, 2012 a few weeks ago and confirmed again today we are covered.” **(Exhibit 24)** (Tr. Ex. 20).

Bonnie Toskey, Ingham County’s lead attorney here, negotiated the language of the Cancellation and Termination Agreements with the Pool,⁹ and approved them for signature. **(Exhibit 24)** (Tr. Ex. 20). During the negotiations, Toskey double-checked to confirm that the Pool would still provide coverage for claims before June 1, 2012. **(Exhibit 25)** (Tr. Ex. 21). Both Pratt and Toskey agreed that Conklin should sign the Agreements. **(Exhibit 26)** (Tr. Ex. 22).

At some point before 3:16 pm on May 31, 2012, Pratt and Toskey had a conversation with Pratt regarding withdrawing Pool members. In follow up, Pratt sent Toskey a letter that confirmed the following: “A withdrawing Member *forfeits any and all rights to dividends, credits and/or accumulated interest that is to be paid or shall become payable after the effective date of the Member’s withdrawal from the Pool.*” **(Exhibit 27)** (Tr. Ex. 23 (emphasis added).) After receiving that information, Toskey forwarded the Agreements to Conklin for signature. **(Exhibits 28, 29, 30)** (Tr. Exs. 24, 25, 26).

⁹ The changes to the Termination Agreement included (i) specifying that the Road Commission would be dissolved, and “by operation of law” “is not eligible” to be a Member of the MCRCSIP, (ii) the Commission and MCRCSIP agree that the Commission “is not eligible to participate” as a member as of June 1, 2012, (iii) termination would be “concurrent with the termination of the Ingham County Road Commission” as of June 1, 2012; (iv) MCRCSIP would service claims arising from incidents or events prior to June 1, 2012, and (v) “The exception shall be the Employment Practices & Public Officials Errors and Omissions Liability Agreement which is a claims made policy / coverage only.” *Id.* at Termination Agreement. Toskey proposed these changes to the Cancellation Agreement: (i) specification that the Commission would be “non-existent” as of June 1, 2012; (ii) insurance coverage would be “terminated concurrent with the termination of the Ingham County Road Commission” on June 1, 2012; (iii) MCRCSIP would service claims arising from incidents or events prior to June 1, 2012 and (iv) “The exception shall be the Employment Practices & Public Officials Errors and Omissions Liability Agreement which is a claims made policy / coverage only.” **(Exhibit 24)** (Tr. Ex. 20 at Cancellation Agreement). Ultimately, all but the last change was incorporated into the final agreements. **(Exhibits 29, 30)** (Tr. Exs. 25, 26).

The Cancellation Agreement specifically noted that “[b]ecause, as of June 1, 2012, the Commission being non-existent will no longer be a member of the [Pool] or a road commission within the meaning of the applicable By-Laws and the Inter-Local Agreement that govern membership in the [Pool], the [Pool] will not be able to issue insurance coverage to the Commission after it is dissolved.” *Id.* And it specified that the purpose of the Agreement was to effectuate termination of insurance immediately after dissolution even though the notice period would be violated. *Id.* The parties also exchanged the following documents: (i) a mutual waiver of the notice period and associated release; (ii) an agreement regarding the cancellation date; (iii) a date for the contribution adjustment; and (iv) arrangements regarding existing claims.

C. **Ingham County demands a refund of insurance premiums and surplus equity payments. The surplus equity request is denied.**

Wasting no time, on June 1, 2012, Jill Rhode, Director of Financial Services at Ingham County wrote Ms. Pratt, requesting a refund of insurance “premiums,” (**Exhibit 31**) (Tr. Ex. 27), and in a separate letter,¹⁰ (**Exhibit 32**) (Tr. Ex. 28) requested surplus payments. The Pool agreed to refund the unused pro-rata portion of the contribution, but denied the request for a surplus refund, noting that the “authorization by the County to withdraw from [the Pool] preceded any inquiry into the possible availability of Membership in the Pool. . . .” (**Exhibit 33**) (Tr. Ex. 29).

III. **JACKSON COUNTY**

A. **Jackson County thoroughly analyzed whether to transfer Road Commission powers.**

As early as March 2012, Jackson County was also evaluating whether it should assume the power of the Jackson County Road Commission. (**Exhibit 34**) (Tr. Ex. 30). Insurance coverage was an issue from the beginning. *Id.* In August 2012, after the Pool rejected a proposed by-law

¹⁰ It is unclear whether this was sent because it is not on letterhead.

amendment that would have allowed counties to become Pool members, an ad hoc committee analyzed the benefits of transferring power from the Road Commission to the Board of County Commissioners. **(Exhibit 35)** (Tr. Ex. 31). In October, Jackson County also analyzed the value of future equity distributions. **(Exhibit 36)** (Tr. Ex. 32). Throughout the fall, the Ad Hoc Committee held a series of hearings, during which the committee members conducted interviews, received public comment, gathered survey data, and discussed the pros and cons of transferring power. **(Exhibit 37)** (Tr. Ex. 33).

The Pool assisted Jackson County with its analysis by providing information about the Pool. **(Exhibit 38)** (Tr. Ex. 34). Jackson County conducted its own investigation into available insurance **(Exhibit 39)** (Tr. Ex. 35), recognizing that the County would not be eligible for membership in the Pool. **(Exhibit 40)** (Tr. Ex. 36, p 6). *It knew that ending a relationship with the Pool meant walking away from approximately nine years of potential future surplus distributions.* **(Exhibit 40, 41)** (Tr. Ex. 36, p 6; Tr. Ex. 37, p 2 (“The Administrator / Controller confirmed that we would lose it from the Road Commissions current insurance carrier [*sic*]. The new insurer would also have a year-end dividend.”)). In October 2012, Jackson County shared the Road Commission’s then current insurance policy with MMRMA, requesting a quote. *Id.* In response, MMRMA compared the two policies, identifying the differences to the County. **(Exhibits 42, 43)** (Tr. Exs. 38, 39).

On December 6, 2012, the final version of a “Feasibility Study for County Operation of Jackson County Road Commission” was sent to the County Administrator. **(Exhibit 44)** (Tr. Ex. 40). This document describes various reasons for the County transferring the powers of the County Road Commission, including (i) savings on personnel costs;¹¹ (ii) savings on insurance

¹¹ The Report estimates \$50,000 in recurrent savings. **(Exhibit 44)** (Tr. Ex. 40, Report p 5).

premiums;¹² (iii) increased insurance rebate;¹³ (iv) centralized decision making¹⁴; (v) single point of service;¹⁵ (vi) less internal conflict among staff;¹⁶ and (vii) improved communication.¹⁷ **(Exhibit 44)** (Tr. Ex. 40, Report p 14).¹⁸ *The Report also confirmed that Jackson County was aware of the Pool members' decision not to allow Counties to participate in the Pool or receive surplus distributions.* **(Exhibit 44)** (Tr. Ex. 40, Report p 7). (See also, **Exhibit 45** (Tr. Ex. 41).

B. Jackson County transfers power.

Jackson County held the requisite public hearings regarding the proposed transfer on January 4, 2013, and January 18, 2013. **(Exhibit 47)** (Tr. Ex. 43). After the first hearing, the County Administrator/Controller prepared a memorandum to the Board of County Commissioners requesting that the “resolution to assume the powers and duties of the Jackson County Road Commission” proceed to ballot at the next public hearing. **(Exhibit 48)** (Tr. Ex. 44). In doing so, Jackson County was aware that it would need to immediately change insurance carriers. **(Exhibit 49)** (Tr. Ex. 45). The County Administrator had already decided to insure through MMRMA if the Jackson County Road Commission was dissolved. **(Exhibit 50, 51, 52)** (Tr. Exs. 46- 48).

¹² The Report estimates \$130,000 annual savings by switching from the Pool to MMRMA. *Id.* Report p 7.

¹³ The MMRMA rebate was approximately \$200,000 compared to \$160,000 from the Pool. *Id.*

¹⁴ *Id.*, Report p 9-10.

¹⁵ *Id.*, Report p 11.

¹⁶ *Id.*, Report p 12.

¹⁷ *Id.*

¹⁸ See also, letter of John Brennan **(Exhibit 46)** (Tr. Ex. 42) (identifying various concerns about the Jackson County Road Commission).

C. **Jackson County Road Commission was dissolved but it apparently did not sign a withdrawal agreement.**

The same day power was transferred, Pratt forwarded Cancellation and Termination Agreements to the Jackson County Road Commission. **(Exhibit 53)** (Tr. Ex. 49). The Court of Appeals has held there was no evidence these documents were ever executed by the Road Commission. But no one disputes that the Jackson County Road Commission was dissolved and ceased existence.

IV. **CALHOUN COUNTY**

As early as April 2012, Calhoun County was also considering dissolving the Calhoun County Road Commission. **(Exhibit 54, 55)** (Tr. Ex. 50, Appendix C, Tr. Ex. 51). It assembled a task force that completed a thorough investigation. Part of that investigation included completion of a comprehensive financial analysis that contained a comparison of available insurance. **(Exhibit 54)** (*Id.*, Appendix D, E., Tr. Ex. 50). The analysis showed that *Calhoun was aware that future surplus distributions would only be given to current Pool members*, and that the County would not be eligible for membership without a bylaw change. **(Exhibit 54)** (Tr. Ex. 50, Appendix E, 6.8.12 letter, p 3).

Part of the reason for the dissolution was financial savings. **(Exhibit 54)** (Tr. Ex. 50). Other reasons included poor road conditions and management issues. (*Id.*, Appendix H). After it completed its investigation, the Task Force unanimously voted to recommend dissolution of the Road Commission. **(Exhibit 54)** (Tr. Ex. 50, Appendix I). By August 31, 2012, a Transition Plan was drafted. **(Exhibit 55)** (Tr. Ex. 51). In preparing that Plan, liability insurance was considered, and MMRMA represented that it would transfer coverage to the County's policy. (*Id.*, p 7).

During the second requisite public hearing, a resolution passed that "dissolved" the Calhoun County Road Commission effective November 1, 2012. **(Exhibit 54)** (Tr. Ex. 50). A

separate resolution was passed to establish the Calhoun County Road Department. **(Exhibit 54)** (Tr. Ex. 50, Appendix I, p 2). And a third resolution passed whereby the County *specifically agreed* to undertake certain contractual obligations of the Road Commission, and *chose not to* assume other contractual obligations, negating the idea that the County simply “stepped into the shoes” of the Road Commission. **(Exhibit 54)** (Tr. Ex. 50, Appendix I, p 4, 5).

V. THE ORIGINAL CIRCUIT COURT DECISION

The trial court dismissed each of the Counties’ four claims, holding in a lengthy, and well-reasoned Opinion that the Pool did not violate the Constitution, did not convert, extort or embezzle anything, and did not breach any contractual obligation. **(Exhibit 56)**. It concluded that the Pool did not violate Article 9, § 18 of the Michigan Constitution, because neither the Counties nor the road commissions they dissolved loaned their credit to the Pool. (*Id.* at 13.) The money those commissions paid to the Pool was a fair exchange of value for insurance coverage. (*Id.*) In addition, neither the Counties nor the dissolved road commissions gave up property, because refund distributions from the Pool “to its members [were] *not* guaranteed.” (*Id.* at 14 (emphasis added).)

The trial court also concluded that the Pool was not guilty of extortion. MCL 750.213. (*Id.*) There was no evidence in the record that the Pool acted with malice, and “the record clearly show[ed] that Plaintiffs were aware and fully cognizant of the fact that dissolution of their respective road commissions would result *in not being entitled to potential future refunds.*” (*Id.* at 15 (emphasis added).)

Moreover, the trial court concluded that there was no merit to the Counties’ conversion and embezzlement claims. (*Id.* at 16.) Conversion requires an obligation to return or deliver money by someone who has been entrusted with it. Here, in contrast, “the record show[ed] that Plaintiffs and

their former road commissions were fully cognizant of the fact that dissolution of the former road commissions would result in the forfeiture of future surplus refunds.” (*Id.* at 16-17.)

Finally and most importantly, the trial court concluded that the Counties’ breach-of-contract claim failed because (i) surplus distributions were not guaranteed, (ii) the Counties’ former road commissions knew beforehand that dissolution and withdrawal would result in the forfeiture of potential future surplus refunds, (iii) each of the County plaintiffs chose to voluntarily withdraw from the Pool and (iv) the Counties couldn’t sue for breach of contract in any event because they never contracted with the Pool for anything. (*Id.* at 17-18.)

VI. INGHAM COUNTY I

The Court of Appeals reversed, but only addressed the Counties’ breach-of-contract claim. (**Exhibit 3**). It never addressed the other dismissed claims. *Ingham County I* held that the Counties were “successors in interest” to the contractual rights of their dissolved road commissions and, directly contrary to the Pool Bylaws, were “eligible” for Pool membership. (*Id.* at 3-5.) But the Court of Appeals did more than that. It also ruled that, because the Counties were successors in interest, they were “entitled” to surplus equity distributions going forward. (*Id.* at 5-6.) The Court of Appeals reached that conclusion summarily, without explaining how the Counties could be entitled to distributions that are only discretionary, or how or why the Counties were entitled to that contractual relief even though their predecessors in interest (the dissolved and withdrawn road commissions) would never have been entitled to receive any such surplus equity distributions.

VII. INGHAM COUNTY III FOLLOWING REMAND.

Responding to the Pool’s first Application for Leave, this Court, in lieu of granting leave, chose to remand the case to the Court of Appeals to consider an issue it had not addressed. The Court of Appeals was directed to review certain of the Pool’s operative documents and assess whether, “even if the . . . Counties [were] successors in interest . . . , the [Pool]” could nonetheless

“decline to issue . . . refunds of surplus premiums from prior-year contributions.” *Ingham County II* at 917.

In conducting that review, the Court of Appeals readily agreed that, because of the clear language in the Pool’s governing documents, withdrawing road commissions were *not* entitled to any refunds. *Ingham County III*, Slip Op at 13. The Court of Appeals nonetheless refused to enforce those provisions because, in its view, they were against public policy. *Id.* Curiously, the panel said in its opinion that the Counties had raised that public policy argument. *Id.* (“The counties argue that the withdrawal policy is unenforceable as a violation of public policy.”). But that was not true. The Court of Appeals raised that issue on its own, and it never afforded either the Pool or the trial court with the opportunity to address that issue. Respectfully, injecting an issue that the parties have not had a chance to address, getting it wrong, and then using it to defeat the Pool’s defense is inherently unfair and requires this Court’s intervention.

STANDARD OF REVIEW

The trial court granted the Pool’s summary disposition motion. In *Ingham County I* and *III*, the Court of Appeals reversed, concluding that the Counties instead were entitled to summary disposition. The appeal before this Court is subject to a de novo standard of appellate review. *Dressel v AmeriBank*, 468 Mich 557; 664 NW2d 151 (2003).

ARGUMENT

I. THE COURT OF APPEALS WRONGFULLY DECIDED THAT AN INSURANCE POOL INSURING GOVERNMENTAL ENTITIES CANNOT AS A MATTER OF PUBLIC POLICY REQUIRE FORFEITURE OF POTENTIAL FUTURE SURPLUS DISTRIBUTIONS AS AN INCENTIVE TO STAY IN THE POOL.

A. The Public Policy Doctrine

It is a longstanding principle of legal jurisprudence in this State that “the duty of the judiciary is to assert what the law ‘is,’ not what it ‘ought’ to be.” *Terrein v Zwit*, 467 Mich 56, 66;

648 NW2d 602 (2002), citing *Marbury v Madison*, 5 US 137, 177; 2 L Ed 60 (1803). Thus, when confronted with an argument that a contract is unenforceable as against “public policy,” courts must exercise great caution to ensure that “[t]he public policy of Michigan is not merely the equivalent of the personal preferences of a majority of [the] Court.” *Id.* at 67. Accord, e.g., *Pitsch v Blandford*, 264 Mich App 28, 31; 690 NW2d 120 (2004) (“Courts must proceed with caution in determining what exactly constitutes Michigan’s ‘public policy,’ and not merely impose its belief of what public policy should be.”). Rather, “[p]ublic policy has been described as ‘the community common sense and common conscience, extended and applied throughout the State to matters of public morals, public health, public safety, public welfare, and the like.’” *Badon v Gen Motors Corp*, 188 Mich App 430, 439; 470 NW2d 436 (1991). “In identifying the boundaries of public policy, . . . the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our *state and federal constitutions, or statutes, and the common law.*” *Terrein*, 467 Mich at 66-67 (Emphasis supplied).¹⁹

Exercising such caution protects the “fundamental policy of freedom of contract” under which “parties are generally free to agree to whatever specific rules they like.” *Port Huron Ed Ass’n v Port Huron Area School Dist*, 452 Mich 309, 319; 550 NW2d 228 (1996), quoting *Dep’t of Navy v Fed Labor Relations Authority*, 962 F2d 48 (1992).²⁰ In Michigan, “competent persons

¹⁹ However, “it does not necessarily follow that every statutory or regulatory violation by one of the contracting parties renders the parents’ contract void and unenforceable.” *Johnson v QFD, Inc*, 292 Mich App 359, 365; 807 NW2d 719 (2011); see also *Maids In’t, Inc v Saunders, Inc*, 224 Mich App 508, 511; 569 NW2d 857 (1997) (holding that the franchise agreements at issue were not unenforceable as a matter of public policy because the Legislature had already set forth remedies in the Franchise Investment Law for the specific violation committed by the plaintiff).

²⁰ See also *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 387; 525 NW2d 891 (1994) (“As a general proposition, parties are free to enter into any contract at their will, provided that the particular contract does not violate the law or contravene public policy.”).

. . . have the utmost liberty of contracting and . . . their agreements voluntarily and fairly made shall be held valid and enforced in the courts.” *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 356; 51 S Ct 476; 75 L Ed 1112 (1931). This Court has cautioned against practices that “would accord the judiciary the power to examine the wisdom of private contracts in order to enforce only those contracts it deems prudent.” *Terrein*, 467 Mich at 69-70. Instead, “absent some specific basis for finding them unlawful, courts cannot disregard private contracts and covenants in order to advance a particular social good.” *Id.* at 70. Mere allegations of unfairness are also insufficient to invalidate a contract. *Royal Property Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708; 706 NW2d 426 (2005) (“[T]his Court cannot rely on a litigants’ subjective views of fairness to establish the public policy of the state.”).

To hold a contract unenforceable as against public policy, the policy invoked by the court “must ultimately be *clearly rooted* in the law.” *Terrein*, 467 Mich at 67 (emphasis added). That is, there “must be . . . *definite indications* in the law of the sovereign to justify the invalidation of a contract as contrary to that policy,” *id.* at 68, quoting *Muschany v United States*, 349 US 49, 66; 65 S Ct 442; 89 L Ed 744 (1945) (internal quotation marks omitted) (emphasis added). And “such . . . public policy must not only be ‘*explicit*,’ . . . it also ‘must be *well defined and dominant*.’” *Id.* at 67, quoting *WR Grace & Co v Local Union 759*, 461 US 757, 766; 103 S Ct 2177, 76 L Ed 2d 298 (1983) (emphasis added).

Applying these principles, Michigan courts have sparingly invalidated contracts as against public policy under certain circumstances -- (i) a contract between two fathers to arrange the marriage of their children,²¹ (ii) a contract requiring an attorney to share legal fees with a

²¹ *Muflahi v Musaad*, 205 Mich App 352, 353; 522 NW2d 136 (1994) (invalidating the contract as an unenforceable marriage brokerage contract).

nonlawyer in violation of the Michigan Rules of Professional Conduct,²² (iii) a contract between a medical provider and a patient absolving the provider from liability for the negligence of its employees before receiving medical treatment,²³ and (iv) a no-fault insurance policy that prohibited assignment of any interest without the insurer's consent.²⁴ But the vast majority of contractual arrangements necessarily survive a public policy challenge -- (i) a commercial insurance policy that computed based coinsurance on replacement cost coverage even though the valuation was based on actual cash value,²⁵ (ii) contracts that shorten statutory limitation periods,²⁶ and (iii) an agreement to share proceeds of lottery winnings.²⁷ In each instance, application of a public policy challenge is contract- and circumstance-specific.

B. The Court of Appeals' Public Policy Analysis Here is Muddled and Wrong, and It Ignores the Core Principles of This Body of Law.

The public policy reasoning of the Court of Appeals is convoluted and difficult to untangle. It is based on several false premises. What's more, the Court of Appeals' reasoning is entirely contrary to the body of law discussed above. The public policy the Court "found" is not clearly rooted in the law, and the panel did not proceed with caution in setting aside an agreement made

²² *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 59; 672 NW2d 884 (2003); see also *Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002) (“[I]t is clear the Supreme Court agreed with the fundamental principle that contracts that violate our ethical rules violate our public policy and therefore are unenforceable.”).

²³ *Cudnik*, 207 Mich App at 387.

²⁴ *Henry Ford Health System v Everest Nat'l Ins Co*, 326 Mich App 398, 405; 927 NW2d 717 (2018).

²⁵ *Royal Property Group, LLC*, 267 Mich App at 726 (explaining further that the insurer's business practices were not fraudulent or deceptive because the “insured is obligated to read the insurance policy,” and the coinsurance clause “gives plain and unambiguous instruction”).

²⁶ *Clark v DaimlerChrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005) (“Michigan has no general policy or statutory enactment prohibiting the contractual modification of the periods of limitations provided by statute.”).

²⁷ *Miller v Radikopf*, 394 Mich 83, 86-88; 228 NW2d 386 (1975).

by and between the Pool and its members. Rather, the panel did the exact opposite. It acted rashly. Though it started with the right statute (i.e., the Inter-Governmental Contracts Act), it got off track in gleaning the purposes that Act was designed to accomplish.

The Court's public policy analysis is baffling because it ignores what the statutes were intended to accomplish and promote – risk-sharing and providing stability in the insurance coverage market for municipal entities like road commissions. MCL 124.7 provides that pools like this one establishing self-insurance must “provide a plan of management,” which, among other things, must (i) establish the “governing authority” of the Pool, (ii) fix contributions, maintain reserves, levy and collect assessments, and dispose of surpluses, (iii) outline “[t]he basis” on which “existing members may leave [] the pool,” and (iv) include any “[o]ther provisions necessary or desirable for the operation of the pool.” MCL 124.7(b)(i)-(v). The statute vests pools with broad discretionary authority to make judgments about how best to accomplish that. The Pool did that here, concluding that, for the long-term stability of the Pool, it made sense to treat withdrawing members differently and less favorably than those that choose to stay members. And that makes perfect sense. Those who choose to join the Pool know, going in, what to expect – and the plaintiff Counties in this instance knew the Pool's Policy regarding withdrawing members, long before they dissolved their road commissions and chose for them to withdraw from the Pool. There were no surprises at all, nor were there inequities. Because of the stabilizing effects of the Pool's membership policy, all Pool road commission members have enjoyed, for many years, the insurance coverage for which they paid.

In choosing to apply public policy the way it did, the Court of Appeals undeniably substituted its judgment about how the Pool should handle withdrawing members without taking into account the whole of what the Pool does and why, and the legitimate discretionary decisions it made about how best to accomplish the Pool's legitimate long-term objectives. Surely, the

public policy doctrine should not be used that way – particularly where there is a reasonable and legitimate rationale for the decisions that the Pool made about how surplus contributions should be handled. Respectfully, the Court of Appeals’ decision is at odds with these legislative directives and their clearly expressed public policy. Accordingly, it is also at odds with Michigan jurisprudential principles regarding the invalidation of contracts on public-policy grounds.

The Court of Appeals recognized that the purpose of a government self-insurance pool is to spread, not concentrate, risk among municipal members. But its decision threatens the Pool’s continuing existence. The Pool’s documents are clearly worded and have been accepted by all members of the Pool for decades, including by the three dissolved road commissions involved here.

The Court didn’t like the Pool’s withdrawal Policy because it thought the Policy “penalize[d] the counties for exercising their rights to dissolve their road commissions under MCL 46.11(s) and MCL 224.6(7).” The Court justified its analysis this way:

. . . More importantly, the forfeiture called for in the withdrawal policy would directly undermine the public purposes that the Pool is required to serve under MCL 124.5(6), affording the remaining members of the Pool a comparatively small windfall (in the form of each one’s pro rata share of the excess equity payments made by the counties’ former road commissions), while imposing a large, unexpected forfeiture on the three withdrawing counties. This scenario undercuts the basic principles of predictability and stability that the legislature intended such self-insurance pools to promote. [Slip Op, July 25, 2019, p 14.]

But this analysis is based on a faulty premise which the Pool continues to challenge and which remains at issue here: whether the Counties were ever entitled to join the Pool as *counties* (*not road commissions*). The Court of Appeals says that the counties undertaking former road commission duties, are the same as “road commissions,” and thus the Pool must accept them as Pool members. But, under the statutory framework for the Pool, it is for the Pool – not the courts

– to determine which types of governmental units are entitled to Pool membership. The Pool has never in its history allowed any governmental entities other than road commissions to be members of the Pool. And that is the Pool’s legislatively authorized prerogative.

Simply put, counties are not road commissions. Road commissions are not counties. They are two separate and distinct governmental entities established by Michigan law. The member road commissions, as members of the Pool, have decided that only road commissions may be members. To allow counties to join, the Pool members (road commissions) would have to amend their Bylaws. This is the road commissions’ risk-sharing pool, and they have determined that it should be limited to road commission membership only. So long as the members and the Pool have observed the legislative requirements and acted reasonably within their authority, they should be the final arbiters of who may join. Admission of counties in place of road commissions would do great violence to the Pool’s foundational documents and insuring agreements. Counties have many more functions and duties than do road commissions. Counties have many more vehicles and pieces of equipment for other purposes too. Which of the Counties’ activities would the Pool insure? The Court of Appeals pretends that the Counties can very easily slip into the shoes of their former Road Commissions as members of the Pool. But that’s utter nonsense. A County’s footprint is much different and far larger in terms of assets and functions than that of their former Road Commissions. The Court’s decision forces the Pool to take on new and different members—i.e., members that are not road commissions—which is itself a violation of public policy.

Then finally, the Court’s invalidation of the withdrawal policy is itself a violation of public policy. Though the Court paid lip service to the importance of predictability and stability, the public policy it applies will have the exact opposite effect. It will leave the Pool vulnerable to other members leaving the Pool at will, who will argue that they can take accumulated surpluses with them, thus jeopardizing the Pool’s assets and the risk-sharing that it was designed to promote.

And it will place other insurance pools similarly at risk of the whims of a judge who believes (even wrongly) that a pool's membership rules are unfair. The continued existence of the Pool and other insurance pools should not be jeopardized like that. Public policy demands otherwise.

This Court should grant leave to address the issues in this case. The Pool must be allowed to argue that the Court of Appeals erred, particularly on a dispositive issue that the Pool never even had the opportunity to address. If for no other reason than to give the Pool a fair and full voice on the issue, this Court should grant leave.

II. JACKSON COUNTY WITHDREW FROM THE POOL WHEN IT DISSOLVED ITS ROAD COMMISSION, REGARDLESS WHETHER IT SIGNED A WITHDRAWAL AGREEMENT. COUNTIES ARE NOT ELIGIBLE FOR POOL MEMBERSHIP.

In *Ingham County I*, the Court of Appeals held that the three plaintiff Counties, upon dissolution of their Road Commissions, were eligible for Pool membership. The Pool has argued otherwise in its first Application to this Court, and in its briefing on remand to the Court of Appeals. Now the Court of Appeals has upheld that first decision of the Court of Appeals as the law of the case.

As in its first Application, the Pool contends that Counties are not eligible for membership in the Pool because they are not "county road commissions." Hence, when the Jackson County Road Commission was dissolved, it necessarily withdrew from the Pool.

When these Counties, including Jackson, dissolved their Road Commissions, they knew that the Pool's members had already rejected a proposed amendment to the Pool's Bylaws that would have paved the way for Counties to become members. Pool membership was, and remains, limited to "county road commissions."²⁸ Counties are not "road commissions."

²⁸ That "counties" remain distinct from "county road commissions" after dissolution is evident in MCL 691.1401(b), which continues to define each as political subdivisions of the state. A county remains a "county", separate and distinct from county road commissions. It cannot

The Michigan Constitution authorized the Legislature to “provide for county road commissioners. . . with the powers and duties provided by law.” Const 1963, art 7, § 16. The Legislature did that by enacting MCL 224.1 et. seq., which outlines the methodology for setting them up, and further defines them as “bod[ies] corporate,” MCL 224.9. As authorized by MCL 124.5, Michigan road commissions in turn organized the Pool. The Pool was created by a Declaration of Trust (**Exhibit 4**), and it is governed by its By-Laws (**Exhibit 7**) and the individual Inter-Local Agreements (**Exhibit 5**) signed by its member road commissions. Importantly, only road commissions can be members (**Exhibit 7**, By-Laws, Art III and IV), and the Pool Board controls whether or when new road commission members may be added to the Pool. (**Exhibit 4**, Trust, Art VI, Sec 6; **Exhibit 7**, By-Laws, Art IV). Hence, under the Pool’s operating documents, Counties are ineligible for membership and, in any event, they cannot become members of the Pool unless the Pool Board, by a two-thirds vote, allows them in. That has not happened.

Despite all this, the Court of Appeals concluded as a matter of law that the Counties are automatically eligible for Pool membership. And since this decision is published, other counties could claim automatic membership in the Pool in the future. What the Court said in *Ingham County* is this:

The Pool’s bylaws limit membership to county road commissions, but the bylaws do not define a county road commission. Instead, the bylaws refer to the statutory authority of county road commissions. Because we concluded that the counties were successors in interest to their dissolved road commissions as a matter of statutory interpretation, we likewise conclude that the successor counties are eligible for Pool membership by virtue of the statutory reference to county road commissions and the Pool’s bylaws. [**Exhibit 1** at 5.]

possibly come within the Pool’s definition of “county road commissions” because it is not one, regardless of the county assuming the former road commission road maintenance functions.

This conclusion is wrong. The meaning of the Pool's bylaws and other governing agreements is a matter first for the Pool, not the courts. The Pool bylaws were drafted and adopted by the Pool members, all of them county road commissions. Since adopting them, the member road commissions have consistently maintained that, under their governing documents, only "county road commissions" can be members. They have never allowed counties to become members, and they specifically voted *not* to accept counties as Pool members after the Legislature allowed counties to dissolve their road commissions. The Pool members have never interpreted their operative documents to extend to counties that assume road functions.

As the Court of Appeals noted, courts must construe bylaws using the same rules that apply to contract interpretation. (*Id.* at 5.) Thus, says the Court of Appeals, it would examine the language of the bylaws (and presumably the other Pool agreements) and apply that language if clear and unambiguous. The Court went on to find ambiguity in the meaning of "county road commissions." But the Pool members, all of whom were and are the source of these By-Laws and agreements, find no ambiguity. They all agree on the meaning of "county road commissions." They all agree that counties are not "county road commissions." There is no authority for the Court to read the By-Laws and agreements to interpret them in a way contrary to the meaning agreed by the Pool members.

What the Court of Appeals has done violates bedrock principles of Michigan contract law. Parties are free to contract as they see fit, and the primary goal in interpreting contracts is to determine and enforce the parties' intent. *Wilkie v Auto Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003); *51382 Gratiot Ave Holdings LLC v Chesterfield Development Co LLC*, 835 F Supp 2d 384 (ED Mich, 2011). The parties to the Pool bylaws and other operative Pool documents agree on their meaning. Those documents express their intent that "county road commissions" means exactly that, and that "county road commissions" does *not* include counties that have dissolved

their road commissions. The Court of Appeals was not free to interpret their bylaws and agreements in a contrary manner.

Another error implicit in the Court's analysis is that it assumes that the Counties can simply be substituted in the place of their dissolved county road commissions in the Pool without addressing the operative documents that prevent that from ever happening. Respectfully, the fact that the functions, property and employees of the respective road commissions have been transferred to the Counties does not mean that they are thereby eligible for Pool membership. To extend membership to, and write insurance coverage for, such Counties would require the Pool to completely re-write its governing documents, and coverages. The Court of Appeals ignored that reality and offered no explanation for its judicial amendment of the Pool's governing documents.

Each of the now withdrawn road commissions, like all other Pool members, signed Inter-Local Agreements which defined the coverage available through the Pool—general liability, auto liability, umbrella liability, and public officials' errors and omissions liability. (**Exhibit 5**, Inter-Local Agreement §13). Since the insurance risks that the Counties pose are necessarily broader than and vastly different from the insurance risks associated with insuring road commissions, substituting these counties' boards of commissioners would require drastic revisions of the Inter-Local and insurance coverage agreements, if nothing else. And the insurance coverages would have to be rewritten in a manner that would parse county commissioners and their functions, county employees, county vehicles, county buildings and properties, etc. Placing these counties into the shoes of their former road commissions is not a simple matter. Counties have a much bigger footprint. Without drastic changes to county structures, Pool bylaws, and the Inter-Local agreements, Counties cannot be eligible for Pool membership.

III. CONCLUSION

This Court saw the merit in the Pool's argument that the Pool's and members' bylaws and interlocal agreements meant that these withdrawn road commissions forfeited the right to receive potential future distributions of surplus. The Counties, even if they are successors in interest (which the Pool does not concede), were entitled to nothing, since their road commissions were entitled to nothing. The Court of Appeals was told to examine the documents and to rule on the Pool's contract argument.

The Court of Appeals recognized the agreements to be clear and unambiguous, and that this meant the withdrawn road commissions were entitled to nothing. But the panel then voided the governing documents' withdrawal provisions as being against public policy – and severable from the other provisions in those documents. The Court of Appeals analysis is just wrong. And to use what turned out to be a dispositive argument that the Pool never had a chance to address, is even worse.

If allowed to stand, the Court of Appeals' published decision does great harm to the Pool and its membership. The precedential opinion will allow other road commissions to opt in or out of the Pool at will, destroying the financial stability that is the Pool's public purpose. It will also allow counties to terminate their road commissions, opt in or out of the Pool at will, with continuing to harm the Pool's stability. And the opinion is bound to affect other insurance pools that similarly incentivize continued membership by denying future distribution of surplus to withdrawn members. In short, the Court of Appeals' decision poses an existential threat to the future of the Pool and other insurance pools like it. The Court of Appeals decision is itself contrary to public policy and should be reversed.

RELIEF REQUESTED

The Pool respectfully requests that the Court grant this Application for Leave to Appeal, reverse the decisions of the Court of Appeals, and reinstate the Circuit Court's order dismissing the Counties' claims, and that the Pool be awarded its costs and fees as allowed by law. Alternatively, the Pool asks that the Court of Appeals be summarily reversed or, at a minimum, that this Court order argument on the application.

Dated: September 4, 2019

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Index to Exhibits to Supreme Court
Application for Leave to Appeal

Exhibit	Description
1.	<i>Co of Ingham v Mich Co Rd Comm Self-Insurance Pool</i> , 321 Mich App 574; 909 NW2d 533 (2017)
2.	12/05/18 Supreme Court Order remanding case to COA for additional decision
3.	Court of Appeals Order On Remand, ____ Mich App ____; ____ NW2d ____, 2019 WL 3366174 (Mich App, July 25, 2019)
4.	Declaration of Trust
5.	Inter-Local Agreement
6.	Memorandum of 7/19/90 to all Pool members announcing Pool's policy for withdrawing members
7.	By-Laws
8.	MCRCSIP Refund Overview with 12 steps to determine proper allocation of distribution to members
9.	12/13/11 Adopted Resolution of Intent to Dissolve the Ingham County Road Commission and Create an Ingham County Department of Transportation and Roads
10.	E-mails with Ingham County re: need for By-Law amendment to continue as Pool member
11.	Ingham County Finance Committee Minutes of 4/18/12
12.	E-mail with Ingham County regarding Board discussions re: amending By-Laws
13.	02/24/12 Email chain including Rhode, Conklin, Lannoye, Pratt re the agreement re how much of the contribution is pro-rated.
14.	02/24/12 Email chain including Rhode, Conklin, Lannoye, Pratt re the agreement re how much of the contribution is pro-rated.
15.	Pool/Ingham County Road Commission e-mail chain
16.	03/06/12 – Ingham Co Proposed Calendar – Transition of Road Comm Functions
17.	03/06/12 – Office of the Ingham County Controller memo to County Services Committee updating 11/2011 memo identifying potential issues associated with the dissolution of the Ingham CRC and the creation of a County Department of Transportation
18.	Ingham County Department of Transportation Transition Plan – Approved by the County Services Committee on March 20, 2012
19.	04/04/12 Email chain including Pratt, Conklin, Rhode, Lannoye re other Members that were insured through MMRMA; 04/05/12 Email of Conklin to Lannoye & Rhode indicating he was advised by Pratt that 10 years remain open and no estimate of what those refunds could be

Exhibit	Description
20.	04/24/12 Resolution Dissolving the Road Commissioners and Creating a Department of Transportation and Roads – 12-123 Ingham Co.
21.	04/24/12 Resolution #12.123 – (additional proposed paragraphs to agreement)
22.	05/29/12 Correspondence to Member Contacts from Pratt with attached proposed Resolutions A & B re membership in MCRCSIP by counties with road responsibilities
23.	05/29/12 Email chain including Pratt, Lannoye, Cohl, Kamm, Rhode, Conklin Henry re MCRCSIP coverage ending 06/01/12 as previously planned; attorneys and certain members determined cannot continue to insure absorbed county road depts
24.	05/30/12 Email chain including Pratt, Conklin, Toskey re edits to Agreement for Cancellation of Insurance & Agreement for withdrawal from MCRCSIP and execution of same
25.	05/30/12 Email chain including Pratt, Conklin, Toskey re edits to Agreement for Cancellation of Insurance & Agreement for withdrawal from MCRCSIP and execution of same
26.	05/30/12 Email chain including Pratt and Toskey forwarding the Agreement with changes indicated in BOLD and requesting Pratt’s approval – once approval is received Toskey will have Conklin execute Agreement
27.	05/31/12 Email chain with Pratt and Toskey re the letter sent to all members in 1990 describing the board’s policy with respect to members withdrawing
28.	05/31/12 Email chain including Pratt, Toskey and Conklin indicating that the Agreements to cancel the coverage/membership with MCRCSIP are ready and that Conklin should sign Agreements
29.	Ingham County Road Commission’s Executed Agreement in Recognition of Termination from MCRCSIP – signed 05/31/2012
30.	Agreement for Cancellation of Insurance between Ingham County Road Commission and MCRCSIP – signed 05/31/2012
31.	06/01/12 letter from Rhode to Pratt requesting refund of insurance premiums
32.	06/01/12 letter from Rhode to Pratt requesting payout of surplus equity
33.	06/25/12 Letter from Pratt to Rhode with response of MCRCSIP Board response to Rhode letters (x2) of 06/04/12; in sum: unused portion of contribution made by Ingham CRC to be paid to County but no refund of surplus equity will be made
34.	03/20/12 Email exchange of Newberry, Wohlford, Pratt re refunds paid to Jackson CRC since 1996
35.	08/10/12 Feasibility Study for County Operation of Jackson CRC
36.	10/18/12 Email from Wohlford to Overton & Straub re report provided to his Board last month

Exhibit	Description
37.	10/18/12, 09/17/12, 10/02/12, 11/29/12, 11/27/12, Jackson CRC Ad Hoc Committee Agenda and Employee Satisfaction Survey
38.	10/10/12 Summary of MCRCSIP info re Jackson CRC from Pratt per request of Wohlford
39.	10/22/12 Email exchange of Overton, Brown & Manser re procuring quote from MMRMA attaching current Jackson CRC insurance policy
40.	10/18/12 Jackson CRC Ad Hoc Committee Meeting Minutes
41.	11/29/12 Jackson CRC Ad Hoc Committee Meeting Minutes
42.	12/13/12 Email exchange of Overton, Manser Armstrong & Walts re changes in policy if Jackson RC switches to MMRMA
43.	11/29/12 Email exchange of Overton, Lightner, Polaczyk, Brown, Walts, Manser & Armstrong re MMRMA coverage proposals for Jackson County
44.	12/06/12 Email from Brown to Overton attaching 12/06/12 "Final" Feasibility Study
45.	12/21/12 Jackson CRC Confidential Update re meeting with Straub, Philips & Griffiths discussing expectations if commissioners assume responsibility for RC.
46.	10/18/12 Correspondence from Brennan, Chief Steward of the Jackson Co Road Workers, to Ad Hoc Comm & Board of Comm'rs re Jackson CRC
47.	12/23/12 Public Notice re public hearings on dissolving Jackson CRC – Jackson Citizen Patriot
48.	01/08/13 Correspondence to Board of Co Comm'rs from Overton re Public Hearing & Action on Dissolution of Jackson CRC.
49.	2013 Jackson CRC Transition Plan
50.	01/18/13 Email exchange of Straub, Overton, Brown, Pratt, Newberry re execution of Jackson CRC Agreement for Cancellation & Agreement in Recognition of Termination
51.	12/17/12 Email exchange of Overton, Manser, Straub re attached MCRCSIP Coverage Agreements
52.	1/15/13 Email between Johnson & Walts re: renewal package
53.	01/18/13 Email exchange of Straub, Overton, Brown, Pratt, Newberry re execution of Jackson CRC Agreement for Cancellation & Agreement in Recognition of Termination
54.	Appendix A – House Bill No. 5125 – effective 02/21/12
55.	Calhoun County Road Commission Transition Plan – draft 1 – 08/31/12
56.	Circuit Court Opinion and Order dated 7/8/2016