

STATE OF MICHIGAN  
IN THE SUPREME COURT

**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.**

\_\_\_\_\_  
Bonnie G. Toskey (P30601)  
COHL, STOKER & TOSKEY, P.C.  
Attorneys for Plaintiffs-Appellees  
601 N. Capitol Ave  
Lansing, MI 48933  
(517) 372-9000  
[btoskey@cstmlaw.com](mailto:btoskey@cstmlaw.com)

John J. Bursch (P57679)  
BURSCH LAW PLLC  
Co-Counsel for Defendant-Appellant  
9339 Cherry Valley Ave, SE - #78  
Caledonia, MI 49316  
(616) 450-4235  
[jbursch@burschlaw.com](mailto:jbursch@burschlaw.com)

**Supreme Court Docket No 160186  
(formerly 156980)**

**Court of Appeals Docket No 334077  
(After Remand)**

**Ingham Circuit Court Case  
No. 15-000432-NZ**

Jon D. Vander Ploeg (P24727)  
John R. Oostema (P26891)  
D. Adam Tountas (P68579)  
SMITH HAUGHEY RICE & ROEGGE  
Attorneys for Defendant-Appellant  
100 Monroe Center NW  
Grand Rapids, MI 49503  
(616) 774-8000  
[jvanderploeg@shrr.com](mailto:jvanderploeg@shrr.com)

**PLAINTIFFS-APPELLEES INGHAM, JACKSON, and CALHOUN COUNTIES'  
ANSWER IN OPPOSITION TO  
APPLICATION FOR LEAVE TO APPEAL  
(AFTER REMAND)**

**Submitted by:  
Bonnie G. Toskey (P30601)  
Cohl, Stoker & Toskey, P.C.  
601 N. Capitol Ave.  
Lansing, MI 48933  
(517) 372-9000**

**TABLE OF CONTENTS**

Table of Contents	pp. i-ii
List of Exhibits to this Answer	p. iii
Index of Authorities	pp. iv-x
Counterstatement of the Basis of Jurisdiction of the Supreme Court	p. xi
Counterstatement of Questions Presented	p. xii
Objections To MCRCSIP’s Statement Under MCR 7.305(A)(1)(a) “Identifying The Judgment Or Order Appealed And The Date Of Its Entry”	pp. xiii-xxii
Answer to Appellant’s “Introduction, etc.”	p. 1
Counterstatement of Facts	p. 5
I. Factual and Procedural Background	p. 5
Argument	p. 14
Issue I: MCRCSIP’s forfeiture policy is void as in violation of public policy; alternatively, the forfeiture policy is void as a breach of trust fatally tainted by conflict of interest, as contrary to Const 1963, art 9, §18, and/or as inapposite to <i>involuntary</i> withdrawal from the Pool prompted by extortion or embezzlement, so the Court of Appeals reached the correct result, whatever the quality of its reasoning.	p. 14
Counterstatement of the Standard of Review	p. 14
Issue Preservation	p. 16
Legal Analysis	p. 18
A. MCRCSIP’s forfeiture policy is void as in violation of public policy.	p. 18
B. Even if the Court of Appeals’ public policy analysis was flawed, MCRCSIP’s forfeiture policy is void as a breach of trust, as contrary to Const 1963, art 9, §18, and/or as inapposite to involuntary withdrawal from the Pool caused by extortion or embezzlement, so the Court of Appeals reached the correct result, whatever the quality of its reasoning.	p. 25

Issue Preservation	p. 25
1. MCRCSIP’s forfeiture policy is void as a breach of trust, fatally tainted by conflict of interest	p. 25
2. MCRCSIP’s forfeiture policy is void as contrary to Const 1963, art 9, §18	p. 28
3. MCRCSIP’s forfeiture policy is inapposite to involuntary withdrawal from the Pool caused by extortion or embezzlement	p. 33
Issue II: The notion that Jackson County “withdrew from the Pool when it dissolved its former appointed Road Commission”, despite never declaring such much less signing a withdrawal agreement or withdrawing from membership in the Pool, is meritless.	p. 38
Counterstatement of the Standard of Review	p. 38
Issue Preservation	p. 39
Legal Analysis	p. 39
Issue III: The Court of Appeals correctly held that, as a matter of law, the Counties which have exercised their rights under MCL 46.11(s) and MCL 224.6(7) to assume the power and duties of their former appointed road commissions, stand in the shoes of their former appointed road commissions for all purposes connected with this case.	p. 45
Counterstatement of the Standard of Review	p. 45
Issue Preservation	p. 45
Legal Analysis	p. 45
Relief Requested	p. 48
Signature of Counsel	p. 48

**LIST OF EXHIBITS TO THIS ANSWER**

<b><u>EXHIBIT</u></b>	<b><u>DESCRIPTION</u></b>
<b>Exhibit A</b>	Complaint
<b>Exhibit B</b>	Counties' (C)(9) and (10) Motion for Summary Disposition
<b>Exhibit C</b>	MCRCSIP Answer to Counties' MSD
<b>Exhibit D</b>	MCRCSIP Supplemental Brief on Remand
<b>Exhibit E</b>	Counties' Supplemental Brief on Remand
<b>Exhibit F</b>	MCRCSIP Supplemental Reply Brief on Remand
<b>Exhibit G</b>	Counties' Supplemental Reply Brief on Remand
<b>Exhibit H</b>	MCRCSIP's (C)(8) Motion for Summary Disposition
<b>Exhibit I</b>	Counties' Answer to MCRCSIP's MSD
<b>Exhibit J</b>	Counties' Brief on Appeal, Court of Appeals No 334077

**INDEX OF AUTHORITIES****Cases**

<i>Abrams v Susan Feldstein, PC</i> , 456 Mich 867; 569 NW2d 160 (1997)	pp. 4, 20
<i>A&amp;D Development v Michigan Commercial Insurance Mut (After Remand)</i> , 2014 WL 7338871 (Mich App, December 23, 2014)	pp. 31, 32
<i>Advisory Opinion re Constitutionality of 1966 PA 346</i> , 380 Mich 554; 158 NW2d 416 (1968)	p. 29
<i>Aetna Life Ins Co v Lavoie</i> , 475 US 813; 106 S Ct 1580; 89 L Ed 2d 823 (1986)	p. 26
<i>Alan v Wayne County</i> , 388 Mich 210; 200 NW2d 628 (1972)	p. 29
<i>Allen v Mich Bell Tel Co</i> , 18 Mich App 632; 171 NW2d 689 (1969)	pp. 4, 19, 20
<i>Alvord v Lent</i> , 23 Mich 369 (1871)	p. 46
<i>B F Farnell Co v Monahan</i> , 377 Mich 552; 141 NW2d 58 (1966)	p. 36
<i>Bolt v City of Lansing</i> , 459 Mich 152; 587 NW2d 264 (1998)	p. 15
<i>Bond v Cowan</i> , 272 Mich 296; 261 NW 331 (1935)	p. 46
<i>Bonner v City of Brighton</i> , 495 Mich 209; 848 NW2d 380 (2014)	p. 15
<i>CE Tackels, Inc v Fantin</i> , 341 Mich 119; 67 NW2d 71 (1954)	p. 24
<i>Check Reporting Servs, Inc v Mich Nat'l Bank–Lansing</i> , 191 Mich App 614; 478 NW2d 893 (1991)	p. 37
<i>Cook v Wolverine Stockyards Co</i> , 344 Mich 207, 73 NW2d 902, (1955)	pp. 4, 19
<i>Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit</i> , 482 Mich 18; 753 NW2d 579 (2008)	p. 15
<i>Dewitt Twp v Clinton Co</i> , 113 Mich App 709; 310 NW2d 2 (1982)	p. 23
<i>Dietz v American Dental Ass'n</i> , 479 F Supp 554 (ED Mich, 1979)	p. 36
<i>Evans Prods Co v State Bd of Escheats</i> , 307 Mich 506; 12 NW2d 448 (1943)	p. 46

<i>Foremost Ins Co v. Allstate Ins Co</i> , 439 Mich 378; 486 NW2d 600 (1992)	p. 37
<i>46<sup>th</sup> Circuit Trial Court v Crawford Co</i> , 476 Mich 131; 719 NW2d 553 (2006)	p. 34
<i>Franges v Gen Motors Corp</i> , 404 Mich 590; 274 NW2d 392 (1979)	p. 46
<i>Graham v Folsom</i> , 200 US 248; 26 S Ct 245; 50 L Ed 464 (1906)	p. 47
<i>In re Green Charitable Trust</i> , 172 Mich App 298; 431 NW2d 492 (1988)	p. 27
<i>Gregory v Village of Lake Linden</i> , 130 Mich 368; 90 NW 29 (1902)	pp. 42, 43
<i>Grinnell Bros v Brown</i> , 205 Mich 134; 171 NW 399 (1919)	pp. 35-36
<i>Guthat v Gow</i> , 95 Mich 527; 55 NW 442 (1893)	p. 42
<i>In re Handelsman</i> , 266 Mich App 433; 702 NW2d 641 (2005)	p. 37
<i>Hogue v Wells</i> , 180 Mich 19; 146 NW 369 (1914)	p. 37
<i>Howe v Patrons' Mut Fire Ins Co of Michigan</i> , 216 Mich 560; 185 NW 864 (1921)	p. 35
<i>Hull v Hostettler</i> , 224 Mich 365, 194 NW 996 (1923),	pp. 2, 4
<i>Imlay Twp Primary School Dist No 5 v State Bd of Ed</i> , 359 Mich 478; 102 NW2d 720 (1960)	p. 41
<i>Kelly v Public Schools of City of Muskegon</i> , 110 Mich 529; 68 NW2d 282 (1896)	p. 42
<i>Kibby v Mich Cent R Co</i> , 142 Mich 313; 105 NW 769 (1905)	p. 34
<i>Knight v Brown</i> , 137 Mich 396; 100 NW 602 (1904)	p. 35
<i>Kukla v Perry</i> , 361 Mich 311, 105 NW2d 176, 183 (1960)	pp. 4, 19
<i>City of Lansing v Wood</i> , 57 Mich 201; 23 NW 769 (1885)	p. 3
<i>Lawrence v Darrah &amp; Associates</i> , 445 Mich 1; 516 NW2d 43 (1994)	p. 17
<i>Lewis v Independent School District</i> , 161 SW2d 450 (Tex. 1942)	p. 31
<i>Long v Chelsea Comm Hosp</i> , 219 Mich App 578; 557 NW2d 157 (1996)	p. 36

<i>Macomb Co Prosecutor v Murphy</i> , 464 Mich 149; 627 NW2d 247 (2001)	p. 41
<i>Madugula v Taub</i> , 496 Mich 685; 853 NW2d 75 (2014)	p. 39
<i>Menendez v Detroit</i> , 337 Mich 476; 60 NW2d 319 (1953)	pp. 17, 25
<i>MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc.</i> , 465 Mich 303; 633 NW2d 357 (2001)	p. 33
<i>Michigan Gun Owners, Inc v Ann Arbor Pub Schools</i> , 502 Mich 695; 918 NW2d 756 (2018)	p. 25
<i>Middlebrooks v Wayne Co</i> , 446 Mich 151; 521 NW2d 774 (1994)	p. 17
<i>Mitcham v Detroit</i> , 355 Mich 182; 94 NW2d 388 (1959)	pp. 18, 20, 45, 48
<i>Oakland Co Drain Comm'r v Royal Oak</i> , 306 Mich 124; 10 NW2d 435 (1943)	p. 29
<i>Ohio &amp; M Ry Co v McCarthy</i> , 96 US (6 Otto) 258; 24 L Ed 693 (1877)	p. 24
<i>Orzel v Scott Drug Co</i> , 449 Mich 550; 537 NW2d 208 (1995)	pp. 4, 19
<i>Parish v New York Produce Exchange</i> , 169 NY 34; 61 NE 977 (1901)	p. 27
<i>Patrons' Fire Insurance Co v Attorney General</i> , 166 Mich. 438; 131 NW 1119 (1911)	p. 35
<i>People v Buhler</i> , 477 Mich 18; 727 NW2d 127 (2007)	p. 41
<i>People v Gallagher</i> , 4 Mich 244 (1856)	p. 42
<i>People v Harris</i> , 495 Mich 120; 845 NW2d 477 (2014)	p. 36
<i>Pere Marquette Ry Co v Public Utilities Comm'n</i> , 218 Mich 307; 188 NW 515 (1922)	p. 22
<i>Petrus v Dickinson Co Bd of Comm'rs</i> , 184 Mich App 282; 457 NW2d 359 (1990)	p. 29
<i>Pierson v H R Leonard Furniture Co</i> , 268 Mich 507; 256 NW 529 (1934)	p. 3
<i>Puett v Walker</i> , 332 Mich 117; 50 NW2d 740 (1952)	p. 34
<i>Puhr v Grand Lodge, German Order of Harugari</i> , 77 Mo App 47; 1898 Westlaw 1840, (1898)	p. 35

<i>Quinto v Cross &amp; Peters Co</i> , 451 Mich 358, 547 NW2d 314 (1996)	p. 44
<i>Radtke v Everett</i> , 442 Mich 368; 501 NW2d 155 (1993)	p. 5
<i>Richardson v Buhl</i> , 77 Mich 632; 43 NW 1102 (1889)	p. 20
<i>Rory v Continental Ins Co</i> , 473 Mich 457; 703 NW2d 23 (2005)	p. 18
<i>Royal Indem Co v H S Watson Co</i> , 93 Mich App 491; 287 NW2d 278 (1979)	p. 45
<i>Russian Orthodox All Saints Church v Darin</i> , 222 Mich 35; 192 NW 697 (1923),	p. 27
<i>Sands Appliance Svcs, Inc v Wilson</i> , 463 Mich 231; 615 NW2d 241 (2000)	pp. 4, 19
<i>School Dist of City of Lansing v City of Lansing</i> , 260 Mich 405; 245 NW 449 (1932),	p. 30
<i>Sears v Cottrell</i> , 5 Mich 251 (1858)	p. 46
<i>Shapero v State Dept. of Revenue</i> , 322 Mich 124; 33 NW2d 729 (1948)	p. 46
<i>Sinas v City of Lansing</i> , 382 Mich 407; 170 NW2d 23 (1969)	p. 31
<i>Speicher v Columbia Twp Bd of Trustees</i> , 497 Mich 125; 860 NW2d 51 (2014)	p. 38
<i>Sprik v Regents of the Univ of Mich</i> , 43 Mich App 178; 204 NW2d 62 (1972)	p. 29
<i>SSC v General Retirement System of City of Detroit</i> , 192 Mich App 360; 480 NW2d 275 (1991)	p. 43
<i>Stachnik v Winkel</i> , 394 Mich 375; 230 NW2d 529 (1975)	pp. 4, 19
<i>Stanek v Nat'l Bank of Detroit</i> , 171 Mich App 734; 430 NW2d 819 (1988)	p. 19
<i>Stanton v Lloyd Hammond Produce Farms</i> , 400 Mich 135; 253 NW2d 114 (1977)	p. 41
<i>Suchodolski v Michigan Consolidated Gas Co</i> , 412 Mich 692; 316 NW2d 710 (1982)	pp. 22-23

<i>Sun Valley Foods Co v Ward</i> , 460 Mich 230; 596 NW2d 119 (1999)	p. 38
<i>Terrien v Zwit</i> , 467 Mich 56; 648 NW2d 602 (2002)	pp. 18, 22
<i>Trail Clinic, PC v Bloch</i> , 114 Mich App 700; 319 NW2d 638 (1982)	p. 38
<i>Traverse City Sch Dist v Attorney General</i> , 384 Mich 390; 185 NW2d 9 (1971)	p. 15
<i>City of Tyler v Texas Employers' Insurance Ass'n</i> , 288 SW 409 (Tex Comm'n App, 1926, judgm't adopted)	pp. 30, 31
<i>Vyne v Glenn</i> , 41 Mich 112; 1 NW 997 (1879)	p. 35
<i>Warren Tool Co v Stephenson</i> , 11 Mich App 274; 161 NW2d 133 (1968)	p. 37
<i>Wilson v Taylor</i> , 457 Mich 232; 577 NW2d 100 (1998)	pp. 18, 20, 23, 45, 48

### Constitutional Provisions

US Const, art 1, § 10	p. 47
Const 1963, art 1, § 10	p. 47
Const 1963, art 3, §7	p. 41
Const 1963, art 6, §1	pp. 19, 42
Const 1963, art 7, §1	pp. 41, 46
Const 1963, art 7, §16	pp. 40, 41, 46
Const 1963, art 9, §18	<i>passim</i>
Texas Constitution, Article III, §52(a)	p. 31
Texas Constitution, Article III, §§60 and 61	pp. 31-32

### Statutes

MCL 15.181(b)	p. 41
MCL 15.182	p. 41

MCL 15.184	p. 41
MCL 45.3	p. 41
MCL 45.501	p. 41
MCL 46.11(s) (2012 PA 14)	<i>passim</i>
MCL 124.1	pp. 1, 2, 30, 42
MCL 124.5(6)	pp. 2, 18, 21
MCL 124.7(a)(ii) and (iv)	pp. 26, 30
MCL 124.7(b)(i)-(v)	pp. 21, 30
MCL 124.1-.13 (1982 PA 138)	p. 1
MCL 224.1	p. 41
MCL 224.6(7) (2012 PA 14)	<i>passim</i>
MCL 224.9	p. 41
MCL 500.2016	pp. 18, 23
MCL 600.2051(2)	pp. 22, 27, 31-32
MCL 600.2919a	p. 37
MCL 691.1401(b)	p. 40
MCL 691.1401(e)	p. 40
MCL 750.213	p. 36

### **Court Rules**

MCR 2.116(C)(8)	pp. 5, 7
MCR 2.116(C)(9)	p. 14
MCR 2.116(C)(10)	p. 11
MCR 2.116(G)(6)	p. 44

MCR 2.116(I)(2)	p. 14
MCR 7.212(C)(6)	p. 5
MCR 7.212(C)(7)	pp. 16, 18, 40, 45
MCR 7.212(D)(3)(b)	p. 5
MCR 7.305(A)(1)(d)	p. 5
MCR 7.305(A)(1)(e)	pp. 16, 18, 40, 45
MCR 7.305(D)	p. 5
MCR 7.310(A)	pp. 1, 5, 44
MCR 7.316(C)(1)(b) and (2)	p. 48

#### Miscellaneous

8 Fletcher, Cyclopedia, Corporations, § 4195, p 791	p. 39
2 Laws Southerland Statutory Const. (2d Ed.) § 490)	p. 46
VTCS, art 8308, §7	p. 30

**COUNTERSTATEMENT OF THE BASIS OF JURISDICTION  
OF THE SUPREME COURT**

This Court's appellate jurisdiction is provided by rule. Const 1963, art 6, §4. This appeal from a decision of the Court of Appeals is within this Court's appellate jurisdiction pursuant to MCR 7.303(B)(1) and MCR 7.305(C)(2)(b). The application was timely filed.

**COUNTERSTATEMENT OF QUESTIONS PRESENTED**

**Issue I: Is MCRCSIP’s forfeiture policy void as in violation of public policy; alternatively, is the forfeiture policy void as a breach of trust fatally tainted by conflict of interest, as contrary to Const 1963, art 9, §18, and/or as inapposite to *involuntary* withdrawal from the Pool prompted by extortion or embezzlement, so that the Court of Appeals reached the correct result, whatever the quality of its reasoning?**

Appellees, the Counties of Ingham, Jackson, and Calhoun, answer “yes, yes, yes, and yes.”

Appellant MCRCSIP answers “no” and ignores the alternative theories entirely.

The Court of Appeals answered “yes” and did not reach the alternative theories.

The circuit court answered “no, no, no, and no”.

**Issue II: Is the notion that Jackson County “withdrew from the Pool when it dissolved its former appointed Road Commission”, despite never declaring such much less signing a withdrawal agreement or withdrawing from membership in the Pool, meritless?**

Appellees, the Counties of Ingham, Jackson, and Calhoun, answer “yes”.

Appellant MCRCSIP answers “no”.

The Court of Appeals answered “yes”.

The circuit court did not address the question.

**Issue III: Did the Court of Appeals correctly hold that, as a matter of law, the Counties of Ingham, Jackson and Calhoun, each of which has exercised its right under MCL 46.11(s) and MCL 224.6(7) to assume the power and duties of their former appointed road commissions, stand in the shoes of their former appointed road commissions for all purposes connected with this case?**

Appellees, the Counties of Ingham, Jackson, and Calhoun, answer “yes”.

Appellant MCRCSIP fails to brief the issue, but may be understood to answer “no”.

The Court of Appeals answered “yes”.

The circuit court did not address the question.

**OBJECTIONS TO MCRC SIP’S STATEMENT UNDER MCR 7.305(A)(1)(a)**  
**“IDENTIFYING THE JUDGMENT OR ORDER APPEALED**  
**AND THE DATE OF ITS ENTRY”**

MCR 7.305(A)(1)-(3) iterates that an application for leave to appeal must contain a specified collection of materials. The first such item is “a statement identifying the judgment or order appealed and the date of its entry”, MCR 7.305(A)(1)(a). Appellant Michigan County Road Commission Self-Insurance Pool (MCRC SIP) has chosen to disregard this simple requirement and to substitute instead a vexatious diatribe, suffused with misrepresentations and permeated with sanctimony. MCRC SIP’s violation of the rule is unacceptable.

The rule, according to its unambiguous terms, posits a straightforward, direct statement *e.g.*:

[Appellant seeks leave to appeal the July 25, 2019 judgment of the Court of Appeals (Exhibit 3<sup>1</sup>), on remand pursuant to this Court’s order of December 5, 2018 (Exhibit 2, S Ct Docket No 156980). This application also seeks leave to appeal aspects of the original October 10, 2017 decision of the Court of Appeals (Exhibit 1) which were previously presented to this Court in No 156980 but not directly addressed in the December 5, 2018 order of remand (Exhibit 2).]

However, instead of the brief, simple statement the rule demands, or even something arguably resembling the statement the rule requires, MCRC SIP has instead presented argument, *viz.*,

\* \* \* 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 bylaws”, 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.” *Ingham Co v MCRC SIP*, 321 Mich App 574, 584-585; 909 NW2d 533 (2017)[*Ingham County I*] (**Exhibit 1**) \* \* \* But the Pool’s governing documents \* \* \*

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<sup>1</sup> In this Answer, references to “Exhibit n”, where “n” is an Arabic numeral, are to MCRC SIP’s collection of 56 exhibits (only some of which are properly part of the record on appeal, MCR 7.310). Any reference to “Exhibit X”, where “X” is an uppercase letter of the alphabet, is to exhibits submitted with this Answer.

By replacing what should be an objective chronology with blatant argument, including quotations from the original Court of Appeals' published decision presented out of context, MCRCSIP forces appellee Counties to devote resources to ferret out the places in the application (other than in the "concise argument" section, as specified in MCR 7.305(A)(1)(e) and designated in MCRCSIP's Table of Contents as being confined to pp. 21-32 of its application) where argument has been inserted, in order to avoid being disadvantaged by MCRCSIP's tactics. Accordingly, the Counties are compelled to respond to this initial section of legal argument and misleading factual summary under the same heading.

The Court of Appeals' decisions are not shown to be erroneous in this portion of the application (the Counties will address other contentions in their respective place). The Court of Appeals initially came to the conclusion that, when the Legislature, in 2012 PA 14, amended MCL 46.11(s) and MCL 224.6 to authorize County Boards of Commissioners to supplant their appointed Road Commissions and assume the powers and duties of those Road Commissions themselves, the County Boards that did so became County Road Commissions, and successors in interest to their former appointed road commissions. 321 Mich App at 581-582. This notion, that elected officials might "wear two hats", has been part of American governmental structure at least since 1789, when the US Constitution went into effect. So Ingham, Jackson, and Calhoun Counties, by availing themselves of the option created by MCL 46.11(s), became both their respective county legislatures and their respective county road commissions. The Court of Appeals noted that a contrary holding would engender constitutional difficulties by impairing the obligation of ongoing road commission contracts in violation of US Const, art 1, §10 and Const 1963, art 1, §10 (a point MCRCSIP ignores entirely). 321 Mich App at 583-584.

Because appellee Counties are thus each a County Road Commission, and MCRCSIP's bylaws provide that membership is open to "county road commissions", without defining that terminology other than by referencing the County Road Commission Act, MCL 224.1 et seq. (Exhibit 7, Art. III), the Court of Appeals concluded that appellee Counties at all times have been eligible to become—or remain—members of MCRCSIP. 321 Mich App at 584.

The Court of Appeals then examined withdrawal agreements extorted from Ingham and Calhoun Counties, parsed their terms, and concluded they had no effect on "any other terms or conditions" of the Declaration of Trust, the interlocal agreement, or the bylaws." Thus, "the withdrawal agreements did not alter eligibility for the refund of surplus premiums from prior-year contributions." *Id.* at 585. Neither in its prior application to this Court (Docket No 156980) nor in this present iteration did or does MCRCSIP challenge this ruling.

The appellee Counties' entitlement to refunds of surplus premiums was the subject of this Court's remand order, so for MCRCSIP to quote the last four lines of 321 Mich App 585 as though still operative, instead of addressing some portion of the Court of Appeals' published decision on remand (Exhibit 3)<sup>2</sup>, illuminates the inescapable conclusion that MCRCSIP's goal here is to mislead and inveigle this Court into acting on bad information<sup>3</sup>, not present some legitimate issue for possible plenary review in conformity with the rules.

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<sup>2</sup> The Court of Appeals' judgment on remand is addressed on the next page.

<sup>3</sup> MCRCSIP successfully induced this Court to remand with direction to the Court of Appeals to examine five specified documents, one of which was not part of the record on appeal (it had been submitted with MCRCSIP's motion for reconsideration to the Court of Appeals, at that point with an acknowledgment it was not part of the record, but without a motion to expand the record in accordance with MCR 7.216(A)(4)). That same acknowledgment was not carried forward to MCRCSIP's prior application, and this Court thus relied on a document that was not even part of the record on appeal.) Having been rewarded for its disregard of the rules and likewise of its attorneys' duty of candor, MRPC 3.3, on this second go-round MCRCSIP appears to have license to take even greater liberties with proper procedure and to disregard facts conveniently.

Turning attention to the Court of Appeals' judgment on remand, the passage of time meant Judges Michael Talbot and Peter O'Connell had retired. MCRCSIP thus had the benefit of two new judges. MCRCSIP initiated its campaign of misrepresentation by filing a motion for leave to file a supplemental brief on remand on January 9, 2019, in which it relied on *ipse dixit* to suggest "supplemental briefing" "will be of assistance to this Court for \* \* \* making this additional determination on remand", without an attempt to explain how its original brief on appeal failed to satisfactorily develop its legal argument as to the documents addressed in the order of remand. That motion was granted without opposition.<sup>4</sup> Even so, under Court of Appeals IOP 7.212(F)-2, "If a motion to file a supplemental brief is granted, a response brief will be permitted."

MCRCSIP filed its supplemental brief on remand (Exhibit D), suffused with argumentative and misleading facts and multiple references to materials not included in the record on appeal, contrary to MCR 7.212(D)(1) and (C)(6) as well as MCR 7.210(A) (see Exhibit E, pp. 1-11). The Counties timely filed *their* supplemental remand brief on February 19, 2019 (Exhibit E).<sup>5</sup> MCRCSIP then moved on March 14, 2019, for leave to file a supplemental reply brief (a proposed reply brief was attached to the motion—Exhibit F), to which the Counties filed both an answer and a proposed supplemental reply brief (Exhibit G). On April 18, 2019, the Court of Appeals granted the motion and accepted both supplemental reply briefs. Notably, nowhere in MCRCSIP's reply brief did it object to the propriety of the Counties' argument

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<sup>4</sup> The Counties' answer in opposition to the motion was proffered late and rejected by the Clerk.

<sup>5</sup> Although submitting 56 exhibits with its application for leave, some of which once again are not part of the record—MCRCSIP's Motion for Summary Disposition was *exclusively* predicated on MCR 2.116(C)(8), and thus only the complaint and documents attached to the complaint could be considered (see Exhibit E, pp. 7-8)—MCRCSIP fails to provide copies of these supplemental briefs, or of the supplemental reply briefs the Court of Appeals permitted, again on MCRCSIP's motion. This omission further evidences MCRCSIP's approach of cherry-picking what it deems to be favorable (in blatant violation of MCR 7.305(A)(1)(d), which incorporates by reference MCR 7.212(C)(6)).

(Exhibit E, pp. 30-35) that MCRCSIP's policy of declaring forfeiture of a withdrawing county's right to its aliquot share of surplus premiums was void as against public policy.<sup>6</sup>

Following the two extra rounds of briefing on remand, the Court of Appeals issued its published opinion on remand on July 25, 2019 (Exhibit 3), in which it first adhered to its original conclusion that Jackson County never withdrew from membership, 321 Mich App at 585, and that the Counties are successors in interest to their former appointed road commissions based on the law of the case doctrine. *Bennett v Bennett*, 197 Mich App 497, 499-500; 496 NW2d 353 (1992) (cited on p. 4 of Exhibit 3; see also *id.*, pp. 12-13).

The Court of Appeals then addressed Ingham and Calhoun Counties' right to share in distributions of surplus premium. Here (Application, p. 3), MCRCSIP falsely insinuates that, in agreeing with the Counties that the forfeiture policy, although part of documents constituting a contract, is void as against public policy, the Court of Appeals addressed "*an issue "no party ever raised or briefed"*", using italics to frame this Jeremiad to suggest that, in so doing, the Court of Appeals has ended civilization as we know it.

To the contrary, in addressing the enforceability of the forfeiture policy, the Court of Appeals *began by expressly noting that the issue was duly raised by the Counties*: "The counties argue that the withdrawal policy is unenforceable as a violation of public policy." (Exhibit 3, p. 13). So at the outset, the allegation that no such issue was raised or briefed is entirely misleading, and apparently deliberately so. The Counties first presented their public policy

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<sup>6</sup> MCRCSIP did contend in its supplemental reply brief (p. 7 of Exhibit F), albeit citing no authority, that notwithstanding the fact the Counties had raised the issues of extortion, violation of Const 1963, art 9, §18, etc. on their appeal of right (the Court of Appeals ruled in the Counties' favor without reaching those issues) and in opposition to MCRCSIP's first Supreme Court application, somehow the Counties were barred from pursuing those issues on remand. As explained in Exhibit G, no such bar existed then, or now. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n. 41; 521 NW2d 774 (1994), citing *Menendez v Detroit*, 337 Mich 476, 483; 60 NW2d 319 (1953).

argument in their summary disposition brief (Exhibit B, pp. 24-25), and carried it forward to their brief on appeal (Exhibit J, pp. 29-30). The Counties then again presented that argument as Issue 3 in their Supplemental Brief on Remand (Exhibit E, pp. 30-35)<sup>7</sup>—without objection by MCRCSIP. That MCRCSIP would resort to predicating its application on this approach is consistent with its tactics throughout this litigation.

Even so, it is well recognized that if no party had raised or briefed the issue, the Court of Appeals would have been entirely within its proper authority to render the identical ruling irrespective of preservation of the issue. MCRCSIP misleads the Court by crying “wolf!” to no legitimate end. As noted in *Walters v Nadell*, 481 Mich 377, 387, 751 NW2d 431 (2008), “this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice....” Inasmuch as the Michigan judiciary is comprised of “one court of justice”, Const 1963, art 6, §1, the Court of Appeals necessarily has like power, either inherently or by virtue of MCL 600.310<sup>8</sup>.

It is thus well settled that an appellate court may, in its discretion, address an issue not properly preserved in order to do justice. “The preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when ‘ ‘necessary to a proper

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<sup>7</sup> The Court of Appeals agreed with that argument by the Counties, albeit based on different reasoning, which had the advantage, first, of avoiding a constitutional issue of whether the policy violates Const 1963, art 9, §18 (Exhibit A, Issue 5) and, second, of not opening a can of worms by holding that MCRCSIP committed the felonies of extortion and embezzlement (which, since they were perpetrated separately as to Ingham and Calhoun Counties, would also have engendered an issue as to MCRCSIP’s federal criminal and civil liability under the Racketeering Influenced and Corrupt Organizations Act, 18 USC §§1961 *et seq.* (*id.*, Issues 3 and 6). Again, appellate courts are under a longstanding duty to avoid constitutional questions if possible, *Clinton v Jones*, 520 US 681, 690; 117 S Ct 1636; 137 L Ed 2d 945 (1997); *Spector Motor Service, Inc v. McLaughlin*, 323 US 101, 105; 65 S Ct 152; 89 L Ed 101 (1944), while choosing a *ratio decidendi* that leads to the least thorny basis for judgment is just judicial common sense.

<sup>8</sup> “The Court of Appeals \* \* \* has authority to issue any writs, directives, and mandates that it judges necessary and expedient to effectuate its determination of cases brought to it.”

determination of a case...” ’ ’ ” *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (citations omitted).

Moreover, when a contract violates public policy, no Michigan court may enforce it, and every Court must *sua sponte* apply the rule. Thus, in *Kukla v Perry*, 361 Mich 311, 324-325, 105 NW2d 176, 183 (1960), this Court held:

In this situation, we have consistently held that where an illegal contract is involved, the court will not enforce it or grant relief thereunder, particularly where it is not the innocent party that is pleading to the court. See *Groves v Jones*, (252 Mich 446, 233 NW 375) *supra*; *Cook v Wolverine Stockyards Co*, 344 Mich 207, 73 NW2d 902; and cases cited therein. Our position may be best summarized by the following excerpt from *McNamara v Gargett*, 68 Mich 454, 462, 36 NW 218, 222 (13 Am St Rep 355).

“It is said, however, that Gargett received 25 bushels of oats, and ought not to be permitted to complain, as there is not a total failure of consideration. But the trouble is, the whole contract is tainted and avoided by the part of the consideration which is illegal. If any part of a consideration is illegal, the whole consideration is void, because Public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise, although he may have connected with the act or promise another which is legal. (I Parsons, Contracts, p. 457); *Snyder v Willey*, 33 Mich 483, 496.”

To like effect, in *Cook v Wolverine Stockyards Co*, 344 Mich 207, 209, 73 NW2d 902, 904 (1955), this Court said:

The trial court held that an illegal contract, against public policy, had been pleaded and that under such circumstances courts will not enforce it or grant relief thereunder but leave the parties where they have placed themselves. In this the court was correct. *Richardson v Buhl*, 77 Mich 632, 43 NW 1102, 6 LRA 457; *Cashin v Pliter*, 168 Mich 386, 134 NW 482 (Ann.Cas.1913C, 697); *Mulliken v Naph-Sol Refining Co*, 302 Mich 410, 4 NW2d 707; *Day v Chamberlain*, 223 Mich 278, 193 NW 824; *Dettloff v Hammond, Standish & Co*, 195 Mich 117, 161 NW 949 (14 N.C.C.A. 901); *Turner v Schmidt Brewing Co*, 278 Mich 464, 270 NW 205.’

That an appellate Court not only can, but must, *sua sponte* refuse to enforce a contract against public policy was addressed from a different angle in *Stachnik v Winkel*, 394 Mich 375, 382-383; 230 NW2d 529 (1975) (boldfaced emphasis added):

‘(The clean hands maxim) is a self-imposed ordinance that closes the doors of a court of

equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. **This presupposes a refusal on its part to be ‘the abettor of iniquity.’** *Bein v Heath*, 47 US 228; 6 How 228, 247; 12 L Ed 416.’ *Precision Instrument Manufacturing Co v Automotive Maintenance Machinery Co*, 324 US 806, 814; 65 S Ct 993, 997; 89 L Ed 1381 (1944).

**Since the clean hands maxim is designed to preserve the integrity of the judiciary, courts may apply it on their own motion even though it has not been raised by the parties or the courts below.** See *Gaudiosi v Mellon*, 269 F.2d 873, 881, 882 (CA 3, 1959). See also *Hall v Wright*, 240 F.2d 787, 795 (CA 9, 1957); *Frank Adam Electric Co v Westinghouse Electric & Mfg Co*, 146 F.2d 165, 167 (CA 8, 1945).

This Court reviews equity actions de novo. **To suggest, as the Court of Appeals below has done, that we may not consider whether the plaintiffs come before us with clean hands simply because neither the parties nor the judge in the Circuit Court raised the issue below would be contrary to the very rationale behind the creation of the clean hands maxim.**

So, as noted in *Sands Appliance Svcs, Inc v Wilson*, 463 Mich 231, 239, 615 NW2d 241 (2000), it is the *duty* of the courts to “refuse to enforce a contract that is contrary to public policy.”

To like effect, the “wrongful conduct rule” of *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995), provides that when a party’s legal position “is based in whole or in part, on his own illegal conduct,” its claim is barred. *Id.* at 558. This rule rests on the premise that courts should not, directly or indirectly, encourage or tolerate illegal activities.

The rationale that Michigan courts have used to support the wrongful-conduct rule are rooted in the public policy that courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct. If courts chose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties.

*Id.* at 559-560 (citations omitted).

So, whether the issue was preserved or not (it was), and whether it was briefed or not (it

was), the Court of Appeals had a duty to refuse to enforce MCRC SIP's putatively contractual forfeiture policy if it was found to violate public policy. As the Court of Appeals noted, that public policy argument was *expressly* made by the Counties, and upholding it was utterly mundane.

MCRC SIP—as usual, citing no authority—fulminates that “this is an extraordinary holding”. Hardly. A bit of research reveals 16 appellate cases citing *Cook*, 69 addressing *Orzel's* “wrongful conduct rule”, 174 in which “unclean hands” appears, and 90 containing the words “illegal contract”.<sup>9</sup> Moreover, these figures are augmented by cases refusing to enforce contracts as unlawful, but in which different terminology is utilized, *e.g.*, *Abrams v Susan Feldstein, PC*, 456 Mich 867; 569 NW2d 160 (1997) (involving an attorney's unethical fee contract).

To summarize: “The principle of freedom to contract does not carry a license to insert any provision in an agreement which a party deems advantageous. The public is concerned with the legality of contracts and limits the contractual freedom of private parties to legal undertakings. This public concern is manifest in the statutes and decisions of this state.” *Allen v Mich Bell Tel Co*, 18 Mich App 632, 636; 171 NW2d 689 (1969).

MCRC SIP decries allowing “*withdrawing* counties” to share in surplus distributions (*i.e.*, to receive a refund of their fair share of excess premiums they previously paid for insurance coverage) as a “windfall”, completely ignoring the fact that, in this case, NO COUNTY VOLUNTARILY WITHDREW from membership, and each will only receive its own aliquot share of unused unneeded insurance premiums remaining as declared surplus. Jackson County

<sup>9</sup> Not all of these cases held the contracts there considered void or voidable as against public policy, but they demonstrate that the issue arises with substantial regularity. Moreover, there are many other precedential cases that support a related proposition, *e.g.*, *Stanek v Nat'l Bank of Detroit*, 171 Mich App 734; 430 NW2d 819 (1988) (exculpatory clause in a bank's stop payment order held to be invalid on public policy grounds).

never relinquished its membership or lost its eligibility to continue membership; Ingham and Calhoun intended to maintain their insurance policies but were extorted to sign withdrawal agreements in order to obtain refunds of their then *current premiums paid for insurance coverage MCRCSIP determined to refuse to provide*. All discussion of “withdrawal” is designed to mask the fact MCRCSIP had breached its contracts with plaintiff Counties *before* any “withdrawal” occurred. As the party first materially breaching its contractual relationship with the Counties, MCRCSIP is barred from enforcing any part of the contract, including its forfeiture provisions. *Jones v Berkey*, 181 Mich 472, 480; 148 NW 375 (1914); *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 573-574; 127 NW2d 340 (1964)<sup>10</sup>.

Finally, the notion that “the Court of Appeals had no business telling the Pool who[m] it had to insure” is sheer effrontery. The Court of Appeals had jurisdiction as well as a duty to construe the contract, which is silent on any definition of “county road commission”. *People v Gallagher*, 4 Mich 244, 281 (1856) (Pratt, P.J., dissenting); *Gregory v Village of Lake Linden*, 130 Mich 368, 369; 90 NW 29 (1902). Thus, it is MCRCSIP that has no business dictating a revision of the contract *ex post facto* to redefine key incorporated *statutory* terminology.

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<sup>10</sup> This represents merely another valid reason MCRCSIP’s quixotic quest to enforce its forfeiture policies must inevitably fail, independently of public policy problems. The fact that (a) the Pool is a trust, and its board of directors trustees, is another such reason (Exhibit E, pp. 36-38), as are (b) the fact that no plaintiff County voluntarily withdrew from membership (*id.*, pp. 27-29), (c) extortion or conversion operates to nullify the legal effect of any withdrawal (*id.*, pp. 30-36), and (d) Const 1963, art 9, §18 (*id.*, pp. 39-45). There are six separate, distinct reasons to uphold the Court of Appeals’ result, even if the Court of Appeals’ reasoning is rejected. *American Alternative Ins Co, Inc v York*, 470 Mich 28, 33; 679 NW2d 306 (2004) (“The trial court and the Court of Appeals applied the wrong legal standards. However, because the Court of Appeals reached the correct result, we affirm the Court of Appeals decision for the reasons stated herein.”).

**ANSWER TO APPELLANT’S “INTRODUCTION, ETC.”**

MCRCSIP opens with the misleading proposition contending that it is governed by a Declaration of Trust (Exhibit 4<sup>11</sup>), by an Inter-Local Agreement (Exhibit 5), and its Bylaws (Exhibit 7). To the contrary, MCRCSIP legally exists exclusively-solely by virtue of MCL 124.1-.13. Moreover, consisting of municipal governmental agencies, MCRCSIP is also subject to Const 1963, art 9, §18, which even the Legislature cannot authorize MCRCSIP to contravene, and must conform to all other applicable laws, regulations, and public policy.

MCRCSIP also glosses over the fact that only its Bylaws, Articles III and IV, offer any insight into who may be or become a member of the Pool. Article III provides in relevant part:

The Pool shall be comprised of county road commissions of the State of Michigan which are authorized and approved under Section 1 of Act 138, PA 1982, as amended (MCL 124.1; MSA 5.4081); to enter into an agreement to pool their loss exposures and which have executed the Pool Trust Agreement. \* \* \* The Pool is not to operate as an insurance company but rather is to be the contracting mechanism by which each Member receives, from the Pool, risk and financial management services and protections.

Article IV then adds:

**1. Members.** A Member county road commission \* \* \* shall be a county road commission located in the State of Michigan, which has paid its annual contribution, as determined by the Pool Board, \* \* \*

So any county-level agency assigned road commission duties “authorized and approved under Section 1 of Act 138, PA 1982, as amended (MCL 124.1); to enter into an agreement to pool their loss exposures” can be a member. That includes both counties acting as road commissions, and county road commissions, MCL 124.1; MCL 46.11(s).

Next, MCRCSIP falsely contends that its “governing documents” provide “that members

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<sup>11</sup> References to “Exhibit n”, where “n” is an Arabic numeral, are to MCRCSIP’s collection of 56 exhibits (only some of which are properly part of the record on appeal, MCR 7.310(A)). Any reference to “Exhibit X”, where “X” is an uppercase letter of the alphabet, is to exhibits submitted with this Answer (sub-exhibits with numbers are indicated with braces { }).

who choose to withdraw from the Pool forfeit<sup>12</sup> any claim to future discretionary Pool distributions.” Irrelevant, because no appellee County “chose to withdraw from the Pool”—Ingham and Calhoun were expelled from the Pool (Exhibit A, Complaint {Exhibits 7a, 7b & 7c}), while Jackson never left—forfeiture is simply inapposite (see also footnote 13).

Nor did the Court of Appeals “with a stroke of the pen” declare appellee Counties “entitled to greater distribution rights than their former [appointed] road commissions ever had.” Appellee Counties merely retain precisely the *same* rights to return of surplus, no more, no less.

MCRCSIP next quotes MCL 124.5(6), wherein the Legislature finds that municipal risk pooling serves a “public and governmental purpose”. Nowhere, however, does the Legislature indicate that a municipal risk pool may seize money (excess or surplus premiums) from some municipalities for the benefit of others, or penalize Counties that have exercised a statutory option created by the Legislature to substitute their Boards of Commissioners for their appointed road commissions.

MCRCSIP contends that “decades ago” it was decided “to limit membership to county road commissions”. Perhaps—but “county road commission” remains a term MCRCSIP’s governing documents do not define, except by reference to MCL 124.1 regarding the power to contract for risk pooling, *which expressly includes counties along with county road commissions*,

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<sup>12</sup> Equity abhors a forfeiture. *Hull v Hostettler*, 224 Mich 365, 369, 194 NW 996 (1923), and what was said in *Hull* applies with equal vigor here (boldfaced emphasis added):

The [Ingham and Calhoun Road Commissions] had a right to \* \* \* assign their interest. They have done so. \* \* \* But [MCRCSIP] claim[s] that [it has] a right to declare a forfeiture of the contract \* \* \*. If it could be said that for this reason [it] might have such a right, in any case, [it has] none in this, because the contract does not give it to [MCRCSIP]. It declares some causes of forfeiture, but does not include [involuntary loss of membership] . None can be implied. In view of these facts, \* \* \* They are not entitled to declare a forfeiture, and, if they were, this court could not aid them. **Equity dislikes forfeitures, and not only will not aid in enforcing them, but will restrict their effect as far as possible.** *Crane v Dwyer*, 9 Mich 350, 80 Am Dec 87; *Lozon v McKay*, 203 Mich 364, 169 NW 11; *Hodges v Buell*, 134 Mich 162, 95 NW 1078.

as does MCL 46.11(s). Each appellee County exercises all the powers, duties, and responsibilities of a county road commission; since MCRC SIP only defines “county road commission” by reference to its powers, each appellee County satisfies the definition. So the Court of Appeals did NOT “ignore the Pool’s ability to define its own membership”—the Pool failed to supply its own definition, and adopted a statutory reference which includes Counties. The Pool now regrets its failure to establish a different contractual definition, but no court can rewrite the contract *ex post facto* to supply a new definition. *Pierson v H R Leonard Furniture Co*, 268 Mich 507, 519; 256 NW 529 (1934) (“It is not within our province to rewrite the contract.”).

MCRC SIP intimates that including Counties that function as road commissions as though they are “county road commissions” “undermines the integrity of the Pool.” This absurd *ipse dixit* is contradicted by MCRC SIP’s own record admissions that it was easily able to continue risk coverage for such Counties—Exhibit A (Complaint {Exhibit 3<sup>13</sup>}; see also *id.*, {Exhibit 2 (2/14/2012 e-mail from Gayle Pratt to like effect)}. Another misrepresentation—with no record support.

Asserted reasons for granting leave are fatuous and dishonest. The claim that the Court of Appeals’ decision “strips pools like the Pool of their right to self-governance” is without foundation. “Self-governance” does not, and cannot, mean operating with impunity for the law or for the legal rights of others. *City of Lansing v Wood*, 57 Mich 201, 208; 23 NW 769 (1885).<sup>14</sup> Nor is the issue jurisprudentially significant, with the “potential to affect innumerable

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<sup>13</sup> “However, the GL [General Liability], AL [Auto Liability], and Excess Umbrella Coverages would all be made available to the County for their Road Operations Only. \* \* \* We were formed to manage those exposures at a stable cost and have been successfully doing so for 28 years.”

<sup>14</sup> “Every one handling what he knows to be a fund protected by law must obey the law.”

associations and other organizations”, other, perhaps, than those that fail to self-define key terminology in their contracts.

Nor has the “Court of Appeals dictated who may be members.” The Pool chose to allow “county road commissions” as statutorily defined by their authority to become members; the Court of Appeals merely noted that the statutes now allow counties to exercise those powers and thus to qualify as “road commissions”. As for “void[ing] the Pool’s specific rules for members that withdraw”, no one has a right to enforce a contract that is void as against public policy<sup>15</sup>, or to declare a forfeiture—applicable only to *voluntary* withdrawals—for an *involuntary* expulsion<sup>16</sup>. The further vacuous speculation—that the Court of Appeals’ decision “will pave the way for Road Commission members [(sic) Pool members] to leave the Pool at will, without the consequences of forfeiting potential future refunds”—ignores the fact no appellee County exited the Pool of its own volition. Ingham and Calhoun were *expelled* (Exhibit A, Complaint {Exhibits 7a, 7b & 7c}); Jackson never left.

MCRCSIP then contends (for the first time) that the purpose of the forfeiture policy was to encourage continuation of Pool membership. MCRCSIP can’t have it both ways. Ingham, Calhoun, and Jackson all relied upon representations that they could remain members and made extensive efforts to retain their Pool membership, but Ingham and Calhoun were ejected, and Jackson was ignored (Exhibit A, Complaint {Exhibits 7a, 7b & 7c}). Additionally, to condition surplus refunds on continuation of participation in the Pool was expressly held to be additional grounds for finding the forfeiture rule contrary to public policy (Exhibit 3, p. 15).

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<sup>15</sup> *Kukla v Perry*, 361 Mich 311, 324-325, 105 NW2d 176, 183 (1960); *Cook v Wolverine Stockyards Co*, 344 Mich 207, 209, 73 NW2d 902, 904 (1955); *Stachnik v Winkel*, 394 Mich 375, 382-383; 230 NW2d 529 (1975); *Sands Appliance Svcs, Inc v Wilson*, 463 Mich 231, 239, 615 NW2d 241 (2000); *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995); *Abrams v Susan Feldstein, PC*, 456 Mich 867; 569 NW2d 160 (1997); *Allen v Mich Bell Tel Co*, 18 Mich App 632, 636; 171 NW2d 689 (1969).

<sup>16</sup> *Hull v Hostettler*, *supra* footnote 13, 224 Mich at 369.

## COUNTERSTATEMENT OF FACTS

MCR 7.305(A)(1)(d) requires that an application include “a concise statement of the material proceedings and facts conforming to MCR 7.212(C)(6)”. MCR 7.212(C)(6), in turn, mandates that an appellant’s factual summary “must fairly state[]” “all material facts, both favorable and unfavorable”, “without argument or bias.” MCRCSIP opens with an argumentative assertion (“The Pool is just that—an insurance pool.”) and tendentious, one-sided, cherry-picked summary, supported by 56 exhibits (only some of which are properly part of the record on appeal, MCR 7.310(A)), which inexplicably do not include the Complaint<sup>17</sup>, the motions for summary disposition, answers and exhibits, the original appellate briefs, or the four (4) supplemental briefs filed on remand.

MCR 7.305(D) does not cross-reference MCR 7.212(D)(3)(b), but the same thing happened on remand—after the Court of Appeals granted MCRCSIP’s motion to file a supplemental brief on remand, MCRCSIP violated MCR 7.212(C)(6), forcing appellee Counties to proffer a Counterstatement of Facts “pointing out the inaccuracies and deficiencies in the [opposing party’s] statement of facts without repeating that statement \* \* \*” under MCR 7.212(D)(3)(b). (Exhibit E, pp. 1-12). Here, only the Counterstatement is necessary.

Rather than belabor the facts, appellee Counties begin with the Court of Appeals first decision, which summarized the facts as follows (Exhibit 1, pp. 1-2, 321 Mich App at 576-579). Lacunae in the Court of Appeals presentation are filled by way of footnotes:

### I. FACTUAL AND PROCEDURAL BACKGROUND

A Declaration of Trust created the Pool in April 1984. The Pool’s bylaws limit membership to county road commissions located in the State of Michigan and require each member to sign an inter-local agreement. The appointed road commissions for

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<sup>17</sup> MCRCSIP sought summary disposition solely under MCR 2.116(C)(8), so only the Complaint and attached exhibits are to be considered in evaluating the bulk of MCRCSIP’s arguments. *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993).

Ingham County, Jackson County, and Calhoun County joined the Pool soon after its formation.

Members of the Pool made annual premium contributions to cover the payment of claims and the Pool's operating and administrative expenses. The Pool's bylaws and the inter-local agreements permitted the refund of surplus funds more than one year after payment of a member's premium contribution. The counties alleged that the Pool had a longstanding practice of refunding excess contributions to members out of unused reserves in proportion to premiums paid, typically calculated and refunded several years later.

In February 2012, the Legislature amended MCL 224.6 to permit transfer of "the powers, duties and functions that are otherwise provided by law for an appointed board of county road commissioners . . . to the county board of commissioners by resolution as allowed under section 11 of 1851 PA 156, MCL 46.11." 2012 PA 14. At the same time, the Legislature amended MCL 46.11 to give a county board of commissioners the authority to pass a resolution dissolving an appointed road commission and transferring its "powers, duties, and functions" to the county board of commissioners. 2012 PA 15. Pursuant to these amendments, the Boards of Commissioners of Ingham County, Jackson County, and Calhoun County adopted resolutions to dissolve their county road commissions and take over their roles.

Ingham County adopted the dissolution resolution on April 24, 2012, effective June 1, 2012. About two weeks before adopting the resolution, Ingham County paid its contribution to the Pool for the fiscal year beginning April 1, 2012, apparently with the understanding that the Pool intended to amend its rules to permit the county successors to the dissolved road commissions to participate in the Pool.<sup>18</sup> Ingham County maintained that it only learned later in May that the Pool would not allow the county to remain a member of the Pool. On May 31, 2012, the Ingham County road commission signed two agreements, one to withdraw from the Pool and one to cancel insurance through the Pool, effective June 1, 2012<sup>19</sup>.

Calhoun County signed a similar withdrawal agreement, effective November 1, 2012. It appears that Jackson County did not sign a withdrawal agreement.

At Ingham County's request, the Pool agreed to refund the unused pro-rata portion of the former road commission's annual contribution for the 2012-2013 fiscal year. The

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<sup>18</sup> There was no "apparently" about it—see Exhibit A, Complaint {Exhibits 4a, 4b & 4c} (MCRCSIP proposed Trust and Bylaw Amendments and Board recommendation to members) and MCRCSIP Exhibit 14, p. 5 (2/23/2012 letter from Pool Administrator Gayle Pratt to ICRC): "Allowing a County Road Department into our Pool as a member appears to require a by-law change that will go before our members on July 19, 2012". It is an undeniable fact.

<sup>19</sup> Before "Agreements", both the ICRC and CCRC were informed by MCRCSIP their insurance would be canceled (rather than transferred to the successor County road operations), but the premiums paid retained by the Pool, unless they signed. Exhibit A, Complaint {Exhibits 7a, 7b & 7c}.

Pool declined, however, to refund surplus equity flowing from prior year contributions because of the road commission's withdrawal from membership.

The counties brought a four-count complaint. The counties alleged that they were eligible for ten years' worth of refunds because the Pool was still refunding contributions from 2002 premiums. The Pool refused to issue these refunds to the counties. Consequently, the counties maintained, the Pool's refusal reflected unconstitutional lending under Const 1963, art 9, § 18, extortion, conversion, and breach of contract. The Pool denied the counties' allegations and disputed their claims.

The counties filed a partial motion for summary disposition as to liability under MCR 2.116(C)(9) and (10)<sup>20</sup>. The Pool filed a cross-motion for summary disposition under MCR 2.116(I)(2). The trial court granted summary disposition under MCR 2.116(I)(2) in favor of the Pool, rejecting all of the counties' arguments.

On remand, the Court of Appeals first quoted its original summary (above), then summarized the appellate rulings to that point (Exhibit 3, pp. 2-3) (boldfaced emphasis added):

The counties brought suit against the Pool, alleging that they were eligible for 10 years' worth of refunds because the Pool was still refunding contributions from 2002 premiums. The parties filed cross-motions for summary disposition, and the trial court granted summary disposition to the Pool and rejected the counties' claims. The trial court reasoned that the counties were not entitled to refunds possibly owed to their former road commissions because the counties were not successors in interest to their former road commissions.

On appeal, this Court disagreed and held that the counties were successors in interest to their former road commissions. *Id.* at 580-584. This Court then addressed "whether the counties could be members of the Pool and thereby be eligible for surplus refunds of prior-year contributions," and concluded "that the successor counties are eligible for Pool membership . . . ." *Id.* at 584.

This Court lastly addressed whether the counties were entitled to refunds because, even though they were successors in interest, they withdrew from the Pool. *Id.* The Court first acknowledged that Jackson County was situated differently from the other counties because it did not sign a withdrawal agreement with the Pool. *Id.* at 585. This Court concluded that without a withdrawal agreement, Jackson County "did not withdraw from the Pool." *Id.* This Court also concluded that Jackson County's "dissolution of its road commission did not automatically result in withdrawal from the Pool." *Id.* This Court then held that, because Jackson County (1) did not withdraw from the Pool and (2) "succeeded its dissolved road commission," it was "eligible for refunds from prior-year contributions made by its road commission." *Id.*

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<sup>20</sup> Importantly, before answering the Complaint, MCRCSIP moved for summary disposition under MCR 2.116(C)(8) on July 9, 2015 (Exhibit H). The Counties answered on August 26, 2015 (Exhibit I). As shown below, key arguments were raised and preserved in this exchange.

Turning to the other counties that did sign withdrawal agreements with the Pool, this Court looked to the language of the withdrawal agreements to determine their scopes. After reviewing the agreements' relevant language, this Court concluded:

Accordingly, reading the withdrawal agreements as a whole and in light of the limitation on their scope, the withdrawal agreements did not alter eligibility for the refund of surplus premiums from prior-year contributions. **Having determined that the counties are successors in interest to their former road commissions, we conclude that the counties are entitled to refunds of surplus premiums reflecting their former road commissions' prior-year contributions through the date listed in each withdrawal agreement.** [*Id.*]

The Pool appealed this Court's decision, and our Supreme Court issued the following order:

Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration of the issue raised by the defendant but not addressed by that court during its initial review of this case: Whether, even if the plaintiff counties are successors in interest to their road commissions, the defendant Michigan County Road Commission Self-Insurance Pool nevertheless may, in accordance with its governing documents, decline to issue to the counties refunds of surplus premiums from prior-year contributions. In addressing this question, the Court of Appeals shall consider, among other things, the following documents: the Declaration of Trust, By-Laws, Inter-Local Agreements, MCRCSIP Refund Overview, and the July 19, 1990 memorandum to the Pool members. The court shall address whether these documents are binding on the parties, and, if so, what effect they have on the plaintiffs' entitlement to refunds. [*Co of Ingham II*, 503 Mich at 917.]

After positing the standard of review and applying the law of the case doctrine to the bulk of the arguments advanced by MCRCSIP in its supplemental briefs, the Court of Appeals then detailed the relevant portions of documents it was directed to address on remand (*id.*, pp. 5-9):

#### B. DOCUMENTS TO CONSIDER ON REMAND

Our Supreme Court directed us to consider, among other things, five documents on remand: the Declaration of Trust, By-Laws, Inter-Local Agreements, MCRCSIP Refund Overview, and the July 19, 1990 memorandum to the Pool members. *Co of Ingham II*, 503 Mich at 917.

##### 1. DECLARATION OF TRUST

The Declaration of Trust created the Pool in 1984. As relevant here, the Declaration of Trust provides:

#### ARTICLE VI POWERS AND DUTIES OF THE BOARD OF DIRECTORS

\* \* \*

SECTION 9. Use of Funds. 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 shall be used only for the following purposes:

\* \* \*

(f) Distribution among the members during that fiscal year in such manner as the Members and the Board of Directors shall deem to be equitable, of any excess monies remaining after payment of claims and claims 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 distributions shall be made earlier than twelve (12) months after the end of each Trust Year; and provided further, that undistributed funds from previous Trust Years may be distributed at any time if not required for loss funding and if approved for distribution by the Board of Directors. *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.*

\* \* \*

## ARTICLE X MISCELLANEOUS

\* \* \*

SECTION 12. Binding Effect. This Trust shall be binding upon and be fully enforceable as to each Member *and the successors and assigns of each Member.* [Emphasis added.]

### 2. INTER-LOCAL AGREEMENT

All parties that became members of the Pool signed an “Inter-Local Agreement” pursuant to 1982 PA 138 (the intergovernmental contracts act, MCL 124.1 *et seq.*), under which certain governmental bodies are permitted to, among other things, “form a group self-insurance pool.” See *Crawford Co v Secretary of State*, 160 Mich App 88, 91; 408 NW2d 112 (1987). These inter-local agreements provided, in relevant part:

This Contract and Inter-Local Agreement is entered into by and between [the Pool] and the undersigned road commission of the State of Michigan (hereinafter “Member”) for the purpose of making a self-insurance pooling program available . . . pursuant to Act 138 of 1982 [the intergovernmental contracts act].

\* \* \*

3. Member Contributions to Pool. . . . 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:

\* \* \*

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 claims and claims 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 than [*sic*] 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.*

\* \* \*

24. Binding Effect. This Agreement is binding upon *the parties hereto, their successors and assigns.* [Emphasis added.]

3. BY-LAWS

The Pool’s By-Laws provide, in relevant part:

ARTICLE VI  
POWERS AND DUTIES OF THE BOARD

\* \* \*

13. The Pool Board shall have the general power to make and enter into all contracts, leases, and agreements necessary or convenient to carry out any of the powers granted under the Trust Agreement, these By-laws or any other laws. All such contracts, leases, and agreements, or other legal documents herein authorized shall be approved by resolution of the Pool Board and shall be executed by those individuals designated in such resolution. In the absence of such a designation, all approved contracts shall be executed by the Chairperson or Vice Chairperson.

14. The Pool Board shall carry out all the duties necessary for the proper operation and administration of the Pool on behalf of the Members and to that end shall have all of the power necessary and desirable for the effective administration of the affairs of the Pool.

ARTICLE VII  
ADMINISTRATION

There shall be an Administrator of the Pool (herein referred to as the “Administrator”) to administer the financial and administrative affairs of the Pool. The Administrator shall be an employee of the Pool and shall be appointed by, and serve at the pleasure of the Pool Board. The Administrator shall have the power and authority to implement policy matters set forth by the Pool Board as they relate to the ongoing operation and supervision of the Pool and the provisions of the Trust Agreement establishing the Pool, the By-laws, the Inter-Local Agreement, applicable Federal and/or State statutes, and other applicable governmental rules and regulations.

\* \* \*

ARTICLE X  
DETERMINATION OF CONTRIBUTIONS BY MEMBERS OR REFUNDS TO MEMBERS

The Pool Board shall determine the amount of contribution to be paid annually by each Member. Such contribution shall be calculated based on past experience, projected future losses, excess and stop loss insurance costs, administrative costs, loss prevention costs, and any other projected expenses to be incurred in the operation and administration of the Pool. Should deficiencies or surpluses occur within the funding of the Pool, the Pool Board shall determine the method of addressing these deficiencies or surpluses through the annual contribution mechanism . . . .

\* \* \*

ARTICLE XII  
WITHDRAWAL OR TERMINATION OF MEMBERSHIP

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.

4. MCRC SIP REFUND OVERVIEW, AND THE JULY 19, 1990 MEMORANDUM

The other two documents that this Court is to consider on remand were both evidently drafted by the Pool's agents in 1990. The first is a correspondence from the Pool's administrator dated July 19, 1990 (the 1990 correspondence), informing the Pool's members that the Pool had adopted a new "policy" for the eligibility of withdrawing members to receive excess-contribution refunds. In relevant part, the 1990 correspondence states: "A withdrawing member forfeits any and all rights to dividend, 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."

The other document is a "Refund Overview" (the refund overview), which the Pool says was disseminated to all of its members in 1990.<sup>1</sup> The document is unsigned and undated. It provides a detailed explanation of the steps that the Pool's Board of Directors use "to determine the proper allocation of the distribution to the members[.]"

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<sup>1</sup> Aside from a copy of the refund overview, the Pool has presented no evidence that the document was ever provided to plaintiffs—or their former road commissions—in 1990 or any time thereafter.

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The Court of Appeals then analyzed contract law principles and the Intergovernmental Contract Act and determined that the "Refund Overview" "does not qualify as such a rule or regulation [*i.e.*, as having contractual status under the Trust, Inter-Local Agreement, or By-Laws], at least for purposes of summary disposition under MCR 2.116(C)(10). (Exhibit 3, p. 12). The refund policy, however, was held to qualify as part of the parties' contract (*id.*).

Turning to the central question, the Court of Appeals first held that Jackson County is not precluded from entitlement to its aliquot share of surplus refunds because "Jackson did not withdraw from the Pool," rendering "the provision that the Pool relies on to deny Jackson County refunds from prior-year contributions—that the Pool can treat members *who withdraw*

from future Pool Years differently”—“inapplicable”. *Id.*, p. 13. The Court reached the opposite conclusion as to Ingham and Calhoun Counties, leading to its next inquiry, “whether the withdrawal policy is enforceable” (*Id.*, p. 13), and then opined (*id.*, pp. 13-15):

Absent ambiguity, a contract must generally be enforced as written. *Innovation Ventures*, 499 Mich at 507. “However, contracts founded on acts prohibited by a statute, or contracts in violation of public policy, are void.” *Allard v Allard*, 318 Mich App 583; 899 NW2d 420 (2017). See also *Krause v Boraks*, 341 Mich 149, 155; 67 NW2d 202 (1954) (explaining that “neither law nor equity will enforce a contract made in violation of . . . a statute or one that is in violation of public policy”) (quotation marks and citation omitted).

The counties argue that the withdrawal policy is unenforceable as a violation of public policy. “In ascertaining the parameters of our public policy, we must look to policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.” *Rory v Continental Ins Co*, 473 Mich 457, 471; 703 NW2d 23 (2005). See also *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002) (“In defining ‘public policy,’ it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges.”).

As noted earlier, the parties’ agreement in this case is governed by the intergovernmental contracts act. In that act, the Legislature explicitly enumerated the public policy interests that are at stake, providing in MCL 124.5(6):

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 standards 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 intergovernmental contract authorized under this act are made for a public and governmental purpose, and that those contributions benefit each contributing municipal corporation.

In light of MCL 124.5(6) and the statutory enactments discussed in *Ingham Co I*, 321 Mich App at 577, we hold that the withdrawal policy is unenforceable under these circumstances as contrary to public policy. See *Allard*, 318 Mich App at 601 (“Although parties have a fundamental right to contract as they see fit, they have no right to do so in direct contravention of this state’s laws and public policy.”). As MCL 124.5(6) makes clear, the Legislature intended governmental self-insurance pools to serve as a force that would *spread*—not concentrate—risk between municipal members, and to *minimize*—not accentuate—fluctuations. As recognized in *Ingham Co I*, 321 Mich App at 581-582, “when a county dissolves its road commission, the county board of commissioners becomes the successor in interest to the former road commission,” and “the powers, duties, and functions of the dissolved county road commission[]

pass[] to the [county's] boards of commissioners.” In other words, in such situations, the county is more than merely its road commission’s “successor in interest”; the county is effectively a continuation of the dissolved road commission, responsible for providing the same public services that were formerly provided by the road commission.

To permit the Pool to enforce the withdrawal policy against the counties would be to permit the Pool to penalize the counties for exercising their rights to dissolve their road commissions under MCL 46.11(s) and MCL 224.6(7). 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.

We find further support for our conclusion that our state’s public policy disfavors self-insurers conditioning refunds of surplus insurance premiums on continued participation in the self-insurance pool in the Uniform Trade Practices Act, MCL 500.2001 *et seq.* MCL 500.2016 provides:

(1) In addition to other provisions of law, the following practices as applied to worker’s compensation insurance including worker’s compensation coverage provided through a self-insurer’s group are defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(a) As a condition of receiving a dividend for the current or a previous year, requiring an insured to renew or maintain worker’s compensation insurance with the insurer beyond the current policy’s expiration date or requiring a member to continue participation with a worker’s compensation self-insurer group.

While this statute, by its terms, only applies to workers’ compensation insurance, we find it telling that our Legislature classified this type of act as “unfair and deceptive . . . practices in the business of insurance.” Based on our Legislature’s clear condemnation of the Pool’s practice—albeit in the context of workers’ compensation insurance—combined with the public policy interests defined in MCL 124.5(6), we conclude that the Pool’s withdrawal policy is unenforceable as against public policy.<sup>3</sup>

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<sup>3</sup> For similar reasons that the Pool’s withdrawal policy is unenforceable as against public policy, we conclude that the Pool’s proposed construction of the “differently and less favorably” language in the inter-local agreements and Declaration of Trust would render *those* provisions contrary to public policy. If, as the Pool contends, that language should be interpreted as permitting what the withdrawal policy required, it would contravene the public policy set forth by our Legislature in MCL 124.5(6).

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The Court of Appeals then turned attention to the remedy, concluding, after extended legal analysis, that severance of the illegal portions of the contract, as opposed to “upending the

entire Pool” by declaring the contract void *ab initio*, was the appropriate result, meaning appellee Counties all have a right to their aliquot shares of past and future surplus refunds (*id.*, pp. 15-16).

### ARGUMENT

**Issue I: MCRC SIP’s forfeiture policy is void as in violation of public policy; alternatively, the forfeiture policy is void as a breach of trust fatally tainted by conflict of interest, as contrary to Const 1963, art 9, §18, and/or as inapposite to *involuntary* withdrawal from the Pool prompted by extortion or embezzlement, so the Court of Appeals reached the correct result, whatever the quality of its reasoning.**

#### Counterstatement of the Standard of Review

The Court of Appeals correctly posited on remand (Exhibit 3, p. 4):

Because the trial court considered evidence outside the pleadings, we treat the trial court’s grant of summary disposition as having been under MCR 2.116(C)(10). See *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 427; 760 NW2d 878 (2008).

A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff’s claim. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013) (quotations marks and citations omitted).]

“Only the substantively admissible evidence actually proffered may be considered.” *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted).

This appeal arises from the Counties’ summary disposition motion under MCR 2.116(C)(9), with judgment entered for the Pool under MCR 2.116(I)(2). What the Court of Appeals identified as the review standard on first appeal, 321 Mich App at 579-580, also applies:

This Court reviews de novo a trial court’s decision to grant or deny a motion for summary disposition. *Village of Dimondale v Grable*, 240 Mich App 553, 563; 618 NW2d 23 (2000). We also review de novo legal questions, *In re Jude*, 228 Mich App

667, 670; 578 NW2d 704 (1998), including issues of statutory interpretation, *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 426, 648 NW2d 205 (2002), and contract interpretation, *Rossow v Brentwood Farms Dev Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

Summary disposition under MCR 2.116(C)(9) is appropriate when a defendant fails to plead a valid defense and no factual development could defeat the plaintiff's claim. *Village of Dimondale*, 240 Mich App at 564, 618 NW2d 23. A motion for summary disposition under MCR 2.116(C)(9) "tests the sufficiency of a defendant's pleadings, [and] the trial court must accept as true all well-pleaded allegations ...." *Slater*, 250 Mich App at 425. To decide a motion for summary disposition under MCR 2.116(C)(9), the trial court may only consider the pleadings, which include complaints, answers, and replies, but do not include the motion for summary disposition itself. *Village of Dimondale*, 240 Mich App at 565; MCR 2.110(A).

Summary disposition is proper when there is no genuine issue of material fact. MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court considers the affidavits, pleadings, depositions, admissions, and other the evidence submitted in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Finally, a trial court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if it determines that the opposing party, "rather than the moving party, is entitled to judgment." *Sharper Image Corp. v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996).

Issues of contract interpretation are questions of law reviewed de novo on appeal. *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008).

The interpretation and application of a constitutional provision is a question of law, also reviewed de novo. *Bonner v City of Brighton*, 495 Mich 209, 221; 848 NW2d 380 (2014)."A primary rule in interpreting a constitutional provision is the rule of 'common understanding[.]' " *Bolt v City of Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998). "The interpretation that should be given it is that which reasonable minds, the great mass of [the] people themselves, would give it." *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971).

### Issue Preservation

Despite the direction in MCR 7.305(A)(1)(e) that an application contain a concise argument section conforming to MCR 7.212(C)(7), which requires, *inter alia*, “Page references to the [record on appeal] must also be given to show whether the issue was preserved for appeal by appropriate objection or by other means”, nowhere does MCRCSIP attempt compliance. This omission is of supreme importance, inasmuch as MCRCSIP repeatedly asserts that the Court of Appeals decided the issue on remand on public policy grounds even though, allegedly, the issue was never raised or briefed.

In its August 26, 2015 Answer in Opposition to MCRCSIP’s July 9, 2015 (C)(8) Motion for Summary Disposition (Exhibit I, pp. 29-30 ), the Counties presented the following argument:

Furthermore, because the Legislature has left it to the discretion of county boards of commissioners whether to abolish separate county road commissions and absorb the functions, rights and duties thereof into the county board itself, for the MCRSIP to require that member forfeit their membership, and also their pro rata share of any determination of surplus, penalizes those counties that avail themselves of this statutory right. To construe the MCRSIP contract or any bylaw or internal rule to permit this is clearly contrary to the public policy which the Legislature left to the political process—indeed, it is an act of extortion by the MCRSIP. MCL 750.213 (see Issue II above). As held in *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 246; 615 NW2d 241 (2000), “because courts have a duty to refuse to enforce a contract that is contrary to public policy. *Manning v Bishop of Marquette*, 345 Mich 130, 133–134; 76 NW2d 75 (1956)<sup>[FN5 omitted]</sup>, if the contract [of ‘voluntary’ termination] violated the statute, it violated Michigan public policy.” There is no *de minimis* form of extortion which falls beneath the ambit of MCL 750.213<sup>4</sup>. [Emphasis in the original.]

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<sup>4</sup> That MCRSIP has perpetrated the same extortionate acts against multiple counties, in addition to Ingham, Jackson and Calhoun Counties, means that the treble damage provision of 18 USC 18 USC §1964(c), the Racketeering Influenced and Corrupt Organizations Act, may be invoked. 18 USC §1962(c) and (d), makes it a crime (as well as a tort giving rise to civil liability for treble damages, 18 USC §1964(c)) to commit two “predicate acts” in furtherance of any combination or conspiracy, *Boyle v United States*, 556 US 938, 944-946; 129 S Ct 2237; 173 L Ed 2d 1265 (2009). Violation of RICO is a felony, punishable by 20 years imprisonment, and subjects the violator additionally to forfeiture of any interest in, claim against, or property right of any kind over any property constituting or derived from any proceeds of such racketeering activity. 18 USC

§1963(a)(1), (2)(A)(C)(D), (3) and (b). Extortion under state law is a “predicate act”. 18 USC §1961(1)(A).

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That was merely the first time the Counties raised their public policy argument—but note that this very contention, that MCRCSIP’s forfeiture policy, would penalize the Counties for exercising an option the Legislature provided, is also exactly the first reason given by the Court of Appeals on remand for declaring the forfeiture policy invalid (Exhibit 3, p. 14):

To permit the Pool to enforce the withdrawal policy against the counties would be to permit the Pool to penalize the counties for exercising their rights to dissolve their road commissions under MCL 46.11(s) and MCL 224.6(7).

Precisely the same argument was carried forward into the Counties’ original Brief on Appeal (Exhibit J, pp. 29-30), and in their Answer to MCRCSIP’s first application for leave in Docket No 156980, pp. 46-47. On none of those occasions did MCRCSIP respond in its reply briefs.

The Counties again expressly raised their public policy challenge in their Supplemental Brief on Remand, (Exhibit E, pp. 30-35). Notably, nowhere in MCRCSIP’s supplemental reply brief on remand did it object to that argument, or attempt to answer on the merits.<sup>21</sup>

So, although the Counties raised the public policy argument at every stage, MCRCSIP for its part never once proffered a response on the merits. Thus, for MCRCSIP, as appellant in this Court, the issue is not preserved and need not be considered by this Court. *Lawrence v Darrah & Associates*, 445 Mich 1, 4, n. 2; 516 NW2d 43 (1994).

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<sup>21</sup> MCRCSIP did contend in its supplemental reply brief (p. 7 of Exhibit F), albeit citing no authority, that notwithstanding the fact the Counties had raised the issues of extortion, violation of Const 1963, art 9, §18, etc. on their appeal of right (the Court of Appeals ruled in the Counties’ favor without reaching those issues) and in opposition to MCRCSIP’s first Supreme Court application, somehow the Counties were barred from pursuing those issues on remand. As explained in Exhibit G, no such bar existed then, or now. See also *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n. 41; 521 NW2d 774 (1994), citing *Menendez v Detroit*, 337 Mich 476, 483; 60 NW2d 319 (1953).

## Legal Analysis

### A. MCRCSIP's forfeiture policy is void as in violation of public policy.

MCRCSIP begins by contending public policy “is not merely the equivalent of the personal preferences of a majority of [the] Court”—as though the Court of Appeals did not expressly write those very words (quoted above from Exhibit 3, p. 13), citing exactly the same authority—*Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002)—MCRCSIP quotes, and also *Rory v Continental Ins Co*, 473 Mich 457, 471; 703 NW2d 23 (2005). Per *Terrien* at 66-67, such public policy must generally be found in “state and federal constitutions, or statutes, and the common law.”

The Court of Appeals looked to four statutes—MCL 46.11(s), MCL 224.6(7), MCL 124.5(6), and MCL 500.2016—to define the relevant public policy. Only three of those statutes are even cited in MCRCSIP's argument (p. 26)—but each citation involves mere referencing or quoting the Court of Appeals' decision on remand. Nowhere in its argument does MCRCSIP ever quote even one of these statutes<sup>22</sup>, or analyze their terms, still less attempt to identify a flaw in the Court of Appeals' reading of them. Any challenge to the decision on remand on this basis thus fails. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998)<sup>23</sup>, quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

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<sup>22</sup> MCRCSIP does quote MCL 124.5(6) on pp. 6-7 of its application, its “Introduction”. Having provided no addendum to its brief containing full quotations of all statutes cited in the application, MCRCSIP's failure to quote the statutes in its brief is a violation of MCR 7.305(A)(1)(e) (which incorporates MCR 7.212(C)(7), “If determination of the issues presented requires the study of a constitution, statute, \* \* \* written instrument or document, or relevant part thereof, this material must be reproduced in the brief or in an addendum to the brief.”).

<sup>23</sup> “[A] mere statement without authority is insufficient to bring an issue before this Court. It is not sufficient for a party ‘simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.’ ”

MCRCSIP next contends that “Michigan courts have sparingly invalidated contracts as against public policy”, citing four cases, and intimating (without saying so) that this quadrumvirate represents the universe of such instances. The truth is quite different. First, it is a bedrock principle that when a contract violates public policy, no Michigan court may enforce it, and every Court must sua sponte apply the rule. *Kukla v Perry*, 361 Mich 311, 324-325, 105 NW2d 176, 183 (1960); *Cook v Wolverine Stockyards Co*, 344 Mich 207, 209, 73 NW2d 902, 904 (1955). Indeed, this rule is necessary to avoid having Michigan’s “one court of justice”, Const 1963, art 6, §1, become “ ‘the abettor of iniquity’ ”. *Stachnik v Winkel*, 394 Mich 375, 382-383; 230 NW2d 529 (1975). Thus, per *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239, 615 NW2d 241 (2000), it is the *duty* of the courts to “refuse to enforce a contract that is contrary to public policy.”

To like effect, when a party’s legal position “is based in whole or in part, on [its] own illegal conduct,” its claim is barred. *Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995). This rule rests on the premise that courts should not, directly or indirectly, encourage or tolerate illegal activities, lest the Court be seen as condoning or encouraging illegal conduct, or as allowing wrongdoers to profit from illegal acts, or as maintaining a legal system that is a mockery of justice. *Id.* at 559-560

A bit of research reveals a minimum of 11 appellate cases citing *Kukla* and 9 citing *Cook* in connection with “public policy”, 52 addressing *Orzel*’s “wrongful conduct rule”, 174 in which “unclean hands” appears, and 90 containing the words “illegal contract”.<sup>24</sup> One would expect

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<sup>24</sup> No doubt not all of these cases held the contracts there considered void or voidable as against public policy, but they demonstrate that the issue arises with substantial regularity. Moreover, there are many other precedential cases that support a related proposition, e.g., *Stanek v Nat’l Bank of Detroit*, 171 Mich App 734; 430 NW2d 819 (1988) (exculpatory clause in a bank’s stop payment order held to be invalid on public policy grounds); *Allen v Michigan Bell Telephone Co*, 18 Mich App 632; 171 NW2d 689 (1969) (clause limiting liability for damages resulting from a

these numbers to be the tip of the iceberg, with several multiples of those quantities in the trial courts not generating an appeal. Moreover, these figures are augmented by cases refusing to enforce contracts as unlawful, but in which different terminology is utilized, *e.g.*, *Abrams v Susan Feldstein, PC*, 456 Mich 867; 569 NW2d 160 (1997) (attorney’s unethical fee contract); *Richardson v Buhl*, 77 Mich 632, 656-658; 43 NW 1102 (1889) (*sua sponte* finding contract void as against public policy because of unlawful monopoly).

To summarize: “The principle of freedom to contract does not carry a license to insert any provision in an agreement which a party deems advantageous. The public is concerned with the legality of contracts and limits the contractual freedom of private parties to legal undertakings. This public concern is manifest in the statutes and decisions of this state.” *Allen v Mich Bell Tel Co, supra*, 18 Mich App at 636.

Next, MCRCSIP contends the Court of Appeals’ analysis “is muddled, wrong, and it ignores the core principles of this body of law.” Yet, nowhere does MCRCSIP actually quote the Court of Appeals’ analysis, or even acknowledge that the Court of Appeals *began by expressly identifying the proper parameters of a public policy analysis and citing the very same authority on which MCRCSIP relies*. Proceeding on the basis of *ipse dixit* contrary to *Wilson* and *Mitcham*, MCRCSIP asserts the Court of Appeals’ decision on remand is “not clearly rooted in the law” (as though four different statutes are not “the law”), did not “proceed with caution”, “acted rashly”, and “got off track”. By failing to address the content of the four statutes actually cited by the Court of Appeals, MCRCSIP substitutes vacuous argument for proper briefing.

MCRCSIP cites MCL 124.7(b)(i)-(v) as requiring an inter-governmental insurance pool to provide for disposition of surpluses in its governing documents. True, but irrelevant. Nothing

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telephone company’s failure to include an ad in its Yellow Pages held invalid, because the parties were not in a position of equal bargaining power).

in MCL 124.7(b)(i)-(v) suggests, much less provides, that such a pool may provide for dispositions of surplus in contravention of the principles enshrined in MCL 124.5(6). Nowhere does MCRC SIP even attempt to come to grips with the Court of Appeals' analysis:

As MCL 124.5(6) makes clear, the Legislature intended governmental self-insurance pools to serve as a force that would *spread*—not concentrate—risk between municipal members, and to *minimize*—not accentuate—fluctuations. As recognized in *Ingham Co I*, 321 Mich App at 581-582, \* \* \* the county is effectively a continuation of the dissolved road commission, responsible for providing the same public services that were formerly provided by the road commission.

\* \* \* [T]he 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.

MCRC SIP instead argues that Pool members “know, going in, what to expect”, as though knowledge of an illegal forfeiture policy magically effaces the illegality—which is, of course, contrary to the inescapable fact that, for a contract to be void as against public policy, the parties to the contract necessarily agreed to its terms.

However, even if MCRC SIP had successfully shown that the Court of Appeals' reliance on MCL 124.5(6) was misplaced, the Court of Appeals also invoked three other statutes, and independent analysis, to support the identical conclusion of illegality. This Court will search the Application in vain for any glimmer of a reasoned discussion of those other statutes, still less of any citation to authority to suggest the Court of Appeals erred in its reading of them.

The only discussion of MCL 46.11(s) and MCL 224.6(7) appears on p. 26, where MCRC SIP quotes a portion of the Court of Appeals remand opinion that mentions neither statute. The relevant part of the remand opinion is this sentence:

To permit the Pool to enforce the withdrawal policy against the counties would be to permit the Pool to penalize the counties for exercising their rights to dissolve their road commissions under MCL 46.11(s) and MCL 224.6(7).

MCRCSIP argues only that the Court of Appeals erred in the first instance in ruling that those statutes allow counties which absorb their appointed road commissions to become “county road commissions” for purposes of qualifying for membership in the Pool. This really involves Issue III (as MCRCSIP ordered its issues—see Application, pp. i, 5), so rather than address it out of place, it will be discussed below (Issue III<sup>25</sup>).

Irrespective of the issue of successor in interest status, the Court of Appeals held, correctly (*and without current challenge by MCRCSIP in the Application*, or any prior contrary argument) that the Pool could not penalize a County that exercised its option under MCL 46.11(s) and MCL 224.6(7). It is well settled that, where the law provides a right, neither governmental nor private actors may burden the exercise of that right. *Pere Marquette Ry Co v Public Utilities Comm’n*, 218 Mich 307, 313; 188 NW 515 (1922) (“The order apportioning the expense reverses the well-established common-law rule, deprives plaintiff of the right, if it makes the repairs, to sue defendant company and recover the expense thereof, and places a burden upon plaintiff justified by no statute and contrary to its common-law rights.”).

The very notion that municipal government agencies (acting singly or through an unincorporated association, MCL 600.2051(2)) may impede effectuation of policy determined by the State Legislature and the Governor in 2012 PA 14 simply cannot be acknowledged as lawful. It is the Legislative and Executive branches that determine public policy at the state level, *Terrien, supra*, 467 Mich at 67 and n. 11; *Suchodolski v Michigan Consolidated Gas Co*, 412

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<sup>25</sup> Curiously, although on p. 5 of its Application MCRCSIP represents it presents three (3) issues for review, of which the third concerns the eligibility of counties conducting road commission operations to become members, nowhere in its brief is such an issue identified. The brief only argues two issues, corresponding to Issues I and II on p. 5

Mich 692, 695-696; 316 NW2d 710 (1982), lower levels of government have no authority to interfere. As held in *Dewitt Twp v Clinton Co*, 113 Mich App 709, 716-717; 310 NW2d 2 (1982):

However, except as to certain express constitutional grants and limitations of power, local government units are only creatures of legislation. *Bay City v State Board of Tax Administration*, 292 Mich 241, 257; 290 NW 395 (1940), *Kalamazoo v. Titus*, 208 Mich 252; 175 NW 480 (1919). In *Williams v Mayor & City Council of Baltimore*, 289 US 36, 40; 53 S Ct 431, 432; 77 L Ed 1015 (1933), the Court said:

\* \* \*

“A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.”

See also *City of New York v Richardson*, 473 F2d 923, 929 (1973), cert den *sub nom Lavine v Lindsay*, 412 US 950; 93 S Ct 3012; 37 L Ed 2d 1002 (1973). We see no reason why a local governmental unit’s assertion of equal protection and due process rights under our state constitution should lead to a different result. Petitioner refers us to *DeWitt Twp v State Tax Comm*, 397 Mich 576, 579-580, 244 NW2d 920 (1976) \* \* \* It does not appear from the opinion that the Court considered whether local governmental units had due process and equal protection rights under the state constitution which they could invoke in opposition to the will of the Legislature.

Inasmuch as MCRCSIP nowhere disputes this independent basis for the Court of Appeals’ ruling on remand, its appeal must be rejected. *Wilson v Taylor, supra*. To identical effect, MCRCSIP nowhere discusses the Court of Appeals’ independent analysis of and reliance upon MCL 500.2016—which, notably, had been cited in support of their public policy argument by the Counties (Exhibit E, pp. 35-36), with no response by MCRCSIP (Exhibit F).

MCRCSIP presents ancillary arguments here that are not only unsupported by authority, but that interestingly completely and directly contradict its previous positions. For example, MCRCSIP contends the Court of Appeals’ decision “threatens the Pool’s continuing existence” (Application, p. 26), and would somehow wreak havoc on the Pool’s viability on the theory the Pool is neither structured nor in position to provide insurance coverage to anything other than a

county road commission which is *not* also a county board of commissioners (Application, p. 27). Yet, in a February 14, 2012 e-mail from MCRCSIP's Executive Director Gayle Pratt to then ICRC Chairman William Conklin (Exhibit 13, p. 3), Pratt asserted, "I wanted you to know that we would be interested in continuing to provide Road Liability coverage and maybe even Physical Damage coverage for your road vehicles and equipment, if Ingham County continues with their efforts to absorb the RC." If the Pool wishes to limit insurance coverage to road commission *activities*, it remains at liberty to do so, and has previously developed the plans for doing so—not a word much less a ruling in the Court of Appeals' decisions affect that restriction. Moreover, the Pool recognized this opportunity from the get-go, embraced it, and actively solicited continuation of the Counties' patronage. Such gross self-contradiction is both unseemly and impermissible, *CE Tackels, Inc v Fantin*, 341 Mich 119, 124; 67 NW2d 71 (1954), quoting *Ohio & M Ry Co v McCarthy*, 96 US (6 Otto) 258, 267, 268; 24 L Ed 693 (1877), and exposes the Pool's argument as both unsupported by authority and grounded on false representations.

To like effect, on Feb. 28, 2012, MCRCSIP invoiced the ICRC for \$377,122 for 8 different insurance coverages for the period April 1, 2012-March 31, 2013 (Exhibit 13, p. 4) MCRCSIP indicated that if the Ingham Board absorbed the road commission's duties, it would not provide 2 of those coverages and that "the GL [General Liability], AL [Auto Liability] and Excess Umbrella coverages would all be made available to the County for their Road Operations Only." (*id.*, p. 5). Ms. Pratt then concluded, "We, believe that We are the experts in Road Law that this state's Road Commissions and Counties need to manage these exposures." Any suggestion that, if the Pool insures County Boards for road commission-type operations, the Pool's financial stability will be endangered is complete speculation and hyperbole.

**B. Even if the Court of Appeals’ public policy analysis was flawed, MCRC SIP’s forfeiture policy is void as a breach of trust, as contrary to Const 1963, art 9, §18, and/or as inapposite to involuntary withdrawal from the Pool caused by extortion or embezzlement, so the Court of Appeals reached the correct result, whatever the quality of its reasoning.**

### Issue Preservation

In its initial decision, the Court of Appeals chose not to address a variety of arguments concerning the validity of MCRC SIP’s forfeiture policies, but nonetheless ruled in favor of the Counties as to their right to a share of refunds of surplus for actuarial years in which their appointed predecessors had paid premiums contributing to the existence of that surplus. This Court remanded, directing the Court of Appeals to better explain the Counties’ right to a share of surplus, and identifying 5 documents to be considered on remand. Again, the Counties presented the arguments previously ignored, and, again, the Court of Appeals agreed with the Counties on one of several grounds supporting the same result, that MCRC SIP’s forfeiture policy is void as against public policy, and did not reach the other issues.

Alternative grounds for affirmance may be raised by an appellee without a cross-appeal. *Menendez v Detroit*, 337 Mich 476, 483; 60 NW2d 319 (1953). Moreover, “nothing precludes this Court from concluding that although plaintiffs predominantly relied on the wrong reasons, they consistently argued in support of the right result. It is of no consequence that plaintiffs have not consistently argued in support of any particular reasoning. We resolve cases and controversies; we do not sit in judgment of the work of attorneys.” *Michigan Gun Owners, Inc v Ann Arbor Pub Schools*, 502 Mich 695, 736; 918 NW2d 756 (2018) (Markman, CJ, dissenting).

### **1. MCRC SIP’s forfeiture policy is void as a breach of trust, fatally tainted by conflict of interest.**

Article XII of the Pool’s By-laws, provides that “The Pool Board shall develop procedures for addressing accumulated equity, if any \* \* \*.” The July 19, 1990 Memorandum to

the Pool Members fulfills this requirement, but addresses only members who withdraw after giving “written notice of desire” to do so, and *says nothing about the rights of members who are refused continued participation without being expelled for cause after written notice by the requisite 2/3 vote of the members* (Declaration of Trust, Article VI, §7).

Distributing surplus reserves from closed actuarial years among those whose premiums contributed to the surplus was and remains MCRCSIP’s settled policy (reflected in the July 1, 1990 Memorandum, Exhibit 6), but in a misguided effort to discourage exercise of MCL 124.7(a)(ii) MCRCSIP has now deviated so as to deny Plaintiff Counties their predecessors’ shares of such distributions. *Ad hoc* determinations, made by remaining members for their own enrichment, are antithetical to the By-laws, as well as tainted by conflict of interest. The resulting pecuniary advantage to the decision makers—each of whom was a government representative and trustee, operating within an association of government agencies, all of which profited by sharing among themselves surpluses attributable (by MCRCSIP’s own bookkeeping methodology) to Plaintiff Counties’ predecessor appointed Road Commissions, suffices to establish a violation of fundamental due process principles. *Aetna Life Ins Co v Lavoie*, 475 US 813, 822 ff; 106 S Ct 1580; 89 L Ed 2d 823 (1986). Even considering MCRSIP as a private rather than an organization of governmental entities, the lack of fundamental fairness becomes so paramount and obvious as to irredeemably taint the Board’s decision with respect to distributions of declared surplus premiums paid with tax dollars and to warrant judicial intervention.

Especially is this so because the Pool is, by its terms, a Trust (Declaration of Trust, Article I) administered by a Board of Trustees (*id.*, Article III, §1), each member of which has the right to enforce the fiduciary duties owed it by other members (*id.*, Article X, §12). Because,

as an unincorporated association, the Pool is not legally distinct from its members<sup>26</sup>, in dealing with one another the members, too, are trustees, and self-dealing cannot be tolerated by this Court. “[T]ransactions involving self-dealing should be closely scrutinized . . . to see whether the trustee’s actions indicate[ ] any fraud, bad faith or overreaching on the part of the trustee.” *In re Green Charitable Trust*, 172 Mich App 298, 314; 431 NW2d 492 (1988). “Bad faith is not a specific act in itself, but defines the character or quality of a party’s actions.” *Id.* at 315. “[B]ad faith has been defined as arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty.” *Id.* Denying plaintiff Counties their right to succeed to the memberships and surplus shares of their former appointed Road Commissions, in order to seize the refunds that would be due them and share the spoils among those who carried out the *putsch*, stands as an archetype of bad faith and self-dealing, exacerbated when perpetrated by trustees.

Granting that MCRCSIP might from time to time amend its internal rules or policies, it cannot do so if the new rule is unreasonable, OR (as here) the new rule operates to divest former members of rights *already vested*, such as the right to a share of any surplus when “withdrawal” was forced upon them by MCRCSIP. *Parish v New York Produce Exchange*, 169 NY 34, 49-51; 61 NE 977, 981-982 (1901).

Indeed, what MCRCSIP and its members have done is nearly indistinguishable from what was attempted by a faction in *Russian Orthodox All Saints Church v Darin*, 222 Mich 35; 192 NW 697 (1923), but prohibited as unjust, oppressive, and invalid by this Court, which opined, 222 Mich at 55 (boldfaced emphasis and underlining added):

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<sup>26</sup> MCL 600.2051(2) provides that “(2) \* \* \* [A]ny unincorporated voluntary association having a distinguishing name may sue or be sued in its partnership or association name, or in the names of any of its members designated as such or both.” (Emphasis added.) Thus, while MCRCSIP may thus sue or be sued in its own name, the fact that it may also be sued in the names of “any of its members designated as such, or both” means that it is NOT legally distinct from its members at all, but rather MCRCSIP and its members are legally indistinct, and breach of trust or self-dealing by one is breach of trust by all.

Measuring the legal rights and obligations of members belonging to this voluntary association by civil laws, or even its own by-laws and rules, the proceedings under which the minority members assumed to transfer themselves into a majority in order to control its temporal affairs cannot be recognized as of any legal validity. The majority members first took legal steps in the society's name and as its successor to, and did, comply with the provisions of the statute authorizing incorporation of unincorporated voluntary religious societies. There could be but one valid incorporation of the society. As we view the rift between the two factions, these was no actual secession on doctrine or other grounds by either faction, from the church or society, but a contest for supremacy within it amongst its members, for control of its temporalities. The incorporation by the majority was a valid incorporation by the majority of and for the entire voluntary association, including both factions. **It thereby succeeded to the temporalities of the society, but in trust for the religious purposes and uses for which they had been procured and dedicated by that society, and in which each member has a beneficial interest. The majority have not, and could not because of this factional dispute for control, read out of the association those belonging to the opposing faction, if valid members at the time of the division, any more than could the minority.** The faithful exercise by plaintiff of this trust, by whomsoever controlled, remains a subject of equity cognizance. So long as that trust is not violated, the unquestioned right of control is with the majority.

And therein lies the rub in the present case—neither MCRCSIP nor its remaining members could, while holding funds in trust for the entire original group, hijack Pool assets for their own accounts, or “read out of the association those belonging to the opposing faction, who were valid members at the time of the division [or discriminate between those who exercised their rights under MCL 224.6(7) and MCL 46.11(s) and those who did not]”.

## **2. MCRCSIP's forfeiture policy is void as contrary to Const 1963, art 9, §18.**

By converting Plaintiff Counties' shares of declared surplus premiums for distribution among its remaining Members, MCRCSIP has breached Const 1963, art 9, §18 by using the credit of Ingham, Jackson, and Calhoun counties to aid and supplement the financial interests of the other Members of MCRCSIP, all of which are county agencies.

The Michigan Constitution of 1963, art 9, §18, provides that “[t]he credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private, except as authorized in this constitution.” The prohibition against the lending of credit applies to

counties as political subdivisions and instrumentalities of the state. *Alan v Wayne County*, 388 Mich 210, 325; 200 NW2d 628 (1972); *Oakland Co Drain Comm'r v Royal Oak*, 306 Mich 124, 142; 10 NW2d 435 (1943). The purpose of this section is to assure that the state and its political subdivisions, which generally cannot borrow, do not accumulate unauthorized debts by guaranteeing the debts of others. *Advisory Opinion re Constitutionality of 1966 PA 346*, 380 Mich 554, 564; 158 NW2d 416 (1968).

This Court has held that, where the state acquires or transfers something of value, Const 1963, art 9, § 18 is not violated. *Alan, id.*; 200 NW2d 628 (1972). Const 1963, art 9, § 18 is violated only when the state creates an obligation legally enforceable against it for the benefit of another. *Sprick v Regents of the Univ of Mich*, 43 Mich App 178, 190-191; 204 NW2d 62 (1972); *Petrus v Dickinson Co Bd of Comm'rs*, 184 Mich App 282, 297; 457 NW2d 359 (1990).

A transfer of property by a municipal body not supported by adequate consideration violates art 9, § 18. Normally, “the Legislature or Executive Branch is the judge of what is fair value in matters in which it is concerned.... Their judgment, however, is subject to judicial review for abuse of judgment.” *Alan, supra* at 330.

Here, the legislative branch, the Boards of Commissioners of Ingham, Jackson and Calhoun Counties (each as its respective County Road Commission, is also the executive branch)—has concluded that value was not obtained. Obviously, if a county were to make a valuable grant without consideration, the courts would be *forced* to regard that as an abuse of discretion. *Alan, supra* at 326-327. Here, in exchange for signing the two termination agreements, none of Plaintiff Counties’ former appointed Road Commissions received any consideration, still less valuable consideration (see Part B3 below). Yet, MCRC SIP and its members used these invalid agreements as pretext to take for themselves premiums paid by and

belonging to the former Road Commissions of Plaintiff Counties, to which refund rights each Plaintiff County Board of Commissioners legally succeeded under operation of the provisions of MCL 224.6(7) and MCL 46.11(s).

Furthermore, MCL 124.1 *et seq.*, the statute forming the source of authority for and the basis for MCRCSIP's creation and continued existence, does not permit retention of such excess funds. To the contrary, MCL 124.7(a)(ii) requires that the intergovernmental contract specify "the amount of cash reserves to be set aside for the payment of claims", and likewise, in subsection (a)(iv), requires the intergovernmental contract to detail "the amount of aggregate excess insurance coverage to be maintained or the amount of the deposit of unimpaired surplus to be maintained with the state treasurer." Because the Pool owes its existence to this statutory authorization, the statute, being in derogation of common law, must be strictly construed, *School Dist of City of Lansing v City of Lansing*, 260 Mich 405, 419; 245 NW 449 (1932), and therefore the Pool cannot maintain any surplus or excess funds beyond what is identified and detailed in its Declaration of Trust. Yet no such provision is found there or in the Inter-Local Agreement.

Moreover, the very structure of the Pool, even though in this respect ostensibly permitted by MCL 124.7(b)(ii) (which allows the intergovernmental contract to provide for "levying and collecting assessments for deficiencies"), makes each member potentially liable for the debts of other members, and that is a further infringement of Const 1963, art 9, ¶18. *City of Tyler v Texas Employers' Insurance Ass'n*, 288 SW 409 (Tex Comm'n App, 1926, judgm't adopted)<sup>27</sup>.

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<sup>27</sup> In *Tyler*, the Texas Commission of Appeals considered whether an incorporated municipality might subscribe to the Texas Employers' Insurance Association (TEIA) to cover possible workers' compensation liabilities under VTCS art. 8308, §7 (authorizing any employer subject to workers' compensation laws to subscribe to TEIA). The TEIA—like MCL 124.7(b)(ii)—required its members to pay a proportionate share of any assessment the TEIA levied to cover its losses and expenses. 388 SW at 411-412.

Applying Texas Constitution, article III, section 52(a)<sup>28</sup>—indistinguishable from Mich Const 1963, art 9, §18 in its substantive effect—*Tyler* held that, because a subscriber to the TEIA was obligated to pay assessments to cover TEIA’s losses, any municipality that subscribed to the TEIA was lending its credit in violation of article III, section 52. *Id.* In *Lewis v Independent School District*, 161 SW2d 450, 452 (Tex, 1942), the Texas Supreme Court reaffirmed the conclusions reached in *Tyler*.

Because Plaintiff Counties succeeded by operation of statute to all rights of their former appointed Road Commissions, Plaintiffs have a right to the shares of excess or surplus funds MCRCSIP annually distributes for prior years (usually from surplus accumulated over a decade previously, thus in 2015 Defendant distributed surplus from the 2002-2003 premium year). ‘A state agency . . . may not employ the power, directly or indirectly, for the use and benefit of another, unless so authorized by law.’ *Sinas v City of Lansing*, 382 Mich 407, 413–414; 170 NW2d 23 (1969)<sup>29</sup>.

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<sup>28</sup> Texas Constitution, Article III, §52(a) provides:

Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company. However, this section does not prohibit the use of public funds or credit for the payment of assessments on nonassessable life, health, or accident insurance policies and annuity contracts issued by a mutual insurance company authorized to do business in this State.

Texas Constitution, Article III, §§60 and 61 are substantially identical, with section 60 pertaining to “counties and other political subdivisions,” and section 61 to “cities, towns, and villages.”

<sup>29</sup> Defendant’s previous central argument was that “the Pool never had any of the Counties’ money, and the Counties do not ‘own’ the potential refunds they now seek, citing the unpublished decision in *A&D Development v Michigan Commercial Insurance Mut (After Remand)*, 2014 WL 7338871 (Mich App, December 23, 2014) (summary disposition of multiple claims, including conversion, held proper, where participants in a self-insured fund did not own surplus premiums as a matter of law).” Plaintiff Counties have made no claim that they own any part of surplus reserves while funds remain part of reserves for any year of continuing liability exposure. Note, however, that because MCRCSIP remains an unincorporated voluntary association, indistinguishable from its members (see footnote 27 above, citing MCL

From the time Plaintiff Counties' predecessors in interest (ICRC, JCRC, and CCRC) joined the Pool, MCRCSIP's Board of Directors, upon the closing of all risk for an actuarial year, distributed the surplus or excess premiums from that year to the members in proportion to the premiums each had paid for that year. MCRCSIP has continued to declare and distribute surplus reserves according to the same pattern as each actuarial year closes, except it has excluded Plaintiffs from receiving their predecessors-in-interest's shares of such premium distributions, and MCRCSIP has instead divvied up those predecessors' shares among Road Commissions whose counties did not exercise their rights under MCL 224.6(7) and MCL 46.11(s)<sup>30</sup>.

Moreover, the habitual declaration of distributions of excess reserves from closed actuarial years by MCRCSIP's Board of Directors was, pursuant to Article XII of MCRCSIP's Bylaws, and the July 19, 1990 Memorandum, necessarily reflective of an established policy. Again, given the conflict of interest inherent in the MCRCSIP Board's handling of surpluses generated from excess premiums (and loss experience) of plaintiff Counties' former appointed

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600.2051(2)), MCRCSIP does not "own" those funds either, but merely holds those funds as trustee for member counties. Plaintiff Counties are beneficiaries of that Trust.

<sup>30</sup> And that is why the *A&D Development* has no application here. Plaintiff Counties are not claiming a right to immediate access to their aliquot share of MCRCSIP's reserves, but rather are claiming a right to the refund of excess, unused funds whenever the MCRCSIP Board of Directors closes an actuarial year to which the ICRC, JCRC, or CCRC contributed assessments or payments for insurance coverage and MCRCSIP's Board of Trustees declares a distribution of surplus reserves. At the point, once MCRCSIP's Board of Directors determines there is an excess of reserves and directs distribution (and not before), the funds in dispute cease to be property of the Trust or part of reserves, and becomes a fund to be distributed among those who contributed tax dollars to its creation (that is, those whose contributions form any part of the surplus for the closed actuarial year at issue). Indeed, this is precisely what the July 19, 1990 Memorandum provides.

In the *A&D Case*, no such distribution had been declared by the self-insurance pool's board of directors, so the funds remained part of the pool's reserves. The money having been paid into the pool voluntarily, there could be no conversion, because the party paying the premium had no right to a refund unless and until a distribution of surplus reserves might be declared, which never happened in that case. Here, the Pool has already closed out and declared distributions each of the past 7 years (2012-2018) covering actuarial premium years 2002-2009.

Road Commissions (part B1 above), were MCRCSIP to suddenly refuse to declare surpluses now that plaintiff Counties' status as successors to their former appointed Road Commissions is established beyond dispute, that would simply be another form of self-dealing and tortious conversion. Meanwhile, for each of the seven (7) years since Plaintiff Counties replaced their former appointed Road Commissions (see footnote 31), MCRCSIP has declared an annual distribution, although it has disbursed the aliquot shares that should have been paid to Plaintiff Counties among its other members. But this lawsuit has been pending since 2015, and between 2012 and 2015 Plaintiff Counties consistently demanded those shares, so MCRCSIP's members will simply have to disgorge the funds received that should have been paid to plaintiff Counties. *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc*, 465 Mich 303, 308 n. 5; 633 NW2d 357 (2001) ("Equity will not permit a wrongdoer to shelter himself behind a suddenly or secretly changed status though he succeeded in making the change before the chancellor's hand actually reached him.").

**3. MCRCSIP's forfeiture policy is inapposite to involuntary withdrawal from the Pool caused by extortion or embezzlement.**

MCRCSIP admits (Exhibit D, p. 9) that 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". Thus, neither the Ingham County Road Commission, nor Ingham County, *voluntarily* withdrew from membership in the Pool; *continuation of membership was affirmatively denied by the Pool*. This fact is of crucial importance, but nowhere acknowledged by MCRCSIP.

Clearly, both Ingham/ICRC and in like fashion Calhoun/CCRC were extorted to sign the termination agreements as a condition to receive refunds of the premiums they had just paid for the upcoming year. In exchange for signing the two termination agreements, none of Plaintiff

Counties' former appointed Road Commissions received any consideration, still less valuable consideration. According to MCRCSIP, each of the former appointed road commissions, in exchange for signing the termination agreements, was given a refund of unused premiums for the year of termination, 2012-2013 for Ingham and Calhoun Counties, 2013-2014 for Jackson County (which signed *nothing*). However, Plaintiffs' predecessors were each absolutely entitled to a refund of prepaid premiums for insurance coverage that was unilaterally terminated by the Pool and no longer being provided—MCRCSIP could hardly terminate insurance coverage for which payment had been tendered in advance and yet retain the unused portion of the premiums. That would be an elementary breach of contract. *Kibby v Mich Cent R Co*, 142 Mich 313, 315; 105 NW 769 (1905)<sup>31</sup>. Thus, MCRCSIP's "agreement" to refund *unused* premiums for the final year of membership was not valid consideration for any contractual agreement<sup>32</sup>, because MCRCSIP already had a prior legal obligation to refund such funds to Plaintiffs<sup>33</sup> (or their predecessors in interest). *46<sup>th</sup> Circuit Trial Court v Crawford Co*, 476 Mich 131, 158; 719 NW2d 553 (2006) ("Under the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise." *Id.* at 740–741. Such a contract fails for lack of consideration. *Puett v Walker*, 332 Mich 117, 122; 50 NW2d 740 (1952)."). Such

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<sup>31</sup> The holding in *Kibby* was as follows:

“The contract for defendant made it obligatory to furnish a suitable car for the entire trip, and deliver the car and cargo to the connecting line in good condition. It did not fully perform its duty of delivering to the connection carrier the potatoes in a suitable car adapted to their transportation. This was a breach of their contract and they were liable for the consequences.”

<sup>32</sup> Nor was MCRCSIP's agreement to “waive” its 60 day notice requirement—since it was MCRCSIP, by unilaterally declaring membership terminated, that engendered the Counties' withdrawal, it could hardly insist on notice of withdrawals MCRCSIP itself was compelling.

<sup>33</sup> Note that, now that it is known (as Plaintiff Counties all along contended) that each Plaintiff is the *de jure* successor to its former appointed Road Commission, MCRCSIP's concomitant refusal to continue the insurance coverage after the Counties became Road Commissions was itself a breach of contract.

contracts may equally be invalidated as a product of duress, *Vyne v Glenn*, 41 Mich 112, 115; 1 NW 997 (1879), rendering such “agreements” invalid and of no legal force or effect. *Knight v Brown*, 137 Mich 396, 398; 100 NW 602 (1904).

Nor can MCRC SIP hide behind whatever discretion is vested in either its Board of Directors or its members as a group (as during a membership meeting). The members of a voluntary association may set up a tribunal to adjust differences that arise between the association and its members, and may by contract make the tribunal’s decision final *in the absence of bad faith or error in law*. *Howe v Patrons’ Mut Fire Ins Co of Michigan*, 216 Mich 560, 568; 185 NW 864 (1921), quoting *Patrons’ Fire Insurance Co v Attorney General*, 166 Mich. 438, 442; 131 NW 1119 (1911). Here, there is and was never any internal tribunal.

A construction of an association’s foundational document, or its bylaws or internal rules, which results in summarily denying a member its rights, or any other aspect of fundamental fairness, is disfavored, and will not be adopted if any other interpretation is possible. *Howe*, 216 Mich at 566 citing *Puhr v Grand Lodge, German Order of Harugari*, 77 Mo App 47; 1898 Westlaw 1840, (1898). Note that neither the Declaration of Trust, nor the ByLaws, nor the Inter-Local Agreement, purports to declare that the Board of Directors’ (Trustees’) decision to treat a withdrawn member “less favorably”—if applicable to successor members who were *involuntarily* eliminated from the Pool (arguably so the other members could steal their decade’s worth of forthcoming refunds)—is deemed “final”. While such language appears in Article VI, §6 of the Declaration of Trust with respect to admission of *new* members, it is conspicuously absent from any of the various provisions dealing with the Board’s treatment of *former* members, and so does not apply to insulate any action from plaintiffs’ claim. *Expressio unius est exclusio*

*alterius* and *Expressum facit cessare tacitum*.<sup>34</sup> *Grinnell Bros v Brown*, 205 Mich 134, 137; 171 NW 399 (1919).

Moreover, where there has been bad faith, oppression, or other unfair conduct, the association and its members cannot hide behind the finality of an internal tribunal's processes to whitewash all sins. In *Dietz v American Dental Ass'n*, 479 F Supp 554, 557 (ED Mich, 1979), the Court held:

Generally, courts are reluctant to interfere with the internal workings of a private association<sup>35</sup>, but if justice and equity require, courts will review the decision of a private association. See *McCreery Angus Farms v. American Angus Association*, 379 F Supp 1008, 1019 (SD Ill, 1974), summarily aff'd, 506 F2d 1404 (CA 7, 1974); *Falcone v. Middlesex County Medical Society*, 34 NJ 582; 170 A2d 791, 796 (1961).

\* \* \* The association must exercise its powers according to its by-laws and constitution; it cannot decide to exclude or expel a member or deny rights of membership for arbitrary, capricious, or discriminatory reasons. [Citations omitted.]

Regarding extortion, a penal statute is presumed to establish a private cause of action in favor of those within the protective ambit of the statutory proscription. *B F Farnell Co v Monahan*, 377 Mich 552, 555; 141 NW2d 58 (1966); *Long v Chelsea Comm Hosp*, 219 Mich App 578, 585; 557 NW2d 157 (1996). MCL 750.213 defines the crime of extortion, a major felony punishable by up to 20 years' imprisonment, in pertinent part as follows:

Any person who shall, either orally or by a written or printed communication, maliciously threaten \* \* \* any injury to the \* \* \* property \* \* \* of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years or by a fine of not more than 10,000 dollars.

The concept of a "malicious threat" was clarified in *People v Harris*, 495 Mich 120, 136; 845 NW2d 477 (2014) to include "Reckless disregard of the law or of a person's legal rights."

<sup>34</sup> "The expression of one thing is the exclusion of another", and 'a thing expressed puts an end to tacit implication.' "

<sup>35</sup> MCRCSIP, consisting solely of municipal agencies, is not a "private agency".

MCRCSIP's arguments—"The Pool didn't extort anything"—are for a jury to weigh; they involve factual questions as to how MCRCSIP's actions, which are documented for all the world to see, and which engender issues of intent and motive, should be viewed. Summary disposition is rarely appropriate in cases involving questions of credibility, intent or state of mind. *In re Handelsman*, 266 Mich App 433, 438; 702 NW2d 641 (2005). Certainly, the financial motive of MCRCSIP to disincentivize its members is manifest, as is the blatant conflict of interest of both its members and its Board of Directors (each director being an agent of a member as well as a fiduciary for *all* members). All elements of the definition of "malicious threat" adopted in *Harris* are present.

Concerning conversion, conversion arises from "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v. Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). The act is wrongful when it is inconsistent with the ownership rights of another. *Check Reporting Servs, Inc v Mich Nat'l Bank-Lansing*, 191 Mich App 614, 626; 478 NW2d 893 (1991). Under Michigan law, a plaintiff may sue "for the conversion of funds that were delivered to the defendant for a specified purpose, but that the defendant diverted to his or her own use." *Hogue v Wells*, 180 Mich 19, 24; 146 NW 369 (1914); *Warren Tool Co v Stephenson*, 11 Mich App 274, 300; 161 NW2d 133 (1968).

Statutory conversion is the subject of MCL 600.2919a, which provides:

Sec. 2919a. (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:

(a) Another person's stealing or embezzling property or converting property to the other person's own use.

\* \* \*

(2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise.

In accordance with MCL 224.6(7) and MCL 46.11(s), appellee Counties succeeded to all rights and duties of their former appointed Road Commissions. To the extent the ICRC, JCRC, or CCRC was entitled to share in a distribution of MCRC SIP's declared surplus reserves upon the closing of actuarial years from 2002 through 2012 and declaration of a return of surplus by the Board of Trustees, such entitlements devolved upon the Boards of Commissioners of Ingham, Jackson, and Calhoun Counties. "A demand is unnecessary ... where the property has been wrongfully appropriated by the defendant for his own use and benefit." *Trail Clinic, PC v Bloch*, 114 Mich App 700, 706; 319 NW2d 638 (1982). All of the elements necessary to support a claim for statutory conversion are satisfied, and this provides an alternative basis for leaving the Court of Appeals' decision undisturbed (other than to remand for calculation of treble damages).

**Issue II: The notion that Jackson County "withdrew from the Pool when it dissolved its former appointed Road Commission", despite never declaring such much less signing a withdrawal agreement or withdrawing from membership in the Pool, is meritless.**

#### **Counterstatement of the Standard of Review**

The counterstatement of the standard of review in Issue I above applies here as well.

To this must be added that issues of statutory construction are reviewed de novo. *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 133; 860 NW2d 51 (2014). When interpreting a statute, this Court follows the established rules of statutory construction, the foremost of which is to ascertain and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). The language of the statute itself is the most reliable evidence of that intent. *Id.* To the extent possible, effect should be given to every phrase, clause, and word in the statute, and no word should be treated as surplusage or rendered nugatory. *Id.*

### Issue Preservation

This is an entirely new argument by MCRCSIP as to Jackson County. On remand in the Court of Appeals, MCRCSIP simply relied on a blatant falsehood—in its supplemental brief on remand (Exhibit D, p. 13), under the heading “**Jackson County Road Commission withdrew from the Pool**”, MCRCSIP claimed: “The same day power was transferred, Pratt forwarded Cancellation and Termination Agreements to the Jackson County Road Commission (Tr. Ex. 49).” MCRCSIP went on to describe the terms of those Cancellation and Termination Agreements as being operative, despite the fact that MCRCSIP’s own appendix (Exhibit D, pp. 475-476 and 488-489) reflects that “Tr. Ex. 49”, was *nowhere signed by any representative of either Jackson County or its former Road Commission*.

Neither in its prior Court of Appeals’ briefs nor in the trial court did MCRCSIP ever contend that, merely by exercising its authority under MCL 46.11(s) and MCL 224.6(7), Jackson County “withdrew” from membership in the Pool. This is yet another unpreserved issue, and no compelling reason for this Court’s plenary review of such an issue has been presented.

### Legal Analysis

Typical of its tactic of ignoring what the Court of Appeals’ actually wrote, nowhere does MCRCSIP actually quote or analyze the Court of Appeals’ opinion as to what constitutes a “county road commission”. The Court of Appeals held (boldfaced emphasis added):

The parties dispute whether the counties could be members of the Pool for the purpose of determining whether they are eligible for surplus refunds of prior year contributions. The Pool contends that its bylaws only permit road commissions to be members, so the counties are not qualified for membership. This Court construes bylaws using the same rules applied to contract interpretation. *Tuscany Gove Ass’n v Peraino*, 311 Mich App 389, 393; 875 NW2d 234 (2015)<sup>36</sup>. We begin with the plain language of the bylaws and apply it if it is clear and unambiguous. *Rossow*, 251 Mich App at 658.

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<sup>36</sup> To like effect, see *Madugula v Taub*, 496 Mich 685, 718; 853 NW2d 75 (2014) and 8 Fletcher, *Cyclopedia, Corporations*, § 4195, p 791.

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 in the Pool’s bylaws. [321 Mich App at 584.]

Instead of ever coming to grips with this unassailable judicial reasoning, MCRCSIP relies on the *ipse dixit* notion that counties and county road commissions are two distinct “species” of municipality. It attempts to support this xylocephaly first (Application, p. 28 footnote 28) with a citation to MCL 691.1401(b) (nowhere quoted in the Application contrary to MCR 7.305(A)(1)(e) and MCR 7.212(C)(7)), which merely provides a definition of “governmental function”. Presumably, MCRCSIP meant to cite MCL 691.1401(e):

As used in this act:

\* \* \*

(e) “Political subdivision” means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or authority authorized by law or formed by 1 or more political subdivisions; or an agency, department, court, board, or council of a political subdivision.

For starters, this definition, by its express terms, applies only to “this act”, the Governmental Tort Liability Act, which is not involved in this appeal whatsoever. Second, the definition is of the term “political subdivision”, not “county road commission” or “county”. Third, the purpose of the definition—to identify government agencies on which tort immunity is conferred—is *inclusive*, not exclusive. Thus, invocation of this definition to legally distinguish a county acting under MCL 46.11(s) from a county road commission is risible. Fourth, nowhere in any part of the record or either Court of Appeals’ ruling (or the Application) has the meaning of “political subdivision” been at issue.

MCRCSIP fares no better in its reliance on the mandate to the Legislature in Const 1963,

art 7, §16, which directs the Legislature to “provide for county road commissioners \* \* \* with the powers and duties provided by law.” If MCRCSIP intends to argue that MCL 46.11(s) and MCL 224.6(7), by authorizing County Boards of Commissioners to assume the powers and duties of road *commissioners*, is unconstitutional, the issue is plainly not preserved.<sup>37</sup> Meanwhile, nothing in art 7, §16 requires the Legislature to create, or continue, county road *commissions*; the Legislature is only mandated to vest by law powers and duties of county road commissioners.<sup>38</sup>

MCRCSIP continues on, citing MCL 224.1 *et seq* as outlining “the methodology for setting [county road commissions] up”—as though MCL 224.6(7) is somehow not part of that statute. It urges that MCL 224.9 defines county road commissions as “bod[ies] corporate”, heedless of the fact Counties are also bodies corporate—by constitutional and statutory mandate, Const 1963, art 7, §1, MCL 45.3 (counties), MCL 45.501 (charter counties)—having all road commission powers and authority when proceeding under MCL 46.11(s) and MCL 224.6(7).

MCRCSIP insists that “only road commissions can be members”, citing its Bylaws, Articles III and IV (Exhibit 7), yet completely ignoring the salient fact that neither article of the

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<sup>37</sup> Were 2012 PA 14 unconstitutional for that reason, then the ICRC, JCRC, and CCRC would all be resurrected *ab initio*, at which point they would resume their former memberships in the Pool with retroactive effect, and they would be entitled to their shares of surplus refunds, as everything that flowed from enactment of 2012 PA 14 would be a nullity. *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135, 144-145; 253 NW2d 114 (1977).

<sup>38</sup> Nor does, or could, MCRCSIP contend that such statutory structuring of county offices would violate principles of incompatible offices. Combining two county offices into one does not contravene either the Incompatible Offices Act, MCL 15.182 (which, in any event, allows no private right of action, MCL 15.184), or any similar common law prohibition, since per Const 1963, art 3, §7, 2012 PA 14 represents an exercise of the Legislature’s power to alter or abolish the common law. Even so, the offices of County Commissioner and County Road Commissioner are not inherently “incompatible”, MCL 15.181(b). *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 162-163; 627 NW2d 247 (2001). Finally, even if MCL 15.182 were applicable, the Legislature created an exception by enacting 2012 PA 14, which is both later in time and more specific. *People v Buhler*, 477 Mich 18, 26 n. 23; 727 NW2d 127 (2007), citing *Imlay Twp Primary School Dist No 5 v State Bd of Ed*, 359 Mich 478, 485-486; 102 NW2d 720 (1960).

Bylaws has any definition of “county road commission”. The Bylaws merely refer to having power under MCL 124.1 to join the pool, which is circular in light of 2012 PA 14 and thus necessarily *supports* the Court of Appeals’ analysis. Nowhere does MCRC SIP deny that a county which has availed itself of MCL 46.11(s) and MCL 224.6(7) is authorized to enter a contract under MCL 124.1—that statute expressly allows counties and county road commissions (or combinations of the 2) *inter alia* to do so, and likewise does not define either term.

Again citing no authority, MCRC SIP next contends that “the meaning of the Pool’s bylaws and other governing documents is a matter first for the Pool, not for the courts.” That proposition is absurd by any standard. It is the courts<sup>39</sup>—which in Michigan means the “one court of justice”, Const 1963, art 6, §1—which have the duty to construe contracts in cases of dispute among the contracting parties (boldfaced emphasis added):

“The constitution is the fundamental law of the state. It belongs, therefore, to the judiciary to give it a construction, to ascertain its true intent and meaning; and it is as much the duty of a court to do so, when it becomes necessary, **as it is to give a construction to an act of the legislature, or to a written contract between individual citizens**, when the necessity arises.

*People v Gallagher*, 4 Mich 244, 281 (1856) (Pratt, P.J., dissenting). To like effect, in *Gregory v Village of Lake Linden*, 130 Mich 368, 369; 90 NW 29 (1902), this Court bestowed its full imprimatur on the following jury instruction (boldfaced emphasis added):

I charge you that the right of the plaintiff to recover from the defendant in this case depends upon the construction of the written contract introduced in evidence on the trial; and **it is the duty of the court to construe the written instrument, and state what the legal effect of it is or may be.**

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<sup>39</sup> Allowing *arguendo* for contracting parties to include a clause providing that the decision of a designated person or body shall be final, which would be honored by the courts, *Guthat v Gow*, 95 Mich 527, 530-531; 55 NW 442 (1893) (architect); *Kelly v Public Schools of City of Muskegon*, 110 Mich 529, 532; 68 NW2d 282 (1896) (same), no such term appears in any of the governing documents. Therefore, only the judiciary is competent to act as contractual arbiter.

The further argument, that since the Pool's inception, no county has been admitted to membership, offers no probative value. Until 2012 PA 14, no county could exercise the powers of a road commission. That something did not occur before it was possible hardly proves it cannot take place once impossibility is removed.

MCRCSIP continues in the same vein—still citing no authority, because none exists—contending that the Pool members, who are supposedly the source of the contract language (as opposed to attorneys), find no ambiguity, so somehow *their* interpretation controls. The problem is, there was no such “interpretation” until this case arose; all efforts by the Pool to put a gloss on the undefined term “county road commission” in its governing documents have been generated only after this controversy arose (and long after the ink on the actual contracts was dry). As further held in *Gregory v Village of Lake Linden, id.*:

Where parties make a bargain, and finally reduce the terms of that bargain to writing, the writing contains, as a matter of law, whatever the bargain finally is, and testimony to change its terms and make it something else, no matter what negotiations have passed between the parties to the contract before, will not be received or considered in construing the contract.

Neither the Pool, its Trustees or Executive Director, or its Members, has, or is, the final word on the meaning of “county road commission”, for reasons explicated in *SSC v General Retirement System of City of Detroit*, 192 Mich App 360, 365-366; 480 NW2d 275 (1991):

Plaintiff submitted only one affidavit relating to the meaning of the phrase in controversy, that of George Nyman, one of the partners in the plaintiff partnership. The sworn affidavit stated that the partnership understood that upon prepayment the city was entitled to be paid interest reflecting an internal rate of return of 14.5 percent per annum. This was a self-serving statement of opinion for which no factual support was offered. Because of Mr. Nyman's involvement in the partnership, his sworn statement is naturally suspect. Furthermore, his affidavit did not resolve the ambiguity. It merely reasserted plaintiff's version of the contract language.

\* \* \*

The plaintiff's motion was supported only by an affidavit from a partner whose credibility may be crucial to resolution of the disputed issue of fact. Even assuming his statements regarding the partnership's understanding were true, they were not dispositive

of the meaning of the contract language. Accordingly, Mr. Nyman's affidavit was not sufficient to support plaintiff's claim that the contract phrase was unambiguous.

Small wonder MCRC SIP cites no authority—Michigan jurisprudence is firmly to the contrary.

MCRC SIP then reverts to contending it is neither equipped nor structured to provide insurance to counties conducting road commission operations, and claiming that “the insurance risks that the Counties pose are necessarily broader than and vastly different from the insurance risk associated with insuring road commissions”. Yet MCRC SIP points to no evidence in the record, MCR 7.310(A)<sup>40</sup>, to support this contrivance—it had the opportunity in circuit court to produce actuarial studies or other admissible evidence, MCR 2.116(G)(6), to buttress these propositions, and offered . . . *nothing*. As shown above, before adopting its current position, MCRC SIP not only offered to cover the counties' insurance needs limited to their road operations, it touted its expertise in doing so (Exhibit 13, p. 3), so the *only evidence in the record demonstrates that insuring counties' for road operations liability is well within MCRC SIP's existing insurance coverage activity, ability, and experience*. MCRC SIP is debarred from now contradicting itself in this ipse dixit fashion:

“Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.” [*CE Tackels, Inc v Fantin, supra*, 341 Mich at 124, quoting *Ohio & M Ry Co v McCarthy, supra*, 96 US (6 Otto) at, 267, 268].

Happily, this Court's precedents prohibit MCRC SIP from inventing new “facts” on appeal as well as from asserting new, diametrically opposite contentions after litigation has commenced.

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<sup>40</sup> On appeal from summary disposition, only materials entered into the record prior to the trial court's ruling may be considered. *Quinto v Cross & Peters Co*, 451 Mich 358, 367 n. 5; 547 NW2d 314 (1996).

**Issue III: The Court of Appeals correctly held that, as a matter of law, the Counties which have exercised their rights under MCL 46.11(s) and MCL 224.6(7) to assume the power and duties of their former appointed road commissions, stand in the shoes of their former appointed road commissions for all purposes connected with this case.**

**Counterstatement of the Standard of Review**

See Issues I and II above.

**Issue Preservation**

Although MCRCSIP preserved its right to argue this issue in its application, it actually fails to do so. Once again, contrary to MCR 7.305(A)(1)(e) and MCR 7.212(C)(7), (“The arguments, each portion of which must be prefaced by the principal point stated in capital letters or boldface type.”), MCRCSIP fails to actually brief its Issue III. It appears to have folded some argument on that issue into Issue II, but doing so is prohibited by the rule. Accordingly, this Court should apply the established principle that “any issue not briefed and supported on appeal is considered abandoned,” *Royal Indem Co v H S Watson Co*, 93 Mich App 491, 494; 287 NW2d 278 (1979). Equivalently, it can simply apply the rule of *Wilson v Taylor and Mitcham, supra*.

Nowhere in its application does MCRCSIP quote, summarize, or address the Court of Appeals’ analysis of this issue—apparently having no valid legal argument in opposition. Plaintiffs will nonetheless brief the issue to assure this Court this ruling was correct.

**Legal Analysis**

The reasoning of the Court of Appeals on this issue (321 Mich App at 581-584) was simple and straightforward, as well as ineluctable and correct. What little the Counties have to add appears in footnotes:

When the Boards of Commissioners of Ingham County, Jackson County, and Calhoun County dissolved their counties’ road commissions pursuant to MCL 46.11(s) and 224.6(7), the powers, duties, and functions of the dissolved county road commissions passed to the respective counties’ boards of commissioners. The parties dispute the meaning of the word “dissolved” in MCL 46.11(s) and 224.6(7). The counties argue that

the county boards of commissioners absorbed the rights and interests of the road commissions. The Pool counters that the road commissions ceased to exist when the counties dissolved them, so the counties could not absorb their powers, duties, and functions. The trial court agreed with the Pool, ruling that the counties were not successors in interest to their former road commissions because the statute's reference to dissolution signified the end of the road commissions' existence.<sup>41</sup>

We disagree with the trial court. Reading MCL 224.6 as a whole shows that a county that has adopted a county road system must have a board of county road commissioners. The general rule in MCL 224.6(1) and its four exceptions make clear that a county that has adopted the county road system must have a road commission that is elected, MCL 224.6(1), appointed, MCL 224.6(4), reorganized by amendment to a county charter, MCL 224.6(5), or dissolved for its role to be transferred to the county board of commissioners, MCL 224.6(7) and (8). Therefore, when a county dissolves its road commission, the county board of commissioners becomes the successor in interest to the former road commission.

The Pool argues that the counties are not successors in interest to their dissolved road commissions because the statute provides for the transfer of only the "powers, duties, and functions" of the former road commissions but not their property rights or interests. The Pool contends that because the counties have only the powers expressly authorized by statute, the dissolved road commissions' property rights and interests did not transfer to the counties. We reject this stilted reading of the statute.

Counties derive their authority from the Michigan Constitution and state statutes. *Mich Muni Liability and Prop Pool v Muskegon Co Bd of Co Rd Comm'rs*, 235 Mich App 183, 190; 597 NW2d 187 (1999). Local governments have only those powers expressly conferred by the state Constitution or by statute and implicit authority to implement their express powers. *Id.* at 190-191.<sup>42</sup>

Pertinent to the Pool's argument, road commissions have the authority to hold title or

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<sup>41</sup> Note that MCRCSIP itself cites Const 1963, art 7, §16 as mandating the Legislature to provide authority to county road commissioners. A gap of any duration would still violate the Constitution. Since a reasonable construction of 2012 PA 14 is available that avoids this constitutional invalidity, it must be the correct interpretation. *Evans Prods Co v State Bd of Escheats*, 307 Mich 506, 548; 12 NW2d 448 (1943); *Sears v Cottrell*, 5 Mich 251, 259 (1858).

Moreover, a statutory construction "that would produce great inconvenience," "lead to absurd or mischievous results," or "tend to embarrass the course of justice and serve to defeat necessary legal remedies," "ought not to be adopted unless required by some positive rule of law." *Alvord v Lent*, 23 Mich 369, 372 (1871); *Franges v Gen Motors Corp*, 404 Mich 590, 612; 274 NW2d 392 (1979). See also *Shapero v State Dept. of Revenue*, 322 Mich 124, 139; 33 NW2d 729 (1948) (same, citing 2 Laws Southerland Statutory Const. (2d Ed.) § 490).

<sup>42</sup> To like effect is *Bond v Cowan*, 272 Mich 296, 298; 261 NW 331 (1935) ("Counties have delegated powers only."); see also Const 1963, art 7, §1 ("Each organized county shall be a body corporate with powers and immunities provided by law.").

an interest in land and to sell or convey land that is not part of or necessary “for a public street, highway, or park.” MCL 224.9(3). A typical county road commission would own a fleet of road maintenance vehicles, such as snowplows and salt trucks, in addition to a garage facility to house those vehicles along with road maintenance materials and supplies, including salt. Applying the Pool’s argument, these facilities and equipment would become ownerless once a county board of commissioners dissolved its county’s road commission and assumed its powers.

The counties further disagree with the Pool’s narrow reading of the statute because it would constitutionally impair contracts for road construction and maintenance that involved the former road commissions. See US Const, art 1, § 10; Const 1963, art 1, § 10.<sup>43</sup> Rather, the counties argue, the former road commissions’ contractual rights devolved upon the respective counties.

We agree. Whenever possible, courts must interpret a statute to avoid the conclusion that it is unconstitutional or raises doubts about its constitutionality. *People v Nyx*, 479 Mich 112, 124; 734 NW2d 548 (2007). Similarly, courts must read statutes as a whole. *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). A statute that substantially impairs a contractual relationship is unconstitutional unless the statutory impairment serves a “legitimate public purpose” and was implemented in a manner “reasonably related to the public purpose.” *Health Care Ass’n Workers Compensation Fund v Director of the Bureau of Worker’s Compensation, Dep’t of Consumer and Indus Servs*, 265 Mich App 236, 241; 694 NW2d 761 (2005). The Pool’s narrow reading of “powers, duties, and functions” would result in the unconstitutional impairment of the former road commissions’ contracts, rendering the statutory provisions permitting dissolution of the road commissions unconstitutional<sup>40</sup>. We avoid this result by interpreting the statutory provisions more comprehensively. Thus, we conclude that the counties became the successors in interest to their former road commissions when they exercised their statutory right to dissolve the road commissions. As successors in interest, the counties took on all statutory rights and responsibilities given to road commissions.

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<sup>43</sup> In the lower courts, the Counties cited *Graham v Folsom*, 200 US 248, 253; 26 S Ct 245; 50 L Ed 464 (1906), which is directly on point (and controlling under the supremacy clause):

“The power of the state to alter or destroy its corporations is not greater than the power of the state to repeal its legislation. Exercise of the latter power has been repeatedly held to be ineffectual to impair the obligation of a contract. The repeal of a law may be more readily undertaken than the abolition of townships or the change of their boundaries or the boundaries of counties. The latter may put on the form of a different purpose than the violation of a contract. But courts cannot permit themselves to be deceived. They will not inquire too closely into the motives of the state, but they will not ignore the effect of its action.”

The Court of Appeals generally prefers to cite its own cases, as occurred here.

MCRCSIP's Application is devoid of a reasoned argument, addressing either the authorities cited or the reasoning of the Court of Appeals. This must constitute abandonment of the issue. *Wilson v Taylor, supra* and *Mitcham, supra*.

**RELIEF REQUESTED**

For all the foregoing reasons, Plaintiffs-Appellees Counties of Ingham, Jackson, and Calhoun respectfully request that this Honorable Court deny leave to appeal.

In addition, given the panoply of misrepresentations which MCRCSIP has perpetrated in its effort to persuade this Court to grant plenary review, appellee Counties respectfully request that this Court award the Counties actual and punitive damages, including actual costs and attorneys' fees for these proceedings. MCR 7.316(C)(1)(b) and (2).

Respectfully submitted:

COHL, STOKER & TOSKEY, P.C.

Date: October 2, 2019

By: /s/ Bonnie G. Toskey

Bonnie G. Toskey (P30601)  
COHL, STOKER & TOSKEY, P.C.  
Attorneys for Plaintiffs-Appellants  
601 N. Capitol Ave.  
Lansing, Michigan 48933  
(517) 372-9000  
[btoskey@cstm.com](mailto:btoskey@cstm.com)