

IN THE SUPREME COURT

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

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

Plaintiffs-Appellees,

v

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

Defendant-Appellant.

Supreme Court Docket No. 160186

Court of Appeals Docket No. 334077

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

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**DEFENDANT MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE
POOL'S REPLY TO PLAINTIFFS' ANSWER IN OPPOSITION TO
APPLICATION FOR LEAVE TO APPEAL (AFTER REMAND)**

TABLE OF CONTENTS

INDEX OF AUTHORITIES..... ii

REPLY ARGUMENT 1

CONCLUSION..... 7

INDEX OF AUTHORITIES

Cases

AFT Mich v Michigan, 497 Mich 197, 232-233, 86 NW2d 782 (2015)..... 6

Aguirre v State of Michigan, 315 Mich App 706; 891 NW2d 516 (2016)..... 6

Blue Cross & Blue Shield of Mich v Governor, 422 Mich 1, 21, 367 NW2d 1 (1985)..... 6

Borman, LLC v 18718 Borman, LLC, 777 F3d 816, 826 (CA 6, 2015) 6

Gillette Commercial Operations North America & Subsidiaries v Dep’t of Treasury, 312 Mich App 394, 408, 878 NW2d 891 (2015)..... 6

Health Care Ass’n Workers Compensation Fund v Bureau of Worker’s Compensation Dir, 265 Mich App 236, 240, 694 NW2d 761 (2005) 6

In re Certified Question, 447 Mich 765, 777, 527 NW2d 468 (1994) 6, 7

Seitz v Probate Judges Retirement Sys, 189 Mich App 445, 45, 474 NW2d 125 (1991)..... 6

Statutes

MCL 224.6(7) 5

MCL 46.11(s)..... 5

REPLY ARGUMENT

Nothing in the plaintiff Counties' answer changes the following facts: (1) the Court of Appeals reversed the trial court by reaching the extraordinary conclusion that the Michigan County Road Commission Self-Insurance Pool's membership agreement was unenforceable as a matter of public policy; (2) the Court of Appeals had no authority to tell the Pool who can and cannot be a Pool member; (3) the plaintiff Counties received from the Pool exactly that for which they paid: insurance; (4) the plaintiff Counties never had a right to distributions, even when they were still Pool members; and (5) by granting the plaintiff Counties a distribution windfall, the Court of Appeals engaged in an unauthorized transfer of road funding away from the remaining road commissions and the taxpayers those commissions represent. This dispute is of substantial jurisprudential significance and warrants this Court's immediate review.

The plaintiff Counties try to muddle these issues. But a brief review of this case's lengthy history, in context, shows how the plaintiff Counties' position mangles well-settled Michigan law.

In 2012, the Michigan Legislature chose to amend county road commission law to allow counties to dissolve their road commissions, transferring the road commission's powers, duties, and functions to the county board of commissioners. Counties choosing to do so would no longer have road commissions.

Long before that time, the plaintiff Counties had road commissions, all of whom were members of the Pool. These road commissions voluntarily agreed to be bound by the agreements between the Pool, themselves, and all other road commission members. The dispute here arose when these three plaintiff Counties, having dissolved their road commissions, nonetheless demanded money that might have been paid to their former road commissions from collection of surplus premiums determined by a decade of claims experience. Because counties are not road

commissions, they are not eligible for Pool membership or benefits. And most important, by the terms of the Pool’s foundational documents and agreement of the dissolved road commissions, the dissolved road commissions—and the plaintiff Counties that assumed those commissions’ obligations and responsibilities—forfeited any right to receive premium distributions from and after their dates of withdrawal.

The Circuit Court granted summary disposition to the Pool, holding that the Counties are not road commissions and that they could not simply step into the shoes of their former road commissions. Hence, the Pool’s foundational documents and the agreements among Pool members, including the plaintiff Counties’ former road commissions, meant that the former road commissions were not entitled to any distributions. Accordingly, the Counties were not entitled to any Pool distributions, either.

On appeal, the Counties argue that as successors in interest, they were entitled to whatever their former road commissions would have received. They argued, as well, that the withholding of funds from them was “extortion” as a punishment for availing themselves of the new legislative enactment authorizing their dissolution of their road commissions (with the County commissioners taking on the former road commissions’ rights, duties, and obligations). They argued, further, that the Pool’s actions violated the Michigan Constitution’s prohibition on governmental lending of credit. They did *not* argue in the Court of Appeals (or the Circuit Court) that the contract and bylaws to which they were parties with the Pool and other road commissions were violative of public policy and, therefore, to be vitiated.

The Court of Appeals’ first ruling embraced the successors-in-interest argument and held that the Counties were, in essence, “road commissions” entitled to receive distributions. The

Court of Appeals did not address the Counties' constitutional or extortion arguments, nor did it address the Pool's arguments based on the Pool agreements and bylaws.

This Court granted leave to appeal and remanded the case to the Court of Appeals with the explicit instruction to consider whether the Counties, by virtue of the foundational documents and contracts, were not entitled to distributions, because their road commissions, having withdrawn from the Pool, were not entitled to distributions. The Counties did not raise, and this Court did not address, whether the Pool's agreements and bylaws were void against public policy. And in filing their supplemental brief in the Court of Appeals, the Counties again did not make their argument.

The Court of Appeals' second opinion, on remand, agreed with the Pool that the Pool's foundational documents and contracts *did* provide for the forfeiture of future distributions. But the Court of Appeals held, *sua sponte*, that these contracts violated public policy and were, as a matter of law, unenforceable. In other words, having gone through four rounds of briefing over numerous years with nary a word from the Counties about the validity of the Pool's agreements and bylaws as a matter of public policy, the Court of Appeals voided those documents without giving the Pool any opportunity to speak on the issue.

That brings us to the present Application for Leave to Appeal. As explained in the Application, the Court of Appeals' reasoning that the Pool's foundational documents and contracts violate public policy is thin, incomplete, and simply wrong if subjected to full scrutiny. What's more, the issue was not properly before the Court of Appeals.

In their answer, the Counties contend that they made this public policy argument throughout all of the courts below, including to the Court of Appeals on remand. This Court can make that determination for itself by examining each of the Counties' briefs filed to this point.

While those briefs argue that the Pool's enforcement of the bylaws and agreements is "extortion" designed to punish the Counties for abolishing their road commissions, and further argue that the Pool's position somehow violates Michigan constitutional prohibition on lending of credit, the Court will find no citation of authorities or any substantive argument that the Pool's foundational documents and contracts are void as a matter of public policy. That issue was never joined in this litigation until the Court of Appeals inserted it *sua sponte* on remand.

In fact, the Counties in their Supplemental Brief below took the exact opposite position. Voicing their support for the Court of Appeals' first decision, they said:

[P]laintiff Counties further agree that the foundational contractual documents—the Declaration of Trust, Bylaws, and Interlocal Agreement are binding, and that the July 19, 1990 Memorandum, reflecting as it does an action by MCRCSIP's Board of Directors authenticated by the Pool's seal was a legally valid action. These documents are also binding on MCRCSIP. [Emphasis added.]

The Counties did not state this as some alternative argument; it was their statement of position -- that the Pools' foundational documents are valid and binding, though the Counties contend that enforcement of the withdrawal policy is extortion and violative of the Michigan Constitution prohibition upon lending credit.

More important, this Court should grant the Application so that this question of public policy is given full review and analysis. This case is hugely consequential for these parties, and for the future of the Pool and its constituent road commission members, not to mention the future of other inter-governmental agreements that purport to define who can and cannot be members. It is extremely important that this Court produce the final word on whether these Counties, and any others who choose to do what they have done, are effectively "road commissions," entitled to membership in the Pool, and whether these Counties, and potentially any others like them in the future, are entitled to distributions as they claim. Given the millions of public dollars and the

jurisprudential significance of the issues at stake, this Court should grant the Application no matter the merits of the Court of Appeals' public-policy holding.

Of course, for the reasons stated in the Application, the Court of Appeals public-policy holding is grievously wrong. In addition to what the Pool has already said in its Application, the Court of Appeals' interpretation of the legislation allowing counties to dissolve their road commissions implicates the constitutional prohibitions on laws that impair the obligation of contract. The Court of Appeals says this:

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).

The Court then says that enforcement of the withdrawal policy would undermine “basic principles of predictability and stability that the Legislature intended such self-insurance pools to promote.” (Slip Op, p 14).

The latter proposition is demonstrably false. To the contrary, it is the Court of Appeals decision that undermines predictability and stability by upsetting traditional financial arrangements among the Pool and its members, and by even dictating who the Pool members may choose to be admitted to their membership.

And the first proposition—that the Counties may not be penalized for exercising their rights to dissolve their road commissions under the newer legislation—means that these statutes have impaired the obligation of contract, itself an unconstitutional proposition. The foundational documents and contracts at issue here long predated the legislation permitting counties to abolish their road commissions. The Court of Appeals is now saying that the legislation is an expression of public policy that results in the previously enforceable rights and obligations of the contracts between and among the Pool and its constituent member road commissions to be, in some ways,

unenforceable. Moreover, the Court of Appeals interprets the later legislation to have impaired the obligation of contracts as they previously existed.

Legislation is prohibited from impairing the obligation of contracts. That prohibition is contained both in the Michigan and U.S. Constitutions. The Contracts Clause analysis is well stated in *Aguirre v State of Michigan*, 315 Mich App 706; 891 NW2d 516 (2016), where it says:

“Both the Michigan and United States Constitutions prohibit laws that impair obligations under contracts.” *AFT Mich v Michigan*, 497 Mich 197, 232-233, 86 NW2d 782 (2015). “These clauses provide that vested rights acquired under a contract may not be destroyed by subsequent state legislation.” *Seitz v Probate Judges Retirement Sys*, 189 Mich App 445, 45, 474 NW2d 125 (1991). “However, the Contract[s] Clause prohibition on state laws impairing the obligations of contract is not absolute.” *Health Care Ass’n Workers Compensation Fund v Bureau of Worker’s Compensation Dir*, 265 Mich App 236, 240, 694 NW2d 761 (2005) “Rather, the prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people.” *Id.* at 240-241, 694 NW2d 761 (quotation marks and citations omitted).

Consequently, when examining whether a state law substantially impairs an existing contract, courts apply a three-pronged balancing test, “with the first prong being a determination ‘whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.’” *In re Certified Question*, 447 Mich 765, 777, 527 NW2d 468 (1994) (citation omitted). See also *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 21, 367 NW2d 1 (1985). Under this first prong of the analysis, “[w]hether a change in state law has resulted in ‘a substantial impairment of a contractual relationship’ itself requires consideration of three factors: ‘[1] whether there is a contractual relationship, [2] whether a change in law impairs that contractual relationship, and [3] whether the impairment is substantial.’” *Gillette Commercial Operations North America & Subsidiaries v Dep’t of Treasury*, 312 Mich App 394, 408, 878 NW2d 891 (2015) (citation omitted). For purposes of this analysis, “an impairment takes on constitutional dimensions only when it interferes with reasonably expected contractual benefits.” *Id.* at 413-414, 878 NW2d 89, quoting *Borman, LLC v 18718 Borman, LLC*, 777 F3d 816, 826 (CA 6, 2015). If it is determined that the state law resulted in a substantial impairment of a contractual relationship, courts must then examine the second and third prongs, as follows: by

determining whether “the legislative disruption of contract expectancies [is] necessary to the public good,” and whether “the means chosen by the Legislature to address the public need are reasonable.” *In re Certified Question*, 447 Mich at 777, 527 NW2d 468. [Footnotes omitted.]

Applying the three-pronged test here for the contract clause issues, the Court of Appeals’ novel interpretation of the statute constitutes a substantial impairment of contractual relationships by and between the Pool and these Counties and all of the Pool’s constituent road commission members. As for the second prong, this disruption of the contractual expectancies is not necessary in any way for the public good. In fact, it is a disruption of the public good to the extent that it destabilizes the Pool and its members, deterring them from their purposes and goals. The third prong requires that the means chosen by the Legislature to address the public need be reasonable. To vitiate these contractual relationships that were in existence and enforced for years before the Legislature allowed for Counties to dissolve their road commissions is unreasonable. Hence, if the Court of Appeals’ public-policy decision is correct, then that Court’s interpretation of the statute is itself unconstitutional under the Contract Clause.

What the Court of Appeals has held results in a huge and costly disruption of the Pool and the expectations of its members, not to mention the expectations of members and administrators of other inter-governmental agreements. This Court should grant leave to appeal to give a full and careful consideration of this matter, particularly where the dispositive issue in the Court of Appeals was never briefed or argued by either party.

CONCLUSION

The Pool respectfully requests that this Court grant leave to appeal, reverse the decision of the Court of Appeals, and reinstate the Circuit Court’s summary dismissal of the plaintiffs’ claims. Alternatively, the Pool asks for summary reversal with the same outcome. At a bare

minimum, the Pool requests that the Court schedule oral argument on the Application so that the important issues presented can be fully vetted.

DATED: November 26, 2019

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