STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM COURT OF APPEALS
Fitzgerald, P.J., and Neff and White, J.J.

ALBERTA STUDIER, PATRICIA M. SANOCKI, MARY A. NICHOLS, LAVIVA M. CABAY, MARY L. WOODRING, AND MILDRED E. WEDELL,

Plaintiffs-Appellants,

v

MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD, MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM, MICHIGAN DEPARTMENT OF MANAGEMENT AND BUDGET, AND TREASURER OF THE STATE OF MICHIGAN,

Defendants-Appellees,

_____ /

Supreme Court No. 125765

Court of Appeals No. 243796

Ingham County Circuit Court
No. 00-92435-AZ

BRIEF OF DEFENDANTS-APPELLEES' MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD, *et al* IN CASE NO. 125765

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES iii

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW iv

INTRODUCTION 1

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS 3

ARGUMENT 9

I. "Accrued Financial Benefits" as used in Const 1963, art 9, §24, does not include Health Care benefits. 9

A. Standard of Review 9

B. Applying the rules for construing the Constitution, "accrued financial benefits," as used in Const 1963, art 9, §24, does not include health benefits. 9

1. The phrase "accrued financial benefits" as that term is commonly understood does not include health care. 9

2. The circumstances surrounding the adoption of Const 1963, art 9, §24 and the purpose sought to be accomplished by its adoption make it clear that Const 1963, art 9, §24 was included to safeguard public employees' pension checks not health benefits. ... 12

C. MPSERS' non-bargained vested health care benefit is not an "accrued financial benefit." 15

D. No contract or promise was made to MPSERS retirees that their health benefits were protected or guaranteed under the Michigan Constitution. 19

E. Health Benefits are not considered a financial benefit because they are not in the form of monetary compensation as contemplated by the Constitutional Convention delegates. 20

II. The changes made in 2000 by the Michigan Public School Employees' Retirement Board and the Department of Management and Budget to the Plan for public school retirees did not violate the prohibition against impairment of contract found in Const 1963, art 1, §10 and US Const, art I, §10. 26

A. Standard of Review. 26

B. MCL 38.1391(1) does not create a contract. 26

C. Assuming, arguendo, that MCL 38.1391(1) created a contract, the changes made to the Plan in 2000 by the Board and the Department do not impair that contract. 26

1. Changes made in 2000 to co-pays for prescription drugs did not impair any contract. 29

2. Changes made in 2000 to the deductibles and co-pays did not substantially impair any contract. 30

3. Even if there is a substantial impairment, it does not violate the contract clause..... 36

III. There was no dispute of fact and, thus, the Trial Court properly granted Defendants' Motion for Summary Disposition and the Court of Appeals correctly affirmed. 43

A. Standard of Review. 43

B. The Court of Appeals correctly affirmed the dismissal of Plaintiffs' First Amended Complaint. 43

Conclusion and Relief Sought 49

INDEX OF AUTHORITIES

Page

Cases

1974 N.J. Laws, c. 25; N.Y. Laws, c. 993 41

Advisory Opinion re Constitutionality of 1972 PA 258,
389 Mich 659; 209 NW2d 200 (1973),..... 11, 14

Allen v City of Long Beach,
45 Cal2d 128, 131; 287 P2d 765 (1955)..... 33

Allied Structural Steel Co v Spannous,
438 US 234, 244; 98 S Ct 2716; 57 L Ed2d 727 (1978)). 27

Ameritech Mich v Public Service Commission,
460 Mich 396, 414; 596 NW2d 164 (1999)..... 24

Baltimore Teachers Union v Mayor of Baltimore,
6 F3d 1012, 1017 (CA 4, 1993)..... 31, 36

Brown v City of Highland Park,
320 Mich 108; 30 NW2d 798 (1948)..... 13

Burlington Fire Fighter's Ass'n v City of Burlington,
149 Vt 293, 298; 543 A2d 686 (1988)..... 33

Campbell v Judges' Retirement Board,
378 Mich 169; 143 NW2d 755 (1966),..... 38, 39

Duncan v Retired Public Employees of Alaska, Inc,
71 P3d 882 (Alas 2003) 24

El Paso v Simmons,
379 US 497, 506-507; 88 S Ct 577; 13 L Ed29 446 (1965) *reh den* 380 US 926; 85 S Ct 879;
13 L Ed2d 831 (1965)..... 30

Energy Reserves Group, Inc v Kansas Power & Light Co,
459 US 400, 411; 103 S Ct 697; 74 L Ed2d 569 (1983)..... 31, 36

General Motors Corp v Romein,
503 US 181, 186; 112 S Ct 1105; 117 L Ed2d 328 (1992)..... 27, 28

Hammond v Hoffbeck,
627 P2d 1052, 1056 (Alas 1981) 24

Holmes v Michigan Capital Medical Center,
242 Mich App 703, 711; 620 NW2d 319 (2000), *app den* 465 Mich 899; 636 NW2d 144 (2001) 47

In Re Certified Question, 447 Mich at 777. 27

Isagholian v Transamerica Insurance Corporation,
208 Mich App 9, 11; 527 NW2d 13 (1994) 3

Joy Oil Co v Fruehauf Trailer Co.,
319 Mich 277, 280; 29 NW2d 691 (1947) 44

Jurva v Attorney General,
419 Mich 209, 212; 351 NW2d 813(1984), ... 14, 21

Kosa v Treasurer of Michigan,
408 Mich 356, 371; 292 NW2d 452 (1980) 11

Lippman v Board of Education,
66 NY 2d 313; 487 NE2d 897 (1985) 11

McCormic v Auto Club Ins Ass'n,
202 Mich App 233, 237; 507 NW2d 741 (1993) 43

McCulloch v Maryland,
17 US 316; 4 L Ed 579 (1819) 23

McDougall v Schanz,
461 Mich 15, 23; 597 NW2d 148 (1999) 26

McMinn v City of Oklahoma City,
1997 OK 154; 952 P2d 517 (1997) 16

Musselman I,
448 Mich at 528 ..... 20, 21

Musselman II,
450 Mich at 579-580 22

Musselman v Governor ("Musselman I"),
448 Mich 503; 533 NW2d 237 (1995), ... 17

Musselman v Governor (on Rehearing) ("Musselman II"),
450 Mich 574; 545 NW2d 346 (1996) 17

Musselman v Governor,
450 Mich 574, 579; 534 NW2d 346 (1996) 10

Omscolite Corp v Federal Ins Co,
374 Mich 344, 348; 132 NW2d 154 (1965) 44

Peiffer v General Motors Corp,
177 Mich App 674, 677, 443 NW2d 178 (1989) 22

Peninsular Construction Co. v Murra,y
365 Mich 694, 699; 114 NW2d 202 (1962) 48

Port Huron Area School Dist v Port Huron Ed Ass'n,
120 Mich App 112, 116; 327 NW2d 413 (1982) 21

Quinto v Cross & Peters Co,
451 Mich 358, 362-363; 547 NW2d 314 (1996), ... 43, 44, 48

Rakestraw v General Dynamics Land Systems, Inc,
469 Mich 220, 224; 666, NW2d 199 (2003) 11, 29, 33

Romein, 503 US at 186 27

Sappington v Orange Unified School District,
119 Cal App 4th 949; 14 Cal Rptr 3d 764 (2004) 34

Shelby Township Police v Charter Township of Shelby,
438 Mich 247, 253; 475 NW2d 249 (1991) 10

Smith v Globe Life Ins Co,
460 Mich 446, 454; 597 NW2d 28 (1999) 43

Soap & Detergent Ass'n v NRC,
415 Mich 728, 745; 330 NW2d 346 (1982) 9, 20

Studier v Michigan Public School Employees' Retirement Bd 2, 4, 29

Thorning v Hollister School District,
11 Cal App 4th 1598; 15 Cal Rptrs 2d 91 (1992) 16, 17

Transport Workers, Local 290 v SEPTA,
145 F3d 619, 622 (CA 3, 1998). 31, 32

Tyler v Livonia Public Schools,
459 Mich 382, 396; 590 NW2d 560 (1999), ... 11

United States Trust Co v New Jersey,
431 US 1, 21; 52 L Ed2d 92; 97 S Ct 1501 (1977), ... 30, 41

United States Trust Co, supra 40

Washtenaw Community College Education Ass'n v Board of Trustees of Washtenaw Community College,
50 Mich App 467, 472; 213 NW2d 567 (1973) 30, 39, 40

Weiner v County of Essex,
262 *NJ Super* 270; 620 A2d 1071 (1992); 16

Wojcik v City of Romulus,
257 F3d 600 (CA 6, 2001) 28

Statutes

MCL 38.1301 33

MCL 38.1334(1). 14

MCL 38.1334(2) and 28.1341(2) 15

MCL 38.1341 ..... 37, 42

MCL 38.1384 10

MCL 38.1391(1). 28, 30

MCL 8.3a 11, 29, 33

Rules

MCR 2.116(C)(10) 43

MCR 7.212(C)(6) 3

MCR 7.302 (G)(4)(a) 19, 29

MCR 7.306(A), ... 3

MCR 7.309(A) 3

MCR 7.311(A) 3

Constitutional Provisions

Const 1963, art 1, §10 ..... 2, 3, 26, 28, 49

Const 1963, art 9 § 24 ..... 1, 17, 18

Const 1963, art 9, § 24; 2 1

US Const, art I, §10 ..... passim

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. **The Michigan Public School Employees' Retirement Board and the Department of Management and Budget provide a Health Benefits Plan for retirees of the Michigan Public School Employees' Retirement System pursuant to MCL 38.1391(1). Modifications were made to the Plan in 2000. Const 1963, art 9, §24 prohibits the diminishment or impairment of "accrued financial benefits." Is the Plan an "accrued financial benefit" as that phrase is used in Const 1963, art 9, §24?**

The Defendants-Appellees' answer: No.

The Plaintiffs-Appellants' answer: Yes.

The Trial Court's answer: No.

The Court of Appeals' answer: No.

II. **The Michigan Public School Employees' Retirement Board and the Department of Management and Budget previously authorized a Health Benefits Plan for retirees of the Michigan Public School Employees' Retirement System pursuant to MCL 38.1391(1). The Board and the Department changed the Plan in 2000 by increasing the number of medical procedures and prescription drugs covered by the Plan and by minimally increasing deductibles and co-pays for prescription drugs. Did this change violate the prohibition against impairment of contract found in Const 1963, art 1, §10 and US Const, art I, §10?**

The Defendants-Appellees' answer: No.

The Plaintiffs-Appellants' answer: Yes.

The Trial Court's answer: No.

The Court of Appeals' answer: No.

III. **Plaintiffs have admitted that the Plan for health benefits for retirees of the Michigan Public School Employees' Retirement System may have co-pays and deductibles. Plaintiffs did not dispute the Defendants' affidavit which established that historically the Michigan Public School Employees' Retirement System has paid about 80% of the total cost of the health benefits and retirees about 20%. The changes made to the Plan in 2000 did not appreciably change this ratio. Did the Court of Appeals err in affirming the Trial Court's grant of summary disposition to the Defendants?**

The Defendants-Appellees' answer: No.

The Plaintiffs-Appellants' answer: Yes.

The Trial Court's answer: No.

The Court of Appeals' answer: No.

INTRODUCTION

Defendants-Appellees (Defendants) filed their brief as Appellants in *Studier v Michigan Public School Employees' Retirement Bd,* Docket No. 125766, on November 19, 2004. The procedural and factual background for this case were set forth in the Statement of Proceedings and Facts in Defendants brief as Appellants in Docket No. 125766 and are hereby incorporated. The facts are supplemented in this brief, as necessary.

In this brief, Defendants address three issues: 1) whether health benefits are "accrued financial benefits" as that phrase is used in Const 1963, art 9, § 24; 2) whether the increase in health insurance deductibles (deductibles) and prescription drug co-payments (co-pays)[1] impair existing contractual obligations in violation of Const 1963, art 1,§ 10, US Const, art I, §10 and Const 1963, art 9, § 24; and 3) whether the Court of Appeals correctly affirmed the Trial Court's grant of Defendants' Motion for Summary Disposition.

The phrase "accrued financial benefits," as it is used in Const 1963, art 9 § 24, does not include health care benefits. When Const 1963, art 9, § 24 was adopted by the citizens of Michigan, health benefits were not provided to retirees of the Michigan Public School Employees' Retirement System (MPSERS). The purpose for adopting § 24 was to protect the pensions[2] of retirees. At the time Const 1963, art 9, § 24 was adopted, pensions did not include health care coverage. Thus, when the Michigan voters adopted the Constitution they could not have intended to include health benefits in "accrued financial benefits" because such benefits were not available at that time.

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[1] The deductibles and co-pays were implemented January 1, 2000 and April 1, 2000, respectively, to the Master Health Care Plan (Plan) (2000 Plan Modifications), authorized by the Michigan Public School Employees' Retirement Board (Board) and the Department of Management and Budget (Department)

[2] Pension, as it is used in this brief, refers to retirement allowance consisting of financial compensation paid monthly to a retiree based on salary and years of service. See MCL 38.1307; 38.1381 and 38.1384.

Section 91 of the Michigan Public School Employees Retirement Act, 1980 PA 300, MCL 38.1391(1) (Act) does not create a contract. MCL 38.1391(1) delegates the power to authorize a health plan to the Board and the Department which includes the discretion to increase deductibles and co-pays. Defendants' 2000 Plan Modifications to deductibles and co-pays are minimal, reasonable and do not constitute a substantial impairment of any contract.

Plaintiffs argue that by increasing deductibles and co-pays, the Defendants have shifted the burden of who pays for retiree health benefits, thus impairing the contract to pay for health care. (Plaintiffs' Brief, p 8) However, Plaintiffs concede that some co-pays and deductibles are permissible. (Plaintiffs' Brief, p 8, 10) If some co-pays and deductibles are permissible and do not violate a contract, then increasing the co-pays and deductibles cannot impair any contract.

As noted in *Studier v Michigan Public School Employees' Retirement Bd,* Docket No. 125766, this case affects all public school employee retirees, and future retirees, not just the six named Plaintiffs. MPSERS paid over $370,000,000.00 in 2000 for retiree health care costs. (Defendants' Appendix 85a) Between 1993 and 2000 this cost almost doubled (*Id.*) and is projected to increase significantly in foreseeable years.[3] Assuming arguendo, this Court finds that MCL 38.1391(1) creates a contract, it has not been impaired because the 2000 Plan Modifications were for the legitimate governmental purpose of protecting schools from having to pay all of the tremendous increased costs of health care. As a result, this Court should affirm that portion of the decision of the Court of Appeals that held that Defendants' 2000 Plan Modifications are not substantial impairments in violation of Const 1963, art 1,§ 10, US Const, art I, §10 and Const 1963, art 9, § 24.

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[3] See Citizens Research Council of Michigan, Financing Michigan Retired Teacher Pension and Health Care Benefits, Report 337, http://www.crcmich.org (September 2004).

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

Plaintiffs' brief does not fully comply with MCR 7.306(A), MCR 7.309(A) and MCR 7.212(C)(6) because its Statement of Facts contains several pages with virtually no references to the record. (Plaintiffs' brief, pp 5, 6-8, 10) In *Isagholian v Transamerica Insurance Corporation,* 208 Mich App 9, 11; 527 NW2d 13 (1994), the Court disregarded the defendant's statement of facts because it was self-serving and devoid of reference to the record. Plaintiffs' brief also makes reference to events which occurred in 2004 which are not part of the record. (Plaintiffs' brief, pp 6, 25-28) This Court's review is limited to the record. MCR 7.311(A) Therefore, this Court should reject that portion of Plaintiffs' Statement of Facts and Argument that are not supported with page references to the record and are not part of the record.

Procedural Facts

On March 15, 2004, Plaintiffs filed an Application for Leave to Appeal challenging the Court of Appeals' holding that the 2000 Plan Modifications were not substantial impairments of contract in violation of Const 1963, art 1, § 10, US Const, art I, §10; that health benefits are not "accrued financial benefits" as that phrase is used in Const 1963, art 9, §24; and that Defendants' Motion for Summary Disposition was properly affirmed. (Supreme Court Docket No. 125765) Plaintiffs did not appeal that portion of the Court's decision finding that the Plan did not include prescription drug coverage, or that MCL 38.1391(1) does not create a contract for prescription drug coverage.

On September 16, 2004, this Court issued an Order granting the Plaintiffs' Application for Leave. The Court directed the parties to include, among the issues briefed:

> [W]hether health benefits are "accrued financial benefits" within the meaning of Const 1963, art 9, §24, and whether the challenged health care plan amendments impair existing contractual obligations in violation of Const. 1963, art 1, § 10, and US Const, art I, § 10.

The Court further ordered that this case be argued and submitted together with *Studier v Michigan Public School Employees' Retirement Bd,* Docket No. 125766.

Substantive Facts

MPSERS is a cost-sharing, statewide, public school employee retirement system that provides a health care plan for retirees. (Defendants-Appellants' Appendix, Supreme Court No. 125766, hereinafter "Defendants' Appendix" 65a – 76a) Cost-sharing features, including the premium state subsidy and the percentage co-pays and some medical procedures have been a part of the health care plan since its inception in 1975. The Board and the Department have made changes and improvements to the Plan since 1975 that are too numerous to mention. A few examples are the inclusion of more procedures, prescriptions, and services which translate into a financial benefit to members as well as cost-sharing adjustments to allow the inclusion of additional benefits to the plan. Since 1985, over 100 new drugs have been added under the prescription drug benefit alone; 43 of those drugs were added in 1999 and 2000. Furthermore, coverage for 12 new or enhanced medical procedures were added in 2000. (Defendants' Appendix 67a – 76a)

On September 18, 1998, the Board adopted a resolution to increase health insurance deductibles from $145.00 to $165.00 for an individual and from $290.00 to $330.00 for a family effective January 1, 2000. Plaintiffs are challenging the 2000 deductible increase of $20.00 for individuals and $40.00 for family. These deductibles do not apply to prescription drugs. (Defendants-Appellees' Appendix, Supreme Court No. 125765, hereinafter "Defendants'-Appellees' Appendix" 4b – 5b)

On January 21, 2000, the Board amended the Plan by a vote of 8 to 3. (Defendants-Appellees' Appendix 9b – 10b) The amendments modified the Plan's prescription drug co-payment structure and out-of-pocket maximum for prescription drugs, effective April 1, 2000;

and implemented a formulary effective January 1, 2001. (Defendants-Appellees' Appendix 9b-10b)[4]

Plaintiffs are challenging the increased drug co-pays and the adoption of a "formulary" which is a preferred list of Federal Food and Drug Administration-approved drugs. It is designed to give preference to those competing drugs that offer the greatest therapeutic benefit at the most favorable cost. (Defendants-Appellees' Appendix 17b) Under the "formulary " eligible persons pay an additional 20% of a new non-formulary drug's approved cost only when use of the non-formulary drug is not pre-approved by the drug plan administrator. This would happen where the person's prescribing physician does not certify that use of the non-formulary drug is a medical necessity. All existing maintenance prescriptions outside of the formulary, including those of the Plaintiffs, were grandfathered in and are therefore subject to the standard co-payment of 20% of the drug's cost, with a $4 minimum and a $20 maximum. (Defendants-Appellees' Appendix 28b)

The prior prescription drug component of the Plan did not have a per person annual out-of-pocket maximum. Hence, a member's liability for co-payments was unlimited. The Board's modifications placed a $750.00 annual out-of-pocket drug maximum per person. (*Id*)[5]

As a package, the Plan provides hundreds of benefits to retirees for minimal cost-sharing components. It is undisputed that between 1993 and 2000, MPSERS paid about 80% of the total cost of the health care benefits provided to retirees and retirees paid about 20% of those costs.[6]

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[4] Plaintiffs admit that the Plan has always included cost-sharing (Plaintiffs' Brief, p 5).

[5] Plaintiffs, in footnote 3 on p. 6 of their brief, refer to Plan changes that are not at issue in this litigation, nor are they part of the certified record. Additionally, Plaintiffs erroneously imply the changes were implemented in the summer of 2004. The 2004 Plan Modifications will take effect in January 1, 2005. Thus, the 2005 Plan changes are not properly before the Court.

[6] Plaintiffs' without any support or reference to the record erroneously claim on page 10 of their brief that the State paid approximately 87% of Plan costs and retirees paying approximately 13% prior to 2000.

(Defendants' Appendix 77a – 82a; and Defendants-Appellees' Appendix 53b) The increased deductible and co-pays in the prescription drug program in 2000 did not significantly affect the overall cost split between MPSERS and the retirees.

Plaintiffs

Plaintiff Alberta Studier, an elementary school teacher with approximately 38 years of service credit, retired in 1985. She did not elect health insurance coverage as a retiree until December 1, 1988. (Defendants-Appellees' Appendix 13b) Ms. Studier would not have the benefit of five drugs added to the Plan, if she were limited by the drug benefits available when she retired. (Defendants' Appendix 65a – 76a; 68a, 71a, 72a, 74a)

Plaintiff Patricia Sanocki, an aide with 14.7 years of service credit, retired July 1, 1993. Her health care benefit coverage began in October 1993. (Defendants-Appellees' Appendix 13b) A review of Ms. Sanocki's prescription drug usage from April 2000 to September 2000 indicates that she used at least one drug added to the Plan after she retired. (Defendants' Appendix 65a – 76a)

Plaintiff Laviva Cabay, a bus driver with approximately 12 years of service credit, retired in August 1982 and did not elect to receive health care benefits until November 1983. (Defendants-Appellees' Appendix 13b) Her husband is also receiving health care benefits. (Defendants' Appendix 58a) Together they took nine prescription medications costing them $50 per month prior to April 1, 2000. (*Id*, ¶¶ 7, 10, & 12) During April through September 2000, the Cabays used four new drugs added to the Plan after Ms. Cabay retired. (Defendants' Appendix 65a – 76a)

Plaintiff Mary Woodring, an elementary teacher with approximately 27 years of service credit, retired in 1988 and, along with her husband, has been receiving health care benefits since

that time. (Defendants-Appellees' Appendix 13b) The Woodrings are using nine drugs that were not covered by the Plan when Ms. Woodring retired. (Defendants' Appendix 65a – 76a)

Plaintiff Mildred Wedell, an elementary teacher with approximately 29 years of service credit, retired in 1982. (Defendants-Appellees' Appendix 13b) Records show she is receiving retiree health insurance coverage as a dependent of her husband who elected this coverage in July of 1985. (Defendants-Appellees' Appendix 13b) Ms. Wedell takes six drugs not covered by the Plan when she retired. (Defendants' Appendix 65a – 76a)

A breakdown of the total prescription co-payments each plaintiff has incurred for the period January 1992 through September 2000 shows that an individual's condition is not static. Some individuals' costs may decrease, while others may increase. For example, Ms. Sanocki's total cost for co-payments was greater in **1994** ($172.00) than it was in the four subsequent years **1995** ($116.00), **1996** ($128.00), **1997** ($148.00), and **1998** ($140.00), despite her co-pay being lower in 1994 ($4.00) than it was in 1997 and 1998 ($8.00 for brand name and $4.00 for generic drugs). Ms. Cabay's total cost for co-payments was less in **1996** ($176.00) than it was in the three previous years **1993** ($180.00), **1994** ($204.00), and **1995** ($212.00). (Defendants-Appellees' Appendix 38b – 43b)

The table below illustrates the drug costs for Plaintiffs from April through September 2000. Column B shows the cost that would have been incurred before the 2000 plan changes. Column C shows that amount projected over one year. Column D provides the actual cost incurred for six months and Column E is the projection for one year. Finally, Column F provides the additional cost, if any, to each Plaintiff. The cost to Mr. Woodring is shown as a negative amount because the new $750 cap on prescription costs could actually save him $111.76.

A Plaintiff	B Old Plan Cost - 6 Months	C Old Plan Cost – 1 Year	D New Plan Cost – 6 Months	E New Plan Cost – 1 Year	F Additional Cost – 1 year
Studier	168.00	336.00	265.66	531.32	195.32
Cabay	87.81	175.62	116.34	232.68	57.00
Cabay, C.	56.00	112.99	60.25	120.50	8.50
Woodring	82.09	164.18	88.00	176.00	11.82
Woodring, G.	430.88	861.76	510.48	750.00	(111.76)
Sanocki	100.00	200.00	169.23	338.46	138.46
Wedell	200.00	400.00	268.30	536.60	136.60

(Defendants-Appellees' Appendix 29b – 37b)

In addition to the increased prescription drug costs, the Plaintiffs could also potentially experience an increased deductible expense of $20.00 for individual coverage and $40.00 for family coverage. The Plaintiffs would only experience this increase if they received medical services on which the deductible applies. Thus, according to this estimate, none of the Plaintiffs would have paid more than $220.00 per year in increased costs due to the changes to the Plan. In addition, Mr. Woodring could have saved at least $91.76 ($111.76-$20 deductible). The average increase in drug co-pays for the seven individuals listed in the chart is about $62.00. If each individual also incurred the additional $20.00 deductible cost, the total average cost increase under the change to the Plan was about $82.00.

ARGUMENT

I. "Accrued Financial Benefits" as used in Const 1963, art 9, §24, does not include Health Care benefits.

A. Standard of Review

The standard of review for constitutional issues is *de novo*. *McDougall v Schanz*, 461 Mich 15, 23; 597 NW2d 148 (1999).

B. Applying the rules for construing the Constitution, "accrued financial benefits," as used in Const 1963, art 9, §24, does not include health benefits.

Const 1963, art 9, §24 prohibits the state from diminishing or impairing "accrued financial benefits:"

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be contractual obligations thereof which shall not be diminished or impaired thereby.

The Court of Appeals, in its February 3, 2004 Order, concluded that health benefits do not constitute "accrued financial benefits." Applying the rules for construing the Constitution, this Court should also find that health benefits are not "accrued financial benefits," as that phrase is used in Const 1963, art 9, §24.

1. The phrase "accrued financial benefits" as that term is commonly understood does not include health care.

This Court, in *Soap & Detergent Ass'n v NRC*, 415 Mich 728, 745; 330 NW2d 346 (1982), described how the Constitution should be interpreted:

> First, the interpretation given the Constitution should be "the sense most obvious to the common understanding;" the one which "reasonable minds, the great mass of people themselves, would give it" [citations deleted]. Secondly, "the circumstances surrounding the adoption of the constitutional provisions and the purpose sought to be accomplished may be considered" [citations deleted].

The Legislature did not provide for health benefits for state retirees and school retirees until 1975, twelve years after the people of Michigan approved the Constitution which included art 9, §24. As a result, the common understanding of Const 1963, art 9, §24 was that health care

was not included within the phrase "accrued financial benefits." Since health benefits were not part of any state pension plan in 1963, it is not reasonable to conclude that art 9, §24 was to prevent the diminishment of health benefits simply because such benefits did not exist. Instead, reasonable minds would have correctly concluded that financial benefits were pension checks paid by the pension plan. Justice Weaver, in a separate opinion, in *Musselman v Governor*, 450 Mich 574, 579; 534 NW2d 346 (1996), reached this conclusion, saying:

> The pension and the retirement systems in place at the time of the 1961 Constitutional Convention consisted solely of monies paid in the form of a monthly stipend to a retired employee based on years of service. To the electorate, the juxtaposition could not have been more clear: financial benefits of each pension plan and retirement system would be prefunded. However, it would not have been anticipated that these systems included health benefits because health benefits simply did not exist, nor were they expressly included within the scope of accrued financial benefits.

Other language in the Constitution supports this conclusion. For example, the second sentence of Const 1963, art 9, §24 states:

> Financial benefits arising on account of <u>service rendered in each fiscal year shall be funded during that year</u> and such funding shall not be used for financing unfunded accrued liabilities. [emphasis added]

This language clearly relates to the obligation to fund pension payments based on the amount of service time rendered. As used here "financial benefits" cannot include health care benefits because the amount of health care benefits does not depend on the retiree's service time. "Accrued financial benefits" therefore refers to monthly pension payments because those payments are based upon the number of years of service. MCL 38.1384.

The courts have not concluded that the phrase "accrued financial benefits" includes health benefits. For example, in *Shelby Township Police v Charter Township of Shelby*, 438 Mich 247, 253; 475 NW2d 249 (1991), the Supreme Court held that the 1961 constitutional convention

intent in adopting art 9, §24 "...was to insure the proper maintenance and the actuarial integrity of the state pension system [footnote deleted]." The Court further stated in footnote 3 that:

> We defined "accrued financial benefits" as the right to receive certain pension payments on the basis of service performed. [citations deleted]. [*Id*, at 254. (Emphasis added).]

Health benefits are clearly not pension payments and are not defined based on time in service.

In *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659; 209 NW2d 200 (1973), this Court was asked whether 1945 PA 136, as amended by 1972 PA 258, section 174, which required public school employees to pay 5% more toward their retirement, violated Const 1963, art 9, § 24. The Court cited to the Official Record of the Constitutional Convention to conclude that "accrued financial benefits" was inserted in the 1963 Constitution to prevent reductions in the monetary pensions received by retirees. *Id.* at 662-663. Even so, the Court concluded that the increase of $84.00 per year caused by 1972 PA 258 did not subvert Const 1963, art 9, § 24. *Id.* at 664 See also *Kosa v Treasurer of Michigan*, 408 Mich 356, 371; 292 NW2d 452 (1980) and *Lippman v Board of Education*, 66 NY 2d 313; 487 NE2d 897 (1985).

In *Tyler v Livonia Public Schools*, 459 Mich 382, 396; 590 NW2d 560 (1999), the issue was whether Const 1963, art 9, § 24 prevented the coordination of Workers' Compensation payments with disability payments. The Court held that Const 1963, art 9, § 24 "protects only pension benefits....." *Id.* As previously noted, pension benefits in 1963 at the time of the adoption of the Constitution did not include health benefits.

The phrase "accrued financial benefits" should be construed according to its common and approved usage. MCL 8.3a, *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220, 224; 666, NW2d 199 (2003) In *Webster's Third New International Dictionary Unabridged,* (Copyright 1961), the definitions of "accrue," "financial," "benefits" and "pension" plan support this common understanding.

"Accrue:" 1) to come into existence as an enforceable claim; vest as a right; 2: to come by way of increase or addition: arise as a growth or result; 3: to be periodically accumulated in the process of time whether as an increase or a decrease." (*Id.* at 13)

"Financial:" 1) relating to finance or financiers; 2) in good standing as to payment of dues: paying dues." (*Id.* at 851)

"Finance:" 1a: the management or use of funds by a government , business, or individual; b: the study or science of the management of funds; 2) the pecuniary affairs or resources of a state, company, or individual; 3) financing." (*Id.* at 851)

"Benefit:" 1) an act of kindness; good deed; 2) something that guards, aids, promotes well-being; 3) payment, gift; (a): financial help in time of sickness, old age or unemployment; (b) a winning ticket or prize in a lottery; (c) a cash payment or service provided for under an annuity, pension plan or an insurance policy." (*Id.* at 205)

"Pension plan:" systematic provision by an employer for definitely determinable periodic incomes to employees upon retirement with or without funding." (*Id.* at 1672)

The definitions of these words, as they existed in 1961 when the Constitution was being debated, do not include any reference to hospital, medical-surgical, and sick care benefits. The plain meaning of the words confirm that health benefits are not included in the phrase "accrued financial benefits." Thus, the "common understanding, the one which reasonable minds, the great mass of people themselves" in 1963 would give to the phrase "accrued financial benefits" would be that it did not include hospital, medical-surgical, and sick care benefits, i.e., health benefits.

2. <u>The circumstances surrounding the adoption of Const 1963, art 9, §24 and the purpose sought to be accomplished by its adoption make it clear that Const 1963, art 9, §24 was included to safeguard public employees' pension checks not health benefits.</u>

The purpose for adopting §24 was to protect the pensions of retirees. This is clear from a review of the constitutional convention record. Constitutional delegate Mr. Van Dusen confirms this when he said:

> First to give to the employees participating in the plans a security which they do not now enjoy, by making the accrued financial benefits of the plans contractual rights. This you might think, would go without saying, but several judicial determinations have been to the effect that participants in pension plans for public employees have no vested interest in the benefits which they believe they have earned; that the municipalities and the state authorities which provide these plans provide them as a gratuity, and therefore it is within the province of the municipality or the public employer to terminate the plan at will without regard to the benefits which have been, in the judgment of the employees, earned.
>
> Now, it is a belief of the committee that the benefits of pension plans are in a sense deferred compensation for work performed. And with respect to work performed, it is the opinion of the committee that the public employee should have a contractual right to benefits of the pension plan, which should not be diminished by the employing unit after the service has been performed. [1 Official Record, Constitutional Convention 1961, pp 770-771.] [7]

Mr. Van Dusen went on to say:

> ...I would like to indicate that the words "accrued financial benefits" were used designedly, so that the contractual right of the employee would be limited to the deferred compensation embodied in any pension plan, and that we hope to avoid thereby a proliferation of litigation by individual participants in retirement systems talking about the general benefits structure or something other than his specific right to receive benefits.... [1 Official Record, Constitutional Convention 1961, pp 773-774.]

Mr. Van Dusen then concluded:

> ...What we are trying to deal with here are those <u>financial benefits</u> which have accrued. Once the employee by working pursuant to an understanding that this is the benefit structure presently provided, has worked in reliance thereof, he has the contractual right to those benefits which may not be diminished or impaired.... [1 Official Record, Constitutional Convention 1961, p 774, (Emphasis added)]

There is simply no mention in the constitutional convention record that medical benefits were to be included within the meaning of the term "accrued financial benefits." Moreover, since the delegates were attempting to guarantee a retiree's pension payments due to certain court decisions to the contrary, there is no reasonable basis to conclude that the delegates intended to

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[7] See for example, *Brown v City of Highland Park*, 320 Mich 108; 30 NW2d 798 (1948) where the court held that a pension granted by a city did not create a contractual obligation.

include medical benefits within the phrase "accrued financial benefits." See *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich at 662. More specifically, public retirement systems did not routinely provide for medical benefits at the time of the adoption of the Constitution. For example, state retirees and retired school employees did not receive health care benefits until 1974. See 1974 PA 216 and 1974 PA 244, respectively.

In *Jurva v Attorney General*, 419 Mich 209, 212; 351 NW2d 813(1984), the issue was whether early retirement incentives for teachers were in violation of the requirement in Const 1963, art 9, §24 that financial benefits had to be funded during the year in which the services were performed. This Court held:

> [E]arly retirement incentives are not benefits tied in time to service.... The dollar amount of the benefit is measured not by the number of years served (as it would be for purposes of calculating a pension), but rather by the number of years of relinquished employment. We find, therefore, that early retirement incentives are not "financial benefits arising on account of service rendered" and that Const 1963, art 9, § 24 is inapplicable.
>
> *****
>
> The overriding concern of the delegates to the Constitutional Convention was the establishment and maintenance of the actuarial soundness of the state's pension systems, not with the protection of other financial systems. [*Id.* at 224-225.]

The Court concluded that the early retirement incentives did not violate Const 1963, art 9, § 24 because the incentives did <u>not</u> come from the retirement system:

> If the school district were to fail to adequately fund the present accrued liability for pension benefits, the soundness of the pension system would be in jeopardy, whereas failure to provide adequate funds to pay retirement incentives would not have such an effect since those benefits are not paid from the retirement system. [*Id.* at 225.]

Section 34 of the State Employees' Retirement Act (Act) provides that the funds to pay health care benefits "...are not to be treated as pension assets for any purpose." MCL 38.1334(1). The costs of health care benefits are determined separately from the costs for

pensions and the assets to fund those benefits are kept separate. MCL 38.1334(2) and 28.1341(2). Thus, health care benefits cannot be "accrued financial benefits" as that term was used by the delegates who drafted Const 1963, art 9, § 24. Therefore, the Defendants' modifications of the Plan do not violate this constitutional provision and the Court of Appeals' decision on this issue should be affirmed.

C. MPSERS' non-bargained vested health care benefit is not an "accrued financial benefit."

Defendants' modification of the Plan does not violate Plaintiffs' rights under Const 1963, art 9, §24 because such increases neither diminish nor impair the Plaintiffs' accrued financial benefits in their pension plan.

The concept of an accrued benefit suggests that some identifiable portion of the benefit accrues each relevant time period. The second sentence of Const 1963, art 9, §24 states:

> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

This is clearly pension language. Health benefits, however, are not at all like pension benefits. Pension benefits deal with a single subject, the provision of a periodic income to a retiree. Pension benefits may be based on salary and service, a flat amount per year of service or some other easily calculable criteria. A health benefit plan is considerably more complex. (Defendants' Appendix 65a – 76a) New medical technologies become available, and new drugs come onto the market. It is impracticable to define an accrued health benefit. Even if such a definition were possible, taking into account the myriad procedures, technologies, drugs and other elements covered on any given day, it would mean that the accrued benefit of each retiree would differ based on the date of retirement or other point at which vesting occurred. Such a program would be virtually impossible to administer.

Plaintiffs suggest that the courts in *McMinn v City of Oklahoma City,* 1997 OK 154; 952 P2d 517 (1997); *Weiner v County of Essex*, 262 *NJ Super* 270; 620 A2d 1071 (1992); and *Thorning v Hollister School District*, 11 Cal App 4th 1598; 15 Cal Rptrs 2d 91 (1992) "viewed health benefits as part of 'pension benefits' or 'retirement benefits.'" (Plaintiffs' Brief, p 20) This is not accurate. In *McMinn*, the issue was whether an employment contract which classified plaintiff as a city employee "for retirement purposes" obligated the city to provide "fringe benefits such as health and life insurance" in addition to McMinn's monthly pension. The Oklahoma court did not view "health benefits as part of 'pension benefits' or 'retirement benefits'" as Plaintiffs here contend, but rather, held that the phrase "for retirement purposes" was ambiguous and could be construed to include more than a monthly pension payment. *McMinn* is not relevant here because the decision did not address whether the phrase "accrued financial benefits" includes health care benefits.

The issue in *Weiner, supra* was whether the County, as successor to the former welfare agency, was obligated to continue health benefits for those retirees of the welfare agency who were covered by a 1974 Welfare Board resolution affording benefits to employees with twenty-five or more years of service. *Weiner,* 262 *NJ* at 275. The New Jersey Court held that the post-retirement medical benefits conferred by the1974 resolution, adopted pursuant to statute, were property rights of employees employed at that time, which the county could not unilaterally terminate. *Id.* at 275. The Court noted that the County abolished the Welfare Board, restructured it, and assumed the functions of the Welfare Board. Additionally, the County Administrative Code provided that "pension fund membership and rights of any employee" would not be adversely affected by any transfer pursuant to the Code. *Id.* at 277. As a result, the Court held that the obligations assumed by the 1974 resolution were not extinguished simply because the county reorganized and eliminated the Welfare Board in 1979 and the obligation to pay health

benefits for retirees remained. *Id.* at 277, 284-286. This decision is inapplicable to the instant case, because it has no relevance to the issue of whether the phrase "accrued financial benefits" includes health care benefits. Moreover, the court implied that the health benefits could be changed if there was an express legislative modification of the statute upon which they were based. *Id.* at 285.

In *Thorning, supra* the issue was whether the health care benefits of a retired elected school board member could be unilaterally terminated. *Thorning,* 11 Cal App 4th at 1602-1603. The California Court concluded that health benefits promised during the member's term of office could not be terminated. *Id.* at 1605-1606. This decision also is not relevant here because it did not address the issue of whether "accrued financial benefits" includes health benefits.

Moreover, the issue in this case is the meaning to be given to Const. 1963, art 9, § 24 when it was adopted in 1963, not whether benefits conferred after one begins employment may be terminated. Since the delegates to the Constitutional Convention and the people who voted on the new constitution in 1963 could not have reasonably believed that health care benefits were included within art 9 § 24, that provision should not be interpreted now to include health care benefits.

Plaintiffs cite to other cases where "post-retirement health benefits have been referred to as 'defined compensation'" (Plaintiffs' Brief, p 22) Even if those cases reach such conclusions, they do not address the issue of whether health benefits are included within the phase "accrued financial benefits" as used in Const 1963, art 9, § 24. Simply because health benefits for retirees may be a form of deferred compensation, they are not included in Const 1963, art 9, § 24 because health benefits did not exist in 1963 when the Constitution was adopted.

In *Musselman v Governor ("Musselman I")*, 448 Mich 503; 533 NW2d 237 (1995), and *Musselman v Governor (on Rehearing) ("Musselman II")*, 450 Mich 574; 545 NW2d 346 (1996)

there exists considerable discussion about "accrued financial benefits," however, neither of these cases decided this issue.

Plaintiffs allege that the Attorney General argued in the two Musselman cases that the phrase "accrued financial benefits" had a different meaning when used in the first and second sentences of Const 1963, art 9 §24. (Plaintiffs' Brief, p 14-15) However, Plaintiffs admit that the arguments of the Attorney General in the two Musselman cases "are not binding on this Court or the Attorney General herein." (Plaintiffs' Brief, p 15) Moreover, the arguments made by the Attorney General in the *Musselman* cases were made on behalf of the defendants in each case, which are different than the Defendants in this case. Clearly, an attorney may fashion different arguments in different cases on behalf of different defendants. In this respect, Plaintiffs' arguments are not relevant to the issue of whether the phrase "accrued financial benefits" found in Const 1963, art 9 §24 includes health benefits.

Plaintiffs are correct that the phrase "accrued financial benefits" was included in Const 1963, art 9, §24 to protect an employee's pension plan. (Plaintiffs' Brief, p 20) However, Plaintiffs fail to consider or address the fact that in 1963, when the Constitution was adopted, an employee's pension plan did not include health benefits. Thus, the delegates to the Constitutional Convention could not have intended to include health benefits in the phrase "accrued financial benefits."

Assuming arguendo, that health benefits are accrued financial benefits, an analysis of whether there is a significant impairment is determined by looking at the Plan as a whole. Plaintiffs selectively focus on certain components of MPSERS Plan, specifically the prescription drug co-payments, as evidence to support their claim that the Plan has been significantly impaired. Plaintiffs, however, fail to look at the total benefits (drug, medical-surgical and hospitalization) provided by the Plan and what has happened to the Plan as a whole. Instead,

Plaintiffs argue that the "savings" expected to be produced by Plan changes are massive, and erroneously conclude that these changes constitute a substantial impairment. The "savings" referred to are in the nature of avoided future cost increases; and even with these savings, costs to MPSERS will rise more than the rate of inflation. (Defendants' Appendix 77a – 82a)

D. No contract or promise was made to MPSERS retirees that their health benefits were protected or guaranteed under the Michigan Constitution.

Plaintiffs argue that the State changed the method of funding health benefits from pre-funding to pay-as-you-go in 1992, causing concern among retirees about their health benefits in the future. As a result, Plaintiff's claim that a March 24, 1993 letter from the Governor and an October 20, 1994 letter from the Treasurer are evidence that the retirees' health benefits were contractually protected under the Michigan Constitution and therefore "accrued financial benefits" as that phase is used in Const 1963, art 9, § 24. (Plaintiff's Brief 22-23)

Plaintiffs failed to raise this issue in their Application for Leave to Appeal and are precluded from raising it now. See MCR 7.302 (G)(4)(a) If this issue is addressed, the Court should conclude that these two letters do not establish that the Executive Branch concluded that "accrued financial benefits" included health benefits, nor do the letters amount to a promise or contract.

The purpose of the Governor's letter was to explain that a change had occurred in the funding source for health benefits. He advised retirees that the change from pre-funding health care benefits to pay-as-you-go ".... will have no impact on any of your benefits, this year or in the future." This statement was not a promise or guarantee about health benefits being constitutionally protected. Moreover, the letter has nothing to do with whether "accrued financial benefits" as used in Const 1963, art 9, § 24 includes health benefits. In fact, the Governor's letter never mentions the Constitution or that health benefits may not be changed in

the future as a result of some other action that might be taken by the Legislature or the Board and the Department. (Plaintiffs' Appendix 89a)

The Treasurer's letter was sent to retirees to advise them that "[t]he fact that the MPSERS health plan has not been "pre-funded" since 1991 does not change..." the commitment to pay benefits under the retiree health insurance plans. In addition, the letter was to clarify that:

> Proposals under consideration in the Michigan Legislature regarding a defined contribution plan for future employees would have absolutely no impact on current employees or retirees."

While the letter states that "your basic pension benefits are protected under the Michigan Constitution" however, that sentence is included in the paragraph discussing defined contribution retirement plans which concerns monetary post-employment compensation. The letter does not state that health benefits are included in those basic pension benefits. Moreover, the letter does not refer to Const 1963, art 9, § 24. (Plaintiffs' Appendix 90a)

In any event, even if the meaning ascribed by the Plaintiffs is given to these two letters, written in 1993 and 1994, those letters should have no bearing on whether the great mass of people voting in 1963 understood that Const 1963, art 9 § 24 included health benefits. *Soap Detergent Ass'n*, 415 Mich at 745. Since the great mass of people did not have such an understanding, "accrued financial benefits" does not include health benefits.

E. Health Benefits are not considered a financial benefit because they are not in the form of monetary compensation as contemplated by the Constitutional Convention delegates.

Plaintiffs assert that the Court of Appeals erred when it agreed with Justice Riley's reasoning in *Musselman I*, that financial benefits referred only to monetary benefits. Specifically, they argue that Justice Riley erroneously relied on a proposed rule by the Financial Accounting Standards Board (FASB). They also argue that *Musselman I*, dealt with the funding requirements of the second sentence of Const 1963, art 9, § 24 and not the first sentence which is

at issue here. Finally, Plaintiffs argue that "financial" as used in Const 1963, art 9, § 24 should be more broadly defined than in the proposed FASB rule so that it includes health benefits. (Plaintiff's Brief, pp 24-25)

Plaintiffs' arguments should be rejected. First, the Court of Appeals' conclusion that health benefits are not accrued financial benefits is more important than the reason given by the Court of Appeals to support its conclusion. Based upon this Court's opinion as to how the Constitution is to be interpreted and the definition of "accrued financial benefits," when the Constitution was adopted, it is clear that the phrase "accrued financial benefits" in Const 1963, art 9, § 24 did not include health benefits. Thus, the conclusion of the Court of Appeals was correct.

Moreover, Justice Riley only used the proposed FASB rule as an example of how accounting standards address pension benefits in the financial world. She specifically stated that the decision in *Port Huron Area School Dist v Port Huron Ed Ass'n*, 120 Mich App 112, 116; 327 NW2d 413 (1982) was "even more illuminating" than the FASB rule for the proposition that accrued financial benefits did not include health care, and additionally relied upon the opinion in *Jurva v Attorney General*, 419 Mich at 224. *Musselman* I, 448 Mich at 528. Finally, Justice Riley looked to the intent of the framers of the Constitution to limit the term "benefit" by the modifier "financial." *Id.* at 530-531. Thus, Justice Riley's conclusion was correct because it was clear the framers only intended Const 1963, art 9, § 24 to include monetary benefits, not health benefits.

Second, the Court of Appeals also relied on the reasoning of Justices Weaver and Levin, in *Musselman II.* There, Justice Weaver in a concurring opinion properly reasoned that "accrued financial benefits" could not have included health benefits because when the Constitution was

written governmental pension plans that existed only granted monthly stipends, not health benefits. *Musselman* II, 450 Mich at 579-580.

Third, while both *Musselman I and II* dealt with the pre-funding issue addressed by the second sentence in 1963 Const, art 9, § 24, the phrase "financial benefits" would have to have the same meaning in each sentence. *Peiffer v General Motors Corp*, 177 Mich App 674, 677, 443 NW2d 178 (1989). In other words, the great mass of people voting on the Constitution would have concluded that "financial benefits" had the same meaning when used within the same article and section of the Constitution. Thus, the Court of Appeals properly relied on the reasoning in the *Musselman* decisions.

Plaintiffs refer to Statement No. 45 of the Governmental Accounting Standards Board (GASB) where it provides that the State is required to treat post-retirement health benefits the same as pension benefits in its financial reporting. Based on GASB statement 45, Plaintiffs argue that "post-employment benefits such as health care are most assuredly accrued financial benefits because they are, as Richard Van Dusen stated in 1961, 'deferred compensation' paid to employees after retirement." (Plaintiffs Brief p 28) This conclusion is incorrect.

The comments of the GASB, adopted in 2004 about health benefits, are not the standard to be applied to determine the meaning of "accrued financial benefits" in 1963 when the Constitution was adopted. The principles established by this Court for construing the Constitution is not controlled by governmental accounting standards announced 40 years after the Constitutional provision was adopted and has no relevance to what the delegates to the Constitutional Convention intended or what the people voting on the Constitution understood the phrase "accrued financial benefits" to mean. As previously discussed, the electorate could only reasonably believe that "accrued financial benefits" meant the periodic pension payments since pension plans in 1963 did not include health benefits.

The purpose behind GASB accounting standards is to establish uniform practices in preparing financial statements for accounting purposes. This uniformity allows accountants to determine if governments have the proper funds to pay for pension payments and health benefits. These standards, instituted for accounting uniformity, cannot be used to determine how the Constitution, written 40 years earlier, is to be interpreted.

Simply because the GASB requires health care costs to be accounted in a certain way and, for its purposes, considers health costs to be a form of deferred compensation, does not mean that they are accrued financial benefits. Mr. Van Dusen, as delegate to the Constitutional Convention, stated:

> Now, it is the belief of the committee that the benefits of pension plans are in a sense deferred compensation for work performed. [1 Official Record, Constitutional Convention 1961, p 770-771]

As may be concluded, when Mr. Van Dusen recognized that pension benefits were a type of deferred compensation, he was only referring to the monthly stipend that retirees received in 1961, since at that time retirees did not receive health benefits as part of any pension plan. Thus, it is incorrect for Plaintiffs to state that health benefits are accrued financial benefits because they may now be considered deferred compensation under GASB Statement 45, as adopted in 2004.

Plaintiffs argue that, because health benefits were not given to retirees in 1963, this Court should not infer that voters did not intend to exclude health benefits from the phrase "financial benefits." They cite to *McCulloch v Maryland*, 17 US 316; 4 L Ed 579 (1819) for the proposition that the United States Supreme Court has used an "expansive interpretation of the federal constitution's 'necessary and proper' clause (US Const, art 1, 38) to permit Congress to provide for a federal banking system." (Plaintiffs' Brief p 28) However, Const 1963 does not have a necessary and proper clause similar to the United States Constitution. Moreover, the

Michigan Supreme Court has not adopted an expansive interpretation of Const 1963, art 9, § 24. Thus, it is proper to conclude that "accrued financial benefits" did not include health benefits.

Plaintiffs' reliance on *Duncan v Retired Public Employees of Alaska, Inc*, 71 P3d 882 (Alas 2003) to support their position is also misplaced. Article XII, section 7 of the Alaska Constitution provides:

> Retirement Systems. Membership in employee retirement systems of the State or its political subdivisions shall constitute a contracted relationship. Accrued benefits of these systems shall not be diminished or impaired.

In *Duncan* the Court relied on *Hammond v Hoffbeck,* 627 P2d 1052, 1056 (Alas 1981) which held that retirement benefits are "regarded as an element of the bargained-for consideration given in exchange for an employee's assumption and performance of the duties of his employment." As a result, the Alaska Supreme Court held that the phrase "accrued benefits" included health benefits because the phrase was...

> without limitation, suggesting that whatever benefits might be provided by State retirement systems were meant to be covered. Nothing in the text of article XII, section 7, nor in the history of the Constitutional convention, suggests the founders intended to limit 'accrued benefits' to the particular types of benefit being provided by territorial retirement systems at the time of ratification of the Constitution. [*Duncan* 71 P3d at 887]

The *Duncan* decision is distinguishable from this case. Most significant is the fact that Const 1963, art 9, § 24 includes the phrase "accrued <u>financial</u> benefits" not just "accrued benefits." The word "financial" must be given meaning. *Ameritech Mich v Public Service Commission*, 460 Mich 396, 414; 596 NW2d 164 (1999). Moreover, "financial" limits and defines "benefits" which is not the case in Alaska's Constitution. By definition, "financial" limits the benefits to monetary payments and excludes health benefits. Finally, the intent of the framers of Const 1963, art 9, § 24 was only to protect retirement payments since the Courts had previously held that they were only gratuities. [1 Official Record, Constitutional Convention

1961, pp 770-771] Thus, the decision in *Duncan* is neither binding nor persuasive authority to reverse the Court of Appeals' decision below.

Plaintiffs rhetorically ask why voters who approved Const 1963, art 9, § 24 would want to protect pension payments but not health benefits. The simple answer is because in 1963 voters knew that retirement pension payments existed but that health benefits for retirees did not exist. Thus, voters could not have intended to protect health benefits. Moreover, voters knew that retirement pension payments were fixed by statute and therefore a known amount whereas the cost for health benefits was unknown. Therefore, it cannot be presumed that voters intended to guarantee payment for health benefits.

In summary, the phrase "accrued financial benefits" as used in Const 1963, art 9, § 24 does not include health benefits. The Constitutional Convention delegates did not intend to include health benefits within the phrase "accrued financial benefits" because the phrase was added *only* to reverse those Court decisions which held that retirement payments were gratuities. Moreover, the people who voted on Const 1963, art 9, § 24 could not have understood "accrued financial benefits" to include health benefits because health benefits for retirees did *not* exist as a part of a pension plan in 1963. Therefore, this Court should affirm the Court of Appeals' decision that held that Const 1963, art 9, § 24 did not include health benefits and that the 2000 Plan modifications did not violate Const 1963, art 9, § 24.

II. The changes made in 2000 by the Michigan Public School Employees' Retirement Board and the Department of Management and Budget to the Plan for public school retirees did not violate the prohibition against impairment of contract found in Const 1963, art 1, §10 and US Const, art I, §10.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *McDougall v Schanz*, 461 Mich 15, 23; 597 NW2d 148 (1999).

B. MCL 38.1391(1) does not create a contract.

As set forth in Defendants' Brief in Docket No. 125766, MCL 38.1391(1) does not create a contract because it does not contain the standard language found in a contract. It is clear that the Legislature did not intend to create a contract when it enacted MCL 38.1391(1) because it did not use the terms it used in other statutes where a contract was created. Moreover, the Legislature did not covenant that it would not amend MCL 38.1391(1). Instead, the Legislature simply set forth a policy, which it amended numerous times, that if the Board and the Department authorized a Plan for health benefits for retirees, MPSERS would pay the premium for these health benefits. Since MCL 38.1391(1) does not create a contract, the changes made in 2000 by the Board and the Department to the Plan provided to retirees do not violate Const 1963, art 1, §10 and US Const, art I, §10.

C. Assuming, arguendo, that MCL 38.1391(1) created a contract, the changes made to the Plan in 2000 by the Board and the Department do not impair that contract.

In 2000, MCL 38.1391(1) provided that the Board and the Department could authorize a plan for hospital, medical-surgical and sick care benefits for retirees and, if so authorized, MPSERS would pay the premium:

> The retirement system shall pay the entire monthly premium or membership or subscription fee for hospital, medical-surgical, and sick care benefits for the benefit of a retirant or retirant allowance beneficiary who elects coverage in the plan authorized by the retirement board and the department.

Plaintiffs argue this language creates a contract which requires MPSERS to pay the entire monthly premium and prohibits the Board and the Department from increasing deductibles and co-pays for prescription drugs. (Plaintiffs' Brief, pp 4, 8, 10-11) However, Plaintiffs admit they are not "exempt from paying any deductibles or co-pays or any increase in deductibles or co-pays." (Plaintiffs' Brief, p 8) As a result, there cannot be a contract which prohibits the increases made in the 2000 Plan modifications. In other words, since Plaintiffs recognize that MCL 38.1391(1) allows deductibles and co-pays, there is no contract that prohibits changing deductibles and co-pays.

Both the federal and state constitutions generally prohibit the enactment of state laws that impair existing contracts. The language in each is almost identical:

> No bill of attainder, *ex post facto* law or law impairing the obligation of contract shall be enacted. [Const 1963, art 1, §10.]
>
> No state shall...pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. [US Const, art I, §10] [8]

The first step in analyzing a possible impairment is to determine whether a change in state law has resulted in "the substantial impairment of a contractual relationship." *General Motors Corp v Romein*, 503 US 181, 186; 112 S Ct 1105; 117 L Ed2d 328 (1992) (quoting *Allied Structural Steel Co v Spannous*, 438 US 234, 244; 98 S Ct 2716; 57 L Ed2d 727 (1978)). This first step can be divided into "three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Romein*, 503 US at 186. See also, *In Re Certified Question*, 447 Mich at 777.

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[8] Because the clauses are almost identical, they are interpreted similarly. *In Re Certified Question*, 447 Mich at 765, 776-777; 527 NW2d 468 (1994), *cert den* 514 US 1127, 115 S Ct 2000, 131 L Ed 1001 (1995).

Assuming, arguendo, that MCL 38.1391(1) created a contract, there must be "a change in law [that] impairs that contractual relationship..." for a Constitutional violation to occur. *General Motors Corp*, 503 US at 186. In *Wojcik v City of Romulus*, 257 F3d 600 (CA 6, 2001) the city council passed a resolution denying the transfer of the plaintiff's entertainment license as part of his liquor license. The Court, relying on *General Motors Corp*, held that the resolution was not a change in the law and, therefore, no impairment could have occurred. Specifically, the Court held:

> [T]he council's decision not to reassign the entertainment permit was not a change in law, but merely an application of existing law that predated the contractual relationship at issue.

Wojcik, 257 F3d at 613.

In this case, no change was made in 2000 to MCL 38.1391(1). Instead, the Board and the Department simply applied MCL 38.1391(1) which gave them the right to authorize a Plan. Thus, there cannot be a violation of Const 1963, art 1, §10 or US Const, art I, §10.

The only requirement in MCL 38.1391(1) is that MPSERS pay the premium if the Board and the Department authorize a Plan. MCL 38.1391(1) does not prohibit the Board and the Department from creating a Plan with co-pays and deductibles. Here, the Board and the Department authorized a Plan which provides for co-pays and deductibles. Since MCL 38.1391(1) gives the Board and the Department the discretion to change co-pays and deductibles there is no impairment of contract.

The plain language of MCL 38.1391(1), does not require the Defendants to provide health benefits. Instead, MCL 38.1391(1) is permissive and simply allows the Board and the Department to authorize a Plan. The Legislature did not require the Board and the Department to include any particular types of treatments or procedures in a Plan that might be authorized, nor did the Legislature prohibit inclusion of co-pays and deductibles in the Plan. Thus, any changes

made in 2000 to the Plan could be made without impairing any contract because MCL 38.1391(1) did nothing other than provide the Board and the Department with the ability to authorize a plan. To have an impairment, the Defendants would have had to violate the terms of the contract. Here, Defendants were not required under MCL 38.1391(1) to do anything under the terms of the contract, so any changes they made could not impair a contract.

MCL 38.1391(1) provides that, if the Board and the Department authorize a Plan for health benefits, MPSERS will pay the entire premium. The Plaintiffs admit that MPSERS is paying the entire premium. (Plaintiffs' Brief, p 43) Thus, there cannot be any impairment of contract.

1. Changes made in 2000 to co-pays for prescription drugs did not impair any contract.

MCL 38.1391(1) does not require the Board and the Department to include coverage for prescription drugs in a Plan that it may authorize. In fact, prescription drugs are not even mentioned in the statute. The Court of Appeals held that MCL 38.1391(1) did not require the Board to provide prescription drug coverage. *Studier*, *supra* at p 477, n 10. The Plaintiffs did not appeal that holding in their Application for Leave to Appeal. Thus, this issue should not be addressed on appeal. MCR 7.302(G)(4)(a).

As previously noted, MCL 38.1391(1) requires MPSERS to pay the monthly premium "for hospital, medical-surgical, and sick care benefits." These terms should be given their common and ordinary meaning. MCL 8.3a and *Rakestraw*, 469 Mich at 224. Hospital, medical-surgical and sick care all modify "benefits." Benefits are defined as "something that is advantageous or good." Webster's Unabridged Dictionary of the English Language, copyright 2001, p 194. Hospital means "an institution where sick or injured persons are given medical or surgical treatment." *Id.* at 924. Medical-surgical is defined as "of or pertaining to the science or

practice of medicine," *Id.* at 1194, and "pertaining to or involving surgery or surgeons." *Id.* at 1915. Sick is defined as "afflicted with ill health or disease; ailing." *Id.* at 1775. Care is defined as "to watch over; be responsible for." *Id.* at 314.

Based upon these definitions, "hospital, medical-surgical and sick care benefits" are institutions and the practice of medicine and surgery that improve an illness. This language does not include prescription drugs. If the Legislature had intended MPSERS to pay the cost of prescription drugs, it would have included "prescription drugs" in MCL 38.1391(1). Since the Legislature did not use this language, it did not include prescription drugs in any contract created by MCL 38.1391(1).

2. Changes made in 2000 to the deductibles and co-pays did not substantially impair any contract.

Both the federal courts and the state courts have concluded that the contract clause does not bar all changes to a contract. For example, in *United States Trust Co v New Jersey*, 431 US 1, 21; 52 L Ed2d 92; 97 S Ct 1501 (1977), the Court said:

> The prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.

In *Washtenaw Community College Education Ass'n v Board of Trustees of Washtenaw Community College*, 50 Mich App 467, 472; 213 NW2d 567 (1973), the Court of Appeals quoted with approval from *El Paso v Simmons*, 379 US 497, 506-507; 88 S Ct 577; 13 L Ed29 446 (1965) *reh den* 380 US 926; 85 S Ct 879; 13 L Ed2d 831 (1965) that "it is not every modification of a contractual promise that impairs a contract." The Court of Appeals explained that "where a state is alleged to have impaired the obligation of contract, the state's economic interests and sovereign right...to protect the...general welfare of the people [citation omitted] must be balanced against the constitutional limitation." *Id.* at 472. Finally, the Court stated that a statute cannot be attacked under art 1, §10 "where the statute simply restricts a party to those benefits reasonably

to be expected from the contract." *Id.* at 475. The United States Supreme Court has also held that, "state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment." *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 411; 103 S Ct 697; 74 L Ed2d 569 (1983).

While the United States Supreme Court has not clearly defined what constitutes "substantial impairment," the U.S. Court of Appeals for the Fourth Circuit has concluded that "substantial impairment" may occur when "the right abridged was one that induced the parties to contract in the first place." *Baltimore Teachers Union v Mayor of Baltimore*, 6 F3d 1012, 1017 (CA 4, 1993). The U.S. Court of Appeals for the Third Circuit has concluded that substantial impairment may be determined "by inquiring whether legitimate expectations of the plaintiffs have been substantially thwarted." *Transport Workers, Local 290 v SEPTA*, 145 F3d 619, 622 (CA 3, 1998). Under either of these definitions, there has not been a substantial impairment of Plaintiffs' alleged contract.

In this case, the Plaintiffs began work and became members of MPSERS long before health benefits were provided in 1975. (Defendants' Appendix 48a – 64a) Thus, the alleged contract for health benefits could not have been the inducement for Plaintiffs to become school employees. After health benefits were provided in 1975, Plaintiffs only had an expectation that the premium would be paid on a Plan authorized by the Board and the Department. The Plaintiffs could not have legitimately expected that the Plan would never change or would not have co-pays and deductibles. This is especially true because the first Plan authorized by the Board covered only a certain number of medical procedures and prescription drugs and retirees were expected to pay a 10% co-pay on prescription drugs and some medical procedures. (Defendants' Appendix 65a – 67a)

In *Transport Workers, Local 290,* 145 F3d at 620-621, the Southeastern Pennsylvania Transportation Authority (SEPTA) was created by state statute. SEPTA was authorized by the statute to establish a retirement plan for its employees. Initially, the retirement plan provided that SEPTA would fully fund the benefits. In 1995, SEPTA amended the retirement plan to require employees to pay a portion of the costs of the retirement plan. *Id.* at 620-621. The Court concluded that no contractual relationship had been substantially impaired because the 1995 amendment did not thwart any legitimate expectation of the Plaintiffs. *Id.* at 622. In particular, the Court held that the statute contemplated that the retirement plan would be subject to modification by the SEPTA Board and that the employees might be required to pay part of the costs. Further, the retirement plan document stated that the retirement plan could be terminated. Thus, if SEPTA could terminate the retirement plan, it could modify it. These provisions gave notice to the employees that they may have to contribute. The Court held:

> Under these circumstances, an employee's reasonable expectation from the Plan contract cannot include a guarantee that an employee contribution would never be required. *Id.* at 622.

Likewise here, Plaintiffs knew that MCL 38.1391(1) and its predecessors gave the Board and the Department the right to authorize a plan and did not <u>require</u> that a Plan be provided in which MPSERS would pay all of the costs of every health benefit. As a result, Plaintiffs should have expected the Plan would be changed as medical science improved and costs increased. Since the Board and the Department may "authorize" a Plan, but are not required to do so, the Board and the Department could stop authorizing the Plan and effectively end it. If the Board and the Department may completely end the Plan, without impairment of contract, they can certainly modify the co-pays and deductibles included in the Plan. Thus, the modifications made by the Board and the Department in 2000 to the Plan did not substantially impair a contract.

Disadvantageous changes made to a contract do not constitute a substantial impairment if they are accompanied by similar advantageous changes that benefit the party. *Burlington Fire Fighter's Ass'n v City of Burlington*, 149 Vt 293, 298; 543 A2d 686 (1988), and *Allen v City of Long Beach*, 45 Cal2d 128, 131; 287 P2d 765 (1955). Here, the Board enhanced the Plan over the years by adding coverage for hundreds of new medical procedures and drugs. (Defendants' Appendix 65a – 76a) In 2000, the Board added or expanded coverage for 20 medical procedures and added coverage for 12 new drugs. (Defendants' Appendix 75a – 76a) Surely, coverage for these 20 procedures and 12 drugs more than offset the $20.00 per year increase in the deductible and the average $62.00 increase in co-pays.

MCL 38.1301, *et seq* does not contain a definition for "premium or membership or subscription fee." Thus, these words should be construed according to their common and approved usage. MCL 8.3a. *Rakestraw*, 469 Mich at 224. The common meaning of "premium" is "the amount paid or to be paid by the policyholder for coverage under the contract, usually in periodic installments." Webster's Unabridged Dictionary of the English Language, copyright 2001, p 1526. "Membership" is defined as "the state of being a member, as of a society or club." *Id.* at 1199. "Subscription" is defined as "the dues paid by a member of a club, society, etc." *Id.* at 1896. A "fee" is defined as "a charge or payment for professional services." *Id.* at 706. Thus, MCL 38.1391(1) requires MPSERS to pay the monthly cost of the health insurance coverage if the Plan is authorized. MPSERS does that as Plaintiffs admitted on page 43 of their brief. Therefore, MPSERS is not in violation of any contract that MCL 38.1391(1) may have created.

The premium paid for health care insurance may not fully pay for all of the medical procedures available. For example, the policy may only pay 90% of the cost of a hospital stay. Likewise, MPSERS pays for the insurance plan, however, that plan does not fully pay for all of the medical procedures available. As a result, retirees must pay certain deductibles and co-pays.

Thus, it is logical to conclude that the Legislature did not create a contract that requires MPSERS to pay the entire cost of hospital, medical-surgical and sick care benefits. Therefore, the Board did not impair any contract created by MCL 38.1391(1) when it included deductibles and co-pays in the Plan it authorized in 2000.

In *Sappington v Orange Unified School District*, 119 Cal App 4th 949; 14 Cal Rptr 3d 764 (2004), the plaintiffs were retired employees of the defendant. Plaintiffs alleged they had a vested right to a free Preferred Provider Option (PPO) health plan by virtue of policy 4244.2 adopted by the School District in 1976. That policy stated:

> The District shall underwrite the cost of the District's Medical and Hospital Insurance Program for all employees who retire from the District provided they have been employed in the District for the equivalent of ten (10) years or longer.

Id. at 951.

From 1977 to 1997 the District offered retirees free PPO coverage as well as other coverage. In 1998, due to rising costs the District required retirees to pay a charge if they wanted PPO coverage. By 2002-2003, this amount was $105.37 per retiree per month. *Id.* at 951-952.

The California Court of Appeals examined the language in Policy 4244.2 and concluded that the word underwrite did "not constitute a promise to pay the entire cost for enrolling in a District Health Plan." *Id.* at 954. As a result, the Court held:

> [A]ll the District promised retirees under the policy is to provide a medical insurance program in which they could enroll, and to subsidize their costs for enrolling in one of the plans offered. We conclude the retirees have no vested right under the policy to free PPO coverage.

Id. at 955.

Likewise in this case, MCL 1391(1) did not require MPSERS to pay the entire cost of health benefits, but only the premium in a Plan authorized by the Board and the Department. As

a result, the Plaintiffs have no vested right to have MPSERS pay for the entire cost of health benefits for retirees.

The Plaintiffs argue that increasing co-pays and deductibles under the Plan nibbles away at the amount MPSERS is required to pay as the premium. (Plaintiffs' Brief, pp 43, 52) However, MCL 38.1391(1) does not prohibit the use of co-pays and deductibles or changes to co-pays and deductibles. Indeed, the Plaintiffs admitted that deductibles are not unconstitutional. (Defendants-Appellees' Appendix 53b) Moreover, Plaintiffs admit that they are not contesting the payment of all co-pays or deductibles. (Plaintiffs' Brief, p 10) Since MCL 38.1391(1) does not prohibit co-pays and deductibles and Plaintiffs do not contest paying some co-pays and deductibles, there cannot be a contract impairment if the co-pays and deductibles are changed. In other words, if MCL 38.1391(1) does not create a contract prohibiting all co-pays and deductibles, there is no impairment of contract when the co-pays and deductibles are changed.

Even if prescription drug coverage is part of the contract allegedly established by MCL 38.1391(1), retirees can only receive a Plan that the Board has "authorized." As noted in the chart on page 8, even though co-pays have increased that fact has not appreciably increased Plaintiffs' costs. For example, Mr. Woodring could actually save $111.76 under the changes made in 2000. The co-pay has increased over time to maintain the relative share of the cost to be paid by retirees and to pay for the cost of adding new drugs to the Plan. Since the Board has authorized a Plan where the retirees pay a portion of their prescription drug costs, they reasonably could have expected changes to the Plan.

There is no dispute that the Board has continually improved the Plan by adding coverage for new procedures, new services and new drugs. (Plaintiffs' Brief, p 5)[9] These added benefits

[9] Plaintiffs also admit that the Defendants do not have to add new benefits. (Defendants-Appellees' Appendix 44b- 46b)

more than offset the small increase in deductibles and co-pays. Even if the Court were to find that not to be the case, the increased cost to retirees is reasonable. The actual increase in deductible costs was only $20.00 per retiree and the average cost increase for drug co-pays was only about $62.00 per year. (See pp 8-9) Furthermore, none of the existing Plaintiffs incurred more than $220.00 in total increased costs for deductibles and co-pays during the first full year of the Plan Modifications.[10] Thus, changes made to the Plan in 2000 did not substantially impair any contract.

3. Even if there is a substantial impairment, it does not violate the contract clause.

An impairment does not violate the Contract Clause when it is reasonable and necessary to achieve an important public purpose, such as remedying a broad and general social or economic problem. *Energy Reserves Group, Inc*, 459 US at 411-412. The modifications made to the Plan are reasonable in that they facilitate the public purpose of preventing the erosion of school funds and constitute a reasonable response to increasing health care costs.

Assuming, arguendo, that the 2000 Modifications did substantially impair the Plaintiffs' alleged contract, that impairment would not violate the contract clause. In *Baltimore Teachers Union*, the city agreed to pay school employees a specific wage in a collective bargaining agreement. However, in 1991, due to a budget crisis the city effectively cut teachers wages. *Id.* at 1014. While the Court found this to be a substantial impairment of the contract, it found that it did not violate US Const, art I, §10 because the city's action was reasonable under the circumstances. The city tailored its furlough plan to deal with a broad, generalized economic or

[10] Ms. Studier paid the most for the increased cost of drug co-pays of $195.32 for the year. When added to the $20.00 deductible increase, this would be less than $220 for the entire year. Mr. Cabay only paid $8.50 more during the year. Mr. Woodring could actually have saved $111.76 in drug co-pays. See p 9. Since the Supreme Court concluded in *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich at 664 that an increase of $84.00 did not impair a contract, an increase of $82.00 should not impair any contact.

social problem that applied to all employees and it impacted the reliance interests of the employees much like employees in regulated industries. Finally, the Plan was of limited duration. *Id.* at 1020-1021.

Similarly, the 2000 Modifications to the Plan were reasonable under the circumstances. The modifications were made to deal with the economic problem of significant increases in health care costs. The modifications applied to all retirees and it impacted the retirees much like employees in a regulated industry would be impacted. Thus, the 2000 Modifications did not violate the contract clause.

In 1999, the cost of health care paid by retirees was a fixed dollar amount of a $145.00 deductible and a $4.00 co-pay for generic and $8.00 for brand name drugs. The amount paid by MPSERS had no limit. Thus, the percentage of the total paid by MPSERS increased as the cost of health care increased. As an example, the percentage of the total cost paid by MPSERS increased from 80.4% in 1998 to 81.1% in 1999. (Defendants' Appendix 85a) Without a change to the portion of health care costs paid by retirees, the percentage by MPSERS would have continued to increase as overall costs increased. The modifications made by the Board and the Department in 2000 maintained the historic cost split between the system and retirees. While the percentage paid by MPSERS decreased in 2000, as the cost of health care continues to increase, the percentage paid by MPSERS will increase.[11]

If there is no sharing of increases in cost, the cost to MPSERS would become overwhelming. MPSERS receives its funds from schools pursuant to MCL 38.1341. Schools paid over $370 million in 2000 to provide health care benefits to retirees. (Defendants'

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[11] This is evident from the history of the plan. In 1996, the deductible was $95 per individual and $190 per family while MPSERS' share was 81.9%. The deductible was increased in 1997 to $125 per individual and $250 per family and MPSERS' share dropped in 1998 to 80.4%. However, as costs increased, MPSERS' share increased in 1999 to 81.1%. (Defendants' Appendix 85a)

Appendix 85a) If this amount is not controlled, funds available for school pupil instruction will be reduced because the tax revenue available to schools is finite.[12]

Plaintiffs rely on three cases to attack the Court of Appeals' decision which found no substantial impairment. (Plaintiffs' Brief, pp 31-41) In *Campbell v Judges' Retirement Board*, 378 Mich 169; 143 NW2d 755 (1966), the plaintiff circuit judges retired when Section 14 of the Judges' Retirement Act, 1951 PA 198,[13] as amended by 1956 PA 224, provided that plaintiffs were entitled to a pension equal to one-half of the annual salary currently being paid to active circuit judges. The Legislature amended this section by 1961 PA 169 so that retirees would receive one-half of their salary as it was at the time of retirement. 1963 PA 172 thereafter increased the salary of active judges. These two statutory changes resulted in retirees receiving a pension that was less than one-half of the new higher salary for active judges. *Id.* at 177-178. The Plaintiffs argued that 1956 PA 224 gave them the right to receive as a pension one-half of the salary of an active judge.

This Court concluded that the state had entered into a contract with the judges:

> [m]embership and contributions to the fund by the judges are voluntary and a written agreement is entered into between the judges who elect to do so and the judges' retirement board acting for the State. Here a contract is created by such mutual action on the part of the two contracting parties, with the judges' own money, earned as a part of their salaries, being by their consent...placed in the retirement fund...as consideration for the State's agreement to pay a pension to them.

Id. at 179-180. As a result, this Court held a contract was created and the Plaintiffs' right to one-half of the salary paid to an active judge could not be impaired by an amendment to the retirement statute. *Id.* at 181.

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[12] See www.crcmich.org: Report 337, September 2004, Financing Michigan Retired Teacher Pension and Health Care Benefits, a prohibition of the Citizens Research Council of Michigan.
[13] This was repealed by 1992 PA 234.

The facts of *Campbell* are distinguishable from this case in at least three important respects. First and foremost, the judges actually signed the contract required by Section 11 of 1951 PA 198, agreeing to be bound by the retirement act that included a pension allowance of one-half of an active judge's salary. In this case, there is no executed agreement between the Plaintiffs and the Defendants where Defendants agreed to give any specific health benefits to the Plaintiffs.

Second, *Campbell* involved payment of a retirement pension funded by mandatory contributions from the members. *Id.* at 177. This was the consideration for payment of the pension. *Id.* at 180. The instant matter involves health care benefits that are not funded by the Plaintiffs. Hence, there is no consideration.

Third, the holding in *Campbell*, has no applicability to the statutory scheme at issue in this case. In this regard it is significant that MCL 38.1391(1) does not prohibit co-pays and deductibles. Furthermore, there was no amendment to MCL 38.1391(1) in 2000 that changed whatever contract allegedly existed so as to cause an impairment. Finally, the changes made by the Board and the Department in 2000 did not diminish the Plaintiffs' benefits, but, instead, coverage was provided for 20 new or expanded medical procedures and 12 new drugs. (Defendants' Appendix 75a – 76a) Thus, the holding in *Campbell* is not a basis to reverse the Court of Appeals' decision that the changes made by the Board and the Department in 2000 did not impair any contract.

The second case upon which the Plaintiffs rely, *Washtenaw Community College Education Ass'n, supra*, is equally unavailing. In that case, the Plaintiff union of teachers at Washtenaw Community College executed a collective bargaining contract which provided that teachers could make deposits to a retirement fund and the College would match the contributions up to 5% of the teacher's salary. *Id.* at 469. Subsequently, the Legislature enacted 1970 PA 83

that prohibited the College from making contributions to more than one retirement fund. This eliminated the contributions in the agreement since the college was already required to make contributions to MPSERS. *Id.* at 470.

The Court of Appeals held that 1970 PA 83 impaired the collective bargaining contract because it "obliterated" the benefits set forth in the collective bargaining contract. The Court also concluded there was not "a clear statement of legislative intent" that 1970 PA 83 was passed to put MPSERS on a sound financial basis. *Id.* at 476. The Court further stated:

> Assuming such were the case for purposes of this appeal, we would agree requiring junior and community colleges to contribute to the public school employees' retirement fund would be a reasonable step toward alleviating the problem and would thereby be in furtherance of the general welfare of the state.

Id. at 467.

In this case, there was no legislative amendment to MCL 38.1391(1) in 2000. Thus, no changes were made to the alleged contract with retirees. Moreover, the changes made by the Board and the Department in 2000 did not "obliterate" the benefits to retirees but, in fact, increased them. (Defendants' Appendix 75a – 76a) Finally, the changes made by the Board and the Department were a reasonable step to alleviate the ever-rising cost of health care so as to further the general welfare of the State to keep schools from having to pay more of their limited revenue for retiree health benefits. Thus, *Washtenaw* does not support Plaintiffs' arguments.

The last case relied upon by Plaintiffs is *United States Trust Co, supra*. In that case, the New York Port Authority was created by statute as a compact between New York and New Jersey. In 1962, the two states entered in a statutory covenant to authorize the Port Authority to acquire, construct, and operate the Hudson & Manhattan Railroad and the World Trade Center. The statutory covenant read in part:

> The 2 States covenant and agree with each other and with the bondholders of any affected bonds...that so long as any of such bonds remain outstanding and unpaid

> and the holders thereof shall not have given their consent...(b) neither the States nor the port authority...will apply any of the rentals, tolls, fares, fees, charges, revenues or reserves, which have been or shall be pledged in whole or in part as security for such bonds, for any railroad purposes whatsoever other than permitted purposes hereinafter set forth. 1962 N.J. Laws, c. 8, §6; 1962 N.Y. Laws, c. 209, §6.

The Port Authority issued bonds in 1962 to acquire the railroad. In 1974, both New York and New Jersey passed laws repealing the 1962 statutory covenant. 1974 N.J. Laws, c. 25; N.Y. Laws, c. 993. Thus, the bondholders were not guaranteed payment. *Id.* at 9-14. The Plaintiff, the holder of some bonds, brought suit. The United States Supreme Court held that the repeal of the 1962 covenant violated the contract clause. *Id.* at 32.

United States Trust Co is distinguishable. First, the parties to the case did not dispute that the 1962 covenant constituted a contract between the states and the bondholders. Moreover, the statutory language creating the covenant was in terms of a contract. *Id.* at 18. In this case, MCL 38.1391(1) does not establish a contract between the parties.

Second, the repeal of the covenant totally eliminated the security provision for the bonds, which constituted a "serious disruption of the bondholders' expectations." *Id.* at 19. In this case, the Plan Modifications did not eliminate Plaintiff's health benefits nor cause a serious disruption in their expectations. The Plaintiffs could only have expected a reasonable Plan with reasonable co-payments and deductibles and that is what they had even after the Board's 2000 Modifications.

Third, the Port Authority borrowed money from the bondholders. New York and New Jersey guaranteed payment. Thus, the States were in the position of an ordinary citizen entering into a contract with another private person. *Id.* at 24-25, n 23. In this case, the Defendants did not borrow any money from the Plaintiffs and so the Defendants should not be viewed as ordinary citizens contracting with other citizens. Instead, the Defendants are acting as the arm of

the state to carry out the legislative policy of providing reasonable health benefits to retirees. The modifications made by the Board in 2000 to the Plan were necessary to pay for the increase in health care costs without adversely impacting school aid funds.

Fourth, the complete repeal of the 1962 statutory covenant by New York and New Jersey was not reasonable and necessary. The Court specifically noted several other alternatives less harmful to bondholders that could have been attempted. *Id.* at 30-31. The Court stated:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. [footnote deleted] So with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.

Id. at 25.

In this case, there was not a less drastic approach that could have been taken by the Board. There was no other alternative that would allocate the health care cost increases equitably between retirees and MPSERS. In fact, if the Board had not made the modifications it did, millions of dollars of the tax revenue that was provided to schools for public education would have instead gone to pay for a greater percentage of the health care costs of retirees. (See MCL 38.1341) This would have reduced the amount of funds available for classroom instruction. The modifications were thus warranted because they did not alter the reasonable expectations of retirees for health care coverage and retirees continue to receive the essential benefits of the Plan. Thus, if impairment of contract occurred as a result of the modifications made to the Plan in 2000, those modifications did not violate the contract clause of either the Michigan or United States Constitutions.

III. There was no dispute of fact and, thus, the Trial Court properly granted Defendants' Motion for Summary Disposition and the Court of Appeals correctly affirmed.

A. Standard of Review.

The proper standard of review for the grant of summary disposition, pursuant to MCR 2.116(C)(10), is *de novo*. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

In *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), the Supreme Court set forth the standard for reviewing a motion for summary disposition filed pursuant to MCR 2.116(C)(10):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
>
> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material dispute, the motion is properly granted. [*McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).]

B. The Court of Appeals correctly affirmed the dismissal of Plaintiffs' First Amended Complaint.

The trial court granted Defendants' Motion for Summary Disposition filed pursuant to MCR 2.116(C)(10) in its August 28, 2002 Order. The Court reached this conclusion based upon the affidavit of Phillip J. Stoddard filed as Exhibit K. (Defendants' Appendix 77a – 82a)

Plaintiffs agreed that the dollar figures in Exhibit K were correct (Defendants-Appellees' Appendix 52b)[14] Thus, there is no dispute of fact that should cause this Court to reverse the Court of Appeals' decision, that affirmed the Trial Court's decision. It is significant to note that Plaintiffs also filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10) asserting there were no genuine issues of material fact. (Defendants-Appellees' Appendix 47b – 50b) Thus, Plaintiffs likewise concluded there were no factual disputes.

The record clearly established that over the last several years MPSERS retirees have paid about 20% of the cost of their health care benefits and MPSERS has paid about 80%. (Defendants' Appendix 83a - 85a) The Plaintiffs did not dispute these figures. (Defendants-Appellees' Appendix 52b) The changes made by the Board in 2000 did not significantly change that ratio. Since the Plaintiffs did not refute Defendants' affidavit, "the motion was properly granted." *Quinto,* 451 Mich at 363. Thus the Court of Appeals decision to affirm was correct.

Plaintiffs argue that the facts relied upon by the Trial Court, such as Exhibit K, were "grossly inaccurate and dead wrong." (Plaintiffs' Brief, pp 47-48) However, since the Plaintiffs did not object to Exhibit K (Defendants-Appellees' Appendix 52b) at the trial court, they have waived this argument. *Omscolite Corp v Federal Ins Co*, 374 Mich 344, 348; 132 NW2d 154 (1965) and *Joy Oil Co v Fruehauf Trailer Co.*, 319 Mich 277, 280; 29 NW2d 691 (1947). Even if Plaintiffs did not waive this argument, Exhibit K is not substantially in error. During the preparation of their brief to the Court of Appeals, the Defendants discovered an error in Exhibit K. That error was corrected in Exhibit Q (Defendants' Appendix 83a 85a), which was filed with the Court of Appeals. As noted in paragraph 5 of Exhibit Q, the line entitled "Drug Co-payments" in Exhibit K had been erroneously subtracted twice from the amount listed in the line

[14] Defendants' Exhibit Q is an affidavit from Phillip J. Stoddard that corrects an error found in Exhibit K. The correction of the error does not substantially change Exhibit K. (Defendants' Appendix 83a – 85a)

entitled "Medical Net Payments." (Defendants' Appendix 84a) While this error involved millions of dollars because the line entitled "Drug Co-payments" was in the millions, the correction of this error did not substantially change the percentages in the graph contained in Exhibit K. MPSERS and retirees still paid about 80% and 20%, respectively of the cost of health care benefits. (Defendants' Appendix 85a)

Plaintiffs argue that the figures for 2000 are in error by percentages ranging to 21.9%. (Plaintiffs' Brief, p 48) However these changes occurred because the figures for 2000 were only preliminary when Exhibit K was submitted and now the figures are final. (Defendants' Appendix 83a – 84a) Even with these figures, the percentage of the health care costs paid by retirees was still only 21.7% for 2000. This amount is not inequitable since MPSERS' health care costs for 1999 had been 81.1%. Thus the approximate 80%-20% split was maintained.

Plaintiffs also argue that the errors in Exhibit K were "consistently wrong in the State's favor." (Plaintiffs' Application, p 49) However, the changes made to Exhibit K did not substantially change the relative percentage of costs paid by retirees. According to Exhibit K, in 1999 retirees paid 18.8% of the total cost of their health care and in 2000, 20.5%. (Defendants' Appendix 81a) According to Exhibit Q in 1999 retirees paid 18.9% of the total cost of their health care and in 2000, 21.7%. (Defendants' Appendix 85a) These changes are not so significant that Exhibit K is no longer a proper base upon which the Court could rely to grant the Defendants' Motion for Summary Disposition.

Plaintiffs attempt to establish there were genuine issues of material fact and cite to numerous excerpts from their experts' affidavits. (Plaintiffs' Brief, pp 44-46) These excerpts do not create a genuine issue of material fact for the following reasons.

Initially it must be noted that the third, fourth and fifth quotes from Plaintiffs' experts (Plaintiffs' Brief, p 44) compare the Plan for active members to that provided to the retirees

pursuant to MCL 38.1391(1). However, MPSERS has no statutory obligation to provide health benefits to active members and that obligation is left to each individual reporting unit (school district). Thus, this comparison of health benefits has no relevance to whether MCL 38.1391(1) created a contract which has been substantially impaired.

Second, all of the remaining quotes from the Plaintiffs' experts (Plaintiffs' Brief, pp 44-46) pertain to their opinions that there were increases in prescription co-pays. As previously noted, the Court of Appeals held that prescription drugs are not included in the contract allegedly established by MCL 38.1391(1). These opinions do not establish whether the contract to pay the "entire monthly premium" was substantially impaired. As a result, these opinions do not establish a factual dispute.[15]

Third, the quotes address only the cost of the health care plan to retirees without taking into account the additional medical procedures and new prescription drugs added to the Plan since 1975. In other words, even if the costs paid by retirees may have increased slightly over the years, retirees have received numerous new benefits that not only caused their costs to increase, but the added benefit has offset any added cost.

Fourth, the affidavits cited by the Plaintiffs discuss the proportional alleged percentage increase in costs from 1999 to 2000, but not how the Board's changes affected the historical 80%-20% split. Thus, these affidavits are not relevant to the issue of whether the Board's changes in 2000 impaired the historical 80%-20% split. Moreover, the affidavits cited by Plaintiffs contradict each other. As an example, Mr. Dolsky's affidavit of January 16, 2002 (Plaintiff's Brief, p 44; Plaintiffs-Appellants' Appendix Supreme Court No. 125765, hereinafter "Plaintiffs Appendix" p 478a) states that costs from 1999 to 2000 increased 36.1% for retirees

[15] Plaintiffs may argue Defendants' Exhibit K and Q also include co-pays for prescription drugs. However, the cost for prescription drugs can be easily subtracted from each year in the graph and the result still establishes that the relative cost sharing has not changed significantly.

and 8.2% for MPSERS while his affidavit of April 27, 2001 states that such costs increased 41.3% and 22.5%, respectively. (Plaintiffs' Appendix, p 209a) The affidavits from the same person are contradictory and thus not a reliable basis to establish a dispute of fact.

Fifth, Plaintiffs have not demonstrated how these various computations are relevant or how they demonstrate that the Court or Appeals erred. In considering the facts before it, the trial court concluded that the cost-sharing ratio between Plaintiffs and MPSERS over the last eight years was a valid method of ascertaining if there was substantial impairment. These amounts were specified in Exhibit K, which the Plaintiffs did not dispute.

Sixth, the Affidavit of Gordon Trapnell (Plaintiffs' Brief, pp 45-46; Plaintiffs' Appendix, pp 10a-11a) is unsubstantiated and unverifiable opinion. There is nothing in the record that support the assumptions and computations made in reaching his opinion. Moreover, simply because retirees were required to pay more, as a result of the 2000 Modifications, does not mean that there was a substantial impairment of contract. In other words, Mr. Trapnell's opinion is invalid because it does not take into account benefit enhancements made in 2000 that offset any higher costs.

Seventh, the computations used by Plaintiffs' experts do not include all the costs paid by MPSERS. For example, the administrative fees that MPSERS pays to Blue Cross and Blue Shield are substantial, amounting to over $45,000,000.00 in 2000. (Defendants-Appellees' Appendix 51b) The data used by Plaintiffs and the numerous percentages cited in the affidavits of their experts have omitted this significant element of the Plan costs. Thus the affidavits do not create an issue of fact.

Finally, to be valid, an affidavit must be a statement of fact. *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 711; 620 NW2d 319 (2000), *app den* 465 Mich 899; 636 NW2d 144 (2001). The affidavits of the Plaintiffs' actuaries are based on <u>estimates</u>. (Plaintiffs'

Brief, pp 44-45; Plaintiff's Appendix, pp 226a-227a, 470a) To establish that a genuine issue of material fact existed, the Plaintiffs had to set forth specific facts. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Since the Plaintiffs failed to do so, the trial court properly did not rely on the affidavits of Plaintiffs' experts.

Moreover, Plaintiffs' actuaries did not address if or how their estimates would change the approximate 80%-20% cost split between MPSERS and retirees. Thus, even if the actuaries' speculation is accepted, it would not have created a genuine issue of material fact with regard to the cost-sharing split relied upon by the trial court.

Plaintiffs argue that the Trial Court used the wrong standard to determine if there was a significant impairment; comparing the Plan for retirees to other state-wide plans. (Plaintiffs' Brief, pp 49-50) However, the Trial Court also relied on the undisputed fact that the cost split for health benefit costs have remained about the same with MPSERS paying about 80% since 1993. (Plaintiffs' Appendix, pp 559a-561a) This fact alone was enough to grant summary disposition since it established that no impairment occurred as a result of the 2000 Plan Modifications. Moreover, if the Trial Court reached the correct result, even if for the wrong reason, it should not be set aside. *Peninsular Construction Co. v Murra,y* 365 Mich 694, 699; 114 NW2d 202 (1962).

Thus, there is no basis to conclude that the Court of Appeals erred when it affirmed the Trial Court's dismissal of Plaintiffs' First Amended Complaint.

CONCLUSION AND RELIEF SOUGHT

Health care benefits are not included within the phrase "accrued financial benefits" as used in Const 1963, art 9, §24. Thus, the Court of Appeals did not err when it concluded that the Defendants did not violate Const 1963, art 9, §24.

The Court of Appeals correctly concluded that Defendants did not violate Const 1963, art 1, §10 and US Const, art I, §10, when they modified the Plan. There was no contract guaranteeing any particular Plan. As a result, the modifications did not impair any contract. Even if a contract existed, the modifications increased Plaintiffs' costs by only a few dollars, which cost was more than offset by new medical procedures and drug benefits covered by the Plan and did not amount to an impairment. Moreover, the modifications were justified as a reasonable response to meet the ever-increasing cost of health care. Therefore, the Supreme Court should hold that the 2000 Plan Modifications did not violate Const 1963, art 1, §10 and US Const, art I, §10.

Respectfully submitted,

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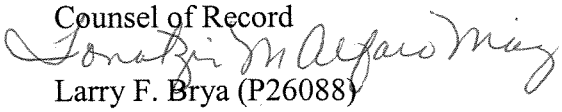

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