

STATE OF MICHIGAN
IN THE SUPREME COURT

ISKANDAR MANUEL, MAGGIE MANUEL,
JIMMY MANUEL, JOSEPH MANUEL, IMAD
MANUEL, ADEL MANUEL,

Plaintiffs-Appellees,

v

LT. TIMOTHY J. GILL, in his/her personal capacity,
LT. KENNETH KNOWLTON, in his/her personal
capacity, OFFICER RUSTY BANEHOFF, in his/her
personal capacity, CAPT. JIMMY PATRICK,
Retired, in his/her personal capacity, TRI-COUNTY
METRO NARCOTICS SQUAD, a Governmental
Agency, INGHAM COUNTY SHERIFF, in his/her
personal capacity, EATON COUNTY SHERIFF, in
his/her personal capacity, CLINTON COUNTY
SHERIFF, in his/her personal capacity, INGHAM
COUNTY, a Governmental Agency, EATON
COUNTY, a Governmental Agency, CLINT
COUNTY, a Governmental Agency, CITY OF
LANSING, a Governmental Agency, LANSING
CHIEF OF POLICE, in his/her personal capacity,
LANSING POLICE COMMISSION, a Governmental
Agency,

Defendants-Appellants.

Supreme Court No. 131103

Court of Appeals No. 258933

Ingham County Circuit Court
No. 03-1944-NO

**DEFENDANT TRI-COUNTY METRO NARCOTICS SQUAD'S
SUPPLEMENTAL BRIEF**

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Introduction

On November 2, 2007, this Court issued an Order granting Defendant Tri-County Metro Narcotics Squad's (hereinafter "Defendant" or "TCM") motion for reconsideration of its April 4, 2007 order denying Defendant's application for leave to appeal.¹ This Court directed the Clerk to schedule oral argument on whether to grant Defendant's application or take other peremptory action. This Court limited oral argument to the following two issues: 1) whether, in light of the statement in the Court of Appeals' judgment that a breach of contract action against Tri-County Metro Narcotics Squad (TCM) was possibly viable in the Court of Claims, TCM was an aggrieved party entitled to appeal, despite the Court of Appeals' affirmance of the Ingham Circuit Court's grant of summary disposition on all grounds; and, 2) whether the Court of Appeals erred in ruling that TCM is equivalent to a State agency. This Court invited the parties to file supplemental briefs.

Although TCM prevailed in the Court of Appeals, it was a Pyrrhic victory indeed, and TCM is a most assuredly an aggrieved party. The Court of Appeals affirmed the Trial Court's granting of summary disposition for TCM not on the legal merits, but on alternative jurisdictional grounds. In doing so, the Court of Appeals effectively granted relief to Plaintiffs by reversing the trial court's determination that Plaintiffs failed to state a claim for breach of contract and that the claim was, alternatively, barred by the statute of frauds. Further, the Court of Appeals erroneously concluded that since TCM was a juridical entity and the equivalent of a State agency, exclusive jurisdiction over this breach of contract claim lay in the Court of Claims. These rulings effectively changed the trial court's dismissal from one with prejudice to a lesser dismissal without prejudice, allowing this claim to be re-filed in the Court of Claims. Plaintiffs

¹ *Manuel v Gill*, Supreme Court No. 131103, 2007 Mich LEXIS 3861 (November 2, 2007).

have, in fact, done just that. Further, because the Court of Appeals' published decision remains the law of the case, appeal to this Court is the only vehicle by which Defendant can raise and obtain review of the following significant legal issues: whether a breach of contract claim has been pled; whether the claim is barred by the statute of frauds; and whether TCM is a juridical entity and, if yes, whether that juridical entity is the equivalent of a State agency invoking the exclusive jurisdiction of the Court of Claims.

The Court of Appeals' holding that TCM is the equivalent of a State agency is contrary to the interlocal agreement that governs TCM, which clearly indicates that the State is, at most, an equal but not a superior member of TCM. It is also contrary to the Urban Cooperation Act, which provides a way for public agencies to cooperate with each other but does not indicate an intent to make the constituent members who exercise joint power a part of any one of the participating bodies. At most, the Act creates a public body where the interlocal agreement has clearly created a separate administrative or legal entity. But it does not create a State agency with all the attendant rights and responsibilities. Thus, the Court of Appeals' holding that TCM is the equivalent of a State agency improperly extends the jurisdiction of the Court of Claims over Plaintiffs' contract claim against TCM.

I. Defendant is an aggrieved party for purposes of this appeal because the Court of Appeals reversed the trial court's determination that Plaintiffs failed to state a claim for breach of contract and, alternatively, that the claim was barred by the statute of frauds. While the Court of Appeals affirmed the dismissal, it was on jurisdiction grounds only, allowing the contract claim to be re-filed against TCM in the Court of Claims. Unless an appeal is granted to TCM, the law of the case doctrine prohibits further review of these issues and the Court of Appeals' published opinion stands as binding precedent not only as to TCM but all other such entities formed under the Urban Cooperation Act.

Black's Law Dictionary defines "aggrieved party" as "[a] party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a

court's decree or judgment."² As demonstrated by the substance of the Court of Appeals' Opinion and the procedural history of this case, TCM has most certainly been adversely affected by the Court of Appeals' decision.

On October 4, 2004, the 30th Circuit Court dismissed Plaintiffs' contract claim against Defendant TCM for failure to state a claim for breach of an oral contract and because any contract was covered by the statute of frauds. (Exh 1, Ingham County Circuit Court 10/04/04 Opinion and Order, Case No. 03-1944-NO.) On appeal to the Michigan Court of Appeals, case no 258933, the court determined that Plaintiffs had stated a claim for breach of an oral contract and that the statute of frauds was inapplicable. While the Court ultimately affirmed the dismissal on jurisdiction grounds, that reasoning was also faulty. The Court concluded that dismissal was appropriate because TCM is the equivalent of a State agency and, therefore, the Court of Claims has exclusive jurisdiction.³

- A. The Court of Appeals affirmed the trial court's opinion on jurisdictional grounds only, reversing the trial court on the legal merits and thus allowing Plaintiffs to re-file their contract claim against TCM in the Court of Claims.

Plaintiffs' breach of contract claim against Defendant TCM was one of a number of claims asserted in Plaintiffs' eleven-count Amended Complaint filed in the Court of Claims on December 9, 2003. With regard to the breach of contract claim, the trial court held that TCM was a juridical entity capable of being sued, but nevertheless dismissed Plaintiffs' claims of breach of contract for the following reasons: 1) Plaintiffs plead their claim for breach of contract in the most conclusory of terms; 2) no writing was provided to the Court to substantiate the existence of any agreement; and, 3) any oral agreement regarding reimbursement of costs and

² Black's Law Dictionary 1144 (7th ed 1999).

³ *Manuel v Gill*, 270 Mich App 355, 377-378; 716 NW2d 291 (2006), appeal den *Manuel v Gill*, 477 Mich 1067; 728 NW2d 869 (2007), review pending *Manuel v Gill*, Supreme Court No. 131103, 2007 Mich LEXIS 2861 (Nov 2, 2007). See also MCL 600.6419.

liabilities incurred or caused by third parties would clearly be barred by the statute of frauds.⁴ (Exh 1, circuit court order, pp 14-15).

Plaintiffs filed a delayed application for leave to appeal in the Court of Appeals, and the court accepted Plaintiffs' application. The Court of Appeals' subsequent opinion agreed with the trial court's conclusion that TCM is a juridical entity, but disagreed with and reversed the specific grounds of dismissal. The Court of Appeals determined that Plaintiffs' allegations were sufficient to state a claim for breach of contract and avoided the statute of frauds.⁵ The Court of Appeals also went further than agreeing with the trial court's determination that TCM was a juridical entity, concluding as well that TCM is "equivalent to a State agency," and therefore, that proper jurisdiction lay against the State in the Court of Claims.⁶ Thus, Court of Appeals concluded that the trial properly granted summary disposition for TCM on Plaintiffs' breach of contract claim, but for the wrong reason.⁷

As a result of this decision, TCM is an aggrieved party for purposes of this appeal. First, the Court of Appeals affirmed that TCM is a juridical entity subject to suit for damages, an error compounded by the Court of Appeals' affirmance and improper extension of that reasoning to find that TCM is not only subject to suit, but is the equivalent of a State entity subject to suit only in the Court of Claims. Second, the Court of Appeals reversed the trial court's ruling on the merits that Plaintiffs' contract claim fails as a matter of law and is, alternatively, barred by the statute of frauds, instead affirming the dismissal only on alternative jurisdictional grounds. Third, by effectively changing the dismissal from one with prejudice to one without prejudice, Plaintiffs were able to re-file the contract claim against TCM in the Court of Claims. By no

⁴ MCL 566.132.

⁵ *Manuel*, 270 Mich App at 376-377.

⁶ *Manuel*, 270 Mich App at 377 (citing the Court of Claims Act, MCL 600.6419).

⁷ *Manuel*, 270 Mich App at 378.

stretch of the imagination can this be seen as a victory for Defendants, despite the Court of Appeals' affirmance of the trial court's grant of summary disposition for all defendants on all Plaintiffs' claims. With these results, TCM is, unquestionably, an aggrieved party.

- B. Plaintiffs have re-filed their contract claim against TCM in the Court of Claims, and if this appeal is not granted, the published Court of Appeals' Opinion holdings that Plaintiffs have stated a contract claim that is not barred by the statute of frauds and that TCM is both a juridical entity and the equivalent of a State agency, remain the law of the case and prevent Defendant TCM from addressing these significant underlying legal issues again.

On August 25, 2006, Plaintiffs re-filed their contract claim against TCM in the Court of Claims, alleging an express or implied contract and seeking contract damages and/or unjust enrichment damages. (Exh 2, *Manuel v Gill*, Court of Claims No. 06-119-MK.) On January 25, 2007, the Court issued an Order staying the proceedings in the Court of Claims pending this Court's decision in *Manuel v Gill*, SC 03-1944-NO.

If this Court does not take up the issues presented by TCM in its application for leave—namely, whether TCM is a juridical entity that is the equivalent to a State agency—the stay in the Court of Claims will be lifted and Plaintiffs' contract claim against TCM will be adjudicated by the Court of Claims. The Court of Appeals' published Opinion erroneously holding that TCM can be sued and is equivalent to a State agency, will constitute the law of the case and thus deprive TCM of the opportunity to raise these significant legal issues in a subsequent appeal.

Under the longstanding law of the case doctrine, an appellate court's final determination on a matter of law generally binds both the lower court on remand and the appellate courts on subsequent appeals of the case.⁸ The purpose of the law of the case doctrine is to promote

⁸ *People v Ferris*, 477 Mich 886; 722 NW2d 217 (2006) (Cavanaugh, J., dissenting) (citing *Grievance Adm'r v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000)).

efficiency, comity, and finality in the law.⁹ Additionally, the doctrine recognizes that an appellate court lacks jurisdiction to modify its own judgment in a particular case except on rehearing.¹⁰ This case does not fall into any recognized exception to the doctrine.¹¹

In short, unless this Court grants TCM's application for leave to appeal or takes other peremptory action, TCM will be unable to argue the underlying legal issues in the very action that was spawned by the Court of Appeals' published decision in this case. TCM, therefore, asserts that it is an aggrieved party and that this Court has jurisdiction to grant TCM's application for leave or take other peremptory action. Significantly, the Court of Appeals' erroneous decision has a much broader sweep than just the instant action. Because the Court of Appeals' decision is published, it is binding precedent in any other case before that Court or a lower court involving entities formed under the authority of the Urban Cooperation Act.

II. TCM is not the equivalent of a State agency.

The Court of Appeals erred in characterizing TCM as equivalent to a State agency. The mere fact the State participates in the entity should not, alone, confer "state status" on that entity. The authority for the creation of TCM comes from Urban Cooperation Act.¹² But, as argued in Defendant TCM's Application for Leave to Appeal, neither the language or intent of the Urban Cooperation Act, nor the requisite interlocal agreement that governs TCM establishes

⁹ *Ferris*, 477 Mich at 886 (citing *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991)).

¹⁰ *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988).

¹¹ See, e.g., *Locricchio*, 438 Mich at 109-110 (exception to law of the case doctrine if the case involves an individual's constitutional rights and the court must undertake an independent review of the constitutional facts); *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995) (exception to law of the case doctrine where there is an intervening change in the law). But see *People v Russell*, 149 Mich App 110, 117-118; 385 NW2d 613 (1985) (exception for an intervening change of the law is not properly recognized in Michigan); *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997) (exception for intervening change in the law contradicts rule that the law of the case doctrine applies regardless of the correctness of the prior determination).

¹² MCL 124.501 *et seq.*

this multi-jurisdictional task force as a State entity or the equivalent of a State entity. The Act also makes clear that the entity is a joint exercise of power, not the State exerting power over the other constituent members.

Likewise, the interlocal agreement that governs TCM's operations does not delegate to the Michigan State Police (MSP) any additional authority over the other constituent members. MSP has only one vote and one voice on the Command Board made up of representatives from each constituent member. MSP shares the expenses and responsibilities of the task force equally among its various members. Thus, even when the State is a participating member of the entity, as here, it exercises no more power or authority than any other constituent member. Further, the interlocal agreement cannot create an entity not otherwise authorized by the Act, or assign more power or authority than is authorized by law.

A. Even where an interlocal agreement creates a separate administrative or legal entity, and thus a public body, not all public bodies are State agencies.

Const 1963, art 7, § 28 empowers the Legislature to authorize two or more units of local government to enter into cooperative agreements with each other. The Legislature has implemented Const 1963, art 7, § 28 by authorizing public agencies to enter into interlocal agreements by means of the Urban Cooperation Act.¹³ For the purposes of the Act, the Legislature has included within the definition of "public agency" the State government and local governmental units.¹⁴ While units of government may jointly exercise power pursuant to contract, each governmental unit entering into the contract must be empowered to exercise the power, privilege, or authority in its own right.¹⁵ The Act expressly empowers the cooperating public agencies to form a separate "legal or administrative entity" to exercise the power jointly

¹³ OAG 1998-1999, No 7019, p 33 (May 14, 1999).

¹⁴ MCL 124.501(2)(e).

¹⁵ MCL 124.501(4); see OAG, 1977-1978, No 5312, p 476 (June 14, 1978).

conferred.¹⁶ It is this resulting legal or administrative entity that is the public body, corporate or politic.¹⁷

Defendant TCM has argued to both the Court of Appeals and this Court that TCM did not elect to create a separate legal or administrative entity. But even if this Court disagrees and concludes that TCM is a separate administrative or legal entity—and thus, a public body—under the Act, the plain language of the Act clearly does not intend that this "public body, corporate or politic" be the equivalent of State agency merely because the State is a participating member.

A State agency is just one of many entities that constitute public bodies, as demonstrated by Section 2(b) of the Freedom of Information Act (FOIA), which defines "public body" as¹⁸:

- (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
- (ii) An agency, board, commission, or council in the legislative branch of the state government.
- (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
- (iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority.
- (v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body. The definition does not include outside consultants employed by the state.

Accordingly, even if this Court were to determine that TCM is a public body, it does not necessarily follow that it is a State agency.

The notable absence of any intent to create a State entity in plain language of the Urban Cooperation Act and TCM's interlocal agreement is the most compelling argument for reversing

¹⁶ OAG 7019, p 33; MCL 124.507.

¹⁷ OAG 7019, p 33; MCL 124.507.

¹⁸ *DeMaria Bldg Co v State of Michigan, Dep't of Mgmt & Budget*, 159 Mich App 729, 732; 407 NW2d 72 (1987) (quoting MCL 15.243(1)(n)).

the Court of Appeals' holding that TCM is the equivalent of a State agency. However, an examination of case law addressing what constitutes a State agency may also be helpful. That inquiry begins with *Advisory Opinion re Constitutionality of PA 1966, No 346*, which specifically addressed whether 1966 PA 346, creating the State Housing Development Authority was constitutional or was an unconstitutional attempt to create a body corporate without the required two-thirds majority of the Legislature and the approval of the electorate . This Court's analysis in *Advisory Opinion* looked to a number of factors in determining that the State Housing Authority was a State agency¹⁹:

We must, as has been stated, look behind the name to the thing named. We must examine its character, its relations, and its functions to determine, indeed, whether it is an agency or instrumentality of State Government. This examination leads us to a consideration of the purposes sought to be accomplished by the law.

In *Advisory Opinion*, the State Housing Authority, was, at least in name, a State agency. Here, the analysis is even more clear-cut than in *Advisory Opinion* because the "thing named"—Tri-County Metro Narcotics Squad—is not even a State agency in name. To the contrary, its very name indicates its nature as a cooperative venture. Further, the purpose of the Urban Cooperation Act is to not to create a specific State entity with the constitutional authority to borrow money or lend the credit of the State, or extend to the employees of all its constituent members the benefits of state employment. Rather, it is created to be a joint exercise of power—in this case, to carry out law enforcement activities and authority common to all the participants.

Next to be considered are this Court's decisions in *Hanselman v Killeen*²⁰ and *League General Insurance Company v The Michigan Catastrophic Claims Association*,²¹ which present

¹⁹ *Advisory Opinion re Constitutionality of PA 1966, No 346*, 380 Mich 554, 571; 158 NW2d 416 (2007).

²⁰ *Hanselman*, 419 Mich at 186-187.

²¹ *League Gen'l Ins Co*, 435 Mich at 349-350.

a more comprehensive analyses of the question of what constitutes a State agency. As previously argued in Defendant TCM's application for leave to appeal and motion for reconsideration, under the analysis in *Hanselman* and subsequently in *League General*, TCM is not a State agency. Without question, the plain language of the Urban Cooperation Act creates a *joint* exercise of power, not an exercise of power by the State, here the Michigan State Police, over local entities. Further, examination of TCM's interlocal agreement clearly designates the MSP as an equal, not a superior, member of the law enforcement task force. As was true in *Hanselman* and *General League*, MSP's involvement does not rise to the level of dominant State control.

Similarly comprehensive reasoning was employed by the Court of Appeals in *Commissioner of Insurance v Advisory Board of the Michigan State Accident Fund* and allowed to stand by this Court.²² In *Commissioner of Insurance*, the Court of Appeals affirmed the circuit court's holding that the Michigan Accident Fund was a State agency whose employees were subject to civil service classification.²³

After citing the general factors articulated in *Advisory Opinion re Constitutionality of PA 1966 No 346*,²⁴ the Court of Appeals then cited the following analysis from *Hanselman*²⁵:

In determining whether an entity is a State agency, the decision must not rest upon the presence of one particular characteristic, but the relationships between the entity and the state and the functions performed by the entity, particularly if those functions serve a public purpose, must be considered.

²² *Commissioner of Ins v Advisory Bd of The Michigan State Accident Fund*, 173 Mich App 566, 579-582; 434 NW2d 433 (1988); app den 433 Mich 872 (1989), overruled on other grounds by *Faircloth v FIA*, 232 Mich App 391; 591 NW2d 314 (1998).

²³ *Commissioner of Ins*, 173 Mich App at 566.

²⁴ *Commissioner of Ins*, 173 Mich App at 579 (citing *Advisory Opinion*, 380 Mich at 571).

²⁵ *Commissioner of Ins*, 173 Mich App at 579 (citing *See Hanselman*, 419 Mich at 186-187).

The Court of Appeals concluded that the Accident Fund was a State agency because the statute that controlled the Fund granted a great deal of power to the Commissioner of Insurance: the Commissioner had the power of supervision over the fund and membership in the fund was subject to compliance with rules established by the commissioner. Additionally, the Fund's investments had to be made in accordance with the rules and conditions prescribed by the Commissioner and the State Treasurer, and by statute, the Commissioner was required to supply the State with a bond. The Commissioner also has statutory power to establish rating classifications and the setting of premium and assessment rates for the Fund. Further, as administrator of the Fund, the Commissioner was statutorily required to keep records of all business transactions involving the fund, and had statutory authority to employ deputies, assistants, and clerical help to assist in the administration of the fund. When an employer who had purchased insurance through the Fund defaulted on premium payments, there was statutory authority for bringing a collection action in the name of the State. Additionally, the Governor had the power to certify the elections of Advisory Board members and to fill interim vacancies on the board. Finally, the Court noted the minimal statutory authority granted to the fund's Advisory Board.²⁶

It is clear from this case law precedent that nothing exists as "the equivalent of a State agency" over which the Court of Claims has jurisdiction. An entity either is a State agency or it is not. Neither TCM nor any entity created under the Urban Cooperation Act is a State agency. As argued above, the Urban Cooperation Act does not establish a State agency. Neither does the interlocal agreement that governs TCM. In examining the relationship of TCM and the State of Michigan, TCM is not an instrumentality of the State, nor does its relationship to the State even

²⁶ *Commissioner of Ins*, 173 Mich App at 580-581.

come close to that of the Accident Fund. Although an MSP Lieutenant supervises the day-to-day operations of TCM's police personnel, he reports to and is overseen by TCM's Command Board. The Command Board, which is made up of TCM's constituent members, sets administrative and operations policy, approves expenditures, and authorizes overall police operations. (Exh 3, TCM interlocal agreement, Art I, VI.) Constituent members retain ultimate control over their equipment and their assigned personnel.

- B. Neither the Urban Cooperation Act nor the interlocal agreement gives TCM the rights and responsibilities of a State agency.
 - 1. TCM is created by the constituent members, not by the State, and is not under the control of any State department.

TCM is created by the interlocal agreement between the various constituent members. The interlocal agreement defines whether an administrative or legal entity is created under the Urban Cooperation Act; the relationships between and responsibilities of the constituent members; its operating procedures; the financial contributions of the members; the division of forfeiture assets; and, the specific obligations of the constituent members, among other matters. The interlocal agreement and its contents are specifically authorized by the Urban Cooperation Act. As argued, this is a joint exercise of equal power. While the MSP participates as a member, they do not have overriding authority over any other member. They are but one member on the Board of Directors.

Each constituent member decides what personnel will be assigned to the entity and retains control of those employees for compensation, workers compensations, liability, and discipline purposes. Money is held, managed and administered by a designated constituent member. In the case of TCM, the City of Lansing is that member. Equipment is provided by each constituent member, for example, guns and ammunition. All the constituent members share any forfeiture proceeds according to an agreed distribution method.

Also, Const 1963, art 5, § 2 requires that all agencies of the State government be allocated within a principal department and grouped as far as practicable according to its major purpose.²⁷ It is the "common understanding test" that applies in interpreting this provision of the constitution.²⁸ Applying the common understanding test, if TCM were a State agency it would have to be allocated within a principal department of state government. Yet, it is not. TCM's operations are directed by its Board of Directors, not a State authority. Moreover, TCM is not subject to the constitutional and statutory restrictions imposed on all State agencies.

2. TCM does not enjoy the benefits of a State agency; it cannot utilize the services of the State Treasurer to hold, invest, or disburse its funds and its personnel are not within the State classified service.

TCM also does not receive the benefits of being a State agency. It cannot utilize the services of the State Treasurer to hold, invest, and disburse its funds. Nor do the employees of its constituent members have the right to be members of the State Employees' Retirement Fund.²⁹ With the exception of MSP's employees, the personnel assigned to TCM are not State classified employees. TCM also does not have statutory entitlement to representation by the State Attorney General. While it is the duty of the Attorney General to prosecute and defend all suits relating to matters connected with departments of State government,³⁰ and the Attorney General

²⁷ OAG 1977-1978, No 5156, p 66 (March 24, 2977) (citing Const 1963, art 5, § 2).

²⁸ *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 155; 665 NW2d 452 (2003) (quoting *Traverse City Sch Dist v Attorney Gen*, 384 Mich 390, 405; 185 NW2d 9 (1971) (further quotation omitted) (stating that the task of the courts in interpreting a constitutional provision is to give effect to the common understanding of the text, the interpretation which the great mass of the people themselves would give it); *Comm for Constitutional Reform v Secretary of State*, 425 Mich 336, 340-342; 389 NW2d 430 (1986) (citing *People v Dean*, 14 Mich 406, 417 (1866) (courts should give effect to the language in the Constitution as the "popular mind" would have understood it at the time it was adopted).

²⁹ See OAG 1963-1964, No 4381, p 487 (October 26, 1964) (analyzing the State Accident Fund and determining that it was a state agency because it received these benefits).

³⁰ MCLA 14.29; MSA 3.182; see also OAG 1977-1978, No 5156, p 66 (March 24, 1977).

is the State of Michigan's only attorney,³¹ in this case, the Attorney General provided legal representation to TCM only because MSP personnel were sued in their personal capacities.

C. TCM funds are not State funds, nor are TCM's financial obligations those of the State.

Analyzing the financial sources and their administration are proper considerations involved in determining State agency status.³² An examination of TCM's financial sources and their administration demonstrates that TCM is not a State agency.

1. The State is not directly liable for the receipt and disbursement of TCM funds.

The State has no administrative responsibility over TCM, and as previously argued, TCM's finances—unlike those of the State Accident Fund which are under the direction of the State's Insurance Commissioner—are not under the direction of any principal department within State government. The Urban Cooperation Act certainly does not authorize any State direction or oversight over TCM's finances, the collection or disbursement of forfeiture funds, or any other moneys contributed for its operations. While TCM is meant to be self-sufficient, the source of funding is derived from contributions made by constituent members and the proceeds of forfeiture actions, none of which is under the direction of a State official. TCM operates on cash contributions from the three participating counties served, not on cash funds from MSP; no State funds are used for the operations of TCM, other than the salary and benefits paid to State employees assigned to TCM, and the equipment purchased and assigned to the Team.

³¹ OAG 1977-78, No 5156, p 66 (March 24, 2977); OAG 1941-1942, No 20644, p 309) (August 27, 1941) (attorneys other than Assistant Attorneys General cannot be employed as attorneys by state officers, departments, boards or commissions and paid from State funds); OAG 1926-1928, p 281 (March 25, 1927) (the State cannot employ attorneys who are not employed by the Department of Attorney General).

³² *Ins Commissioner*, 173 Mich App at 580-582; *Fun 'N Sun RV, Inc v State of Michigan, Accident Fund of Michigan*, 447 Mich 765; 527 NW2d 468 (1994).

TCM itself does not even have the power to dispose of property, open bank accounts, or hold forfeited assets. The City of Lansing holds all monies and forfeited assets as trustee for TCM. (Exh 4, TCM interlocal agreement, Art II, III.) The City of Lansing also manages TCM's financial business, including the opening and maintaining of bank accounts, the holding and accounting of forfeiture funds, the paying of TCM's bills, and the authorizing and payment of all purchases. (Exh 3, TCM interlocal agreement, Art II, III.) Moreover, the State does not and cannot guarantee TCM's obligations and debt, including any contract debt arising that may arise between TCM and Plaintiffs. To determine otherwise would render an unconstitutional result.³³

2. The State has no contractual obligation based on MSP's participation in TCM because the State has not unambiguously expressed an intention to create a contractual obligation.

This Court in *Sun 'N Fun RV, Inc v State of Michigan, Accident Fund of Michigan* reiterated that that the State must intend to contract in order for courts to find a binding contract³⁴:

Courts usually have concluded that a state contractual obligation arises from legislation only if the legislature has unambiguously expressed an intention to create the obligation. [internal citation omitted]. In order to prove that a statutory provision has formed the basis of a contract, the language employed in the statute must be 'plain and susceptible of no-[sic] other reasonable construction' than that the Legislature intended to be bound to a contract. [internal citation omitted]. . . [A] statute can create a contract if the language and circumstances demonstrate a clear expression of legislative intent to create private rights of a contractual nature enforceable against the state. [internal citation omitted].

Similarly, this Court's decision in *Sittler v Board of Control* confirms that the State is not bound where it did not intend to be bound. In *Sittler*, the plaintiff filed suit alleging unlawful termination against the board of control of the Michigan College of Mining and Technology, claiming that the head of the department of languages had authority to make a contract on behalf

³³ *Advisory Opinion*, 380 Mich at 564, 571 (citing Const 1963, art 9, § 18; art 3, § 6; art 4, § 30.)

³⁴ *Sun 'N Fun RV*, 447 Mich at 12-13.

of the board of control.³⁵ By statute, the board of control had authority to enter into employment contracts to hire teachers.³⁶ As this Court explained, *Sittler* involved "the right by contract to bind the State in the operation of [a government function] over a period of time and to expend public funds in greater or less amounts."³⁷ According to *Sittler*, "the power to contract vested by statutory provision in a governmental agency cannot be delegated to some subordinate or representative."³⁸ "The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority."³⁹ As this Court explained⁴⁰:

Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution.

* * *

Nor is a State bound by an implied contract made by a State officer where such officer had no authority to make an express one.

* * *

The powers of State officers being fixed by law, all persons dealing with such officers are charged with knowledge of the extent of their authority or power to bind the State, and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred.

Here, the Urban Cooperation Act did not unambiguously express an intent to create a contractual obligation between the State of Michigan and TCM or to enter into any third party beneficiary obligation to Plaintiffs; in fact, expressly established an entity that is a *joint* exercise

³⁵ *Sittler v Bd of Control*, 333 Mich 681; 53 NW2d 681 (1952).

³⁶ *Sittler*, 333 Mich at 684-685.

³⁷ *Sittler*, 333 Mich at 686.

³⁸ *Sittler*, 333 Mich at 686.

³⁹ *Sittler*, 333 Mich at 687 (quoting *Lake Twp v Millar*, 257 Mich 135, 142; 241 NW 237 (1932)).

⁴⁰ *Sittler*, 333 Mich at 687 (citations omitted).

of power. Nor did agents of TCM have any authority, either express or implied, to represent the State of Michigan by entering into a contract with Plaintiffs on behalf of the State of Michigan. Therefore, the State cannot be contractually bound to Plaintiffs and is not liable for any payments resulting from any oral contract entered into by Plaintiffs and agents of TCM.

Conclusion

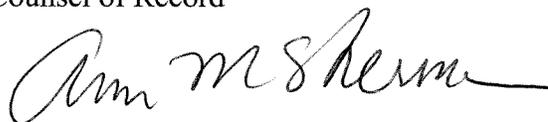
Defendant TCM is an aggrieved party in this case and can only seek redress of the Court of Appeals' erroneous legal conclusions through the actions of this Court in the instant action. Moreover, TCM is not the equivalent of a State agency subject to the Court of Claims' jurisdiction.

WHEREFORE, Defendant Tri-County Metro Narcotics Squad (TCM) respectfully requests that this Court vacate the Court of Appeals' Opinion in this case and remand for entry of judgment for TCM on proper grounds or alternatively, grant TCM's application for leave to appeal.

Respectfully submitted,

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