

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Murphy, C.J., and O'Connell and Beckering, JJ.)

WAYNE COUNTY EMPLOYEES RETIREMENT
SYSTEM and WAYNE COUNTY RETIREMENT
COMMISSION,

Docket No. 147296

Plaintiffs-Counterdefendants-
Appellees,

Court of Appeals No. 308096

v

Wayne County Circuit Court
LC No. 10-013013-AW
Hon. Michael F. Sapala

CHARTER COUNTY OF WAYNE,

Defendant-Counterplaintiff-Appellant,

and

WAYNE COUNTY BOARD OF COMMISSIONERS,

Defendant-Appellant.

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**DEFENDANTS-APPELLANTS WAYNE COUNTY AND WAYNE COUNTY
BOARD OF COMMISSIONERS' REPLY TO BRIEF OF AMICUS CURIAE
MICHIGAN ASSOCIATION OF PUBLIC EMPLOYEE RETIREMENT SYSTEMS**

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I. INTRODUCTION

The arguments that MAPERS sets forth in its amicus brief are largely duplicative of Plaintiffs' own arguments. As to those that are different, they are new arguments that are not properly before this Court. MAPERS' arguments are also without legal or factual support, and thus are entirely unpersuasive. Indeed, the main rationale that MAPERS provides for submitting its amicus brief – that MAPERS is seeking to protect the interests of other retirement systems in Michigan that have funds similar to the IEF – completely lacks factual support.¹ As Wayne County explains in its briefs, the IEF is used to pay out discretionary bonus checks as opposed to constitutionally-protected retirement benefits. This makes the IEF distinct and fundamentally different not only from Wayne County's own defined benefit plans, but from other defined benefit plans in the state of Michigan.

As a result of these fundamental differences, the design changes that the County made to the IEF pursuant to the 2010 ordinance, and the effects of those changes, have nothing whatsoever to do with retirement systems in other municipalities. More importantly, nothing in MAPERS' brief lends any credence to Plaintiffs' claims that the 2010 ordinance somehow violates either Michigan law or the Michigan Constitution. Simply put, the arguments MAPERS makes in its amicus brief are without merit and should be rejected.

II. ARGUMENT

A. **There is no merit to MAPERS' argument that the Retirement Commission's "discretion" to issue 13th check is itself protected by Const 1963, art 9, § 24.**

MAPERS' unique twist on the Const 1963, art 9, § 24 issue is its claim that art 9, § 24 protects the Retirement Commission's "discretion" to make distributions from the IEF. As an initial matter, Plaintiffs never raised this issue – either below or in this Court – and thus

¹ An amicus can no more make unsupported factual assertions than a party.

MAPERS improperly seeks to inject a new issue into the case. See *People v Hermiz*, 462 Mich 71, 76; 611 NW2d 783 (2000) (“Absent exceptional circumstances, amicus curiae cannot raise an issue that has not been raised by the parties.”) (opinion by Taylor, J.).

Moreover, MAPERS’ new claim lacks merit. As MAPERS’ acknowledges, art 9, § 24 protects only “accrued financial benefits.” MAPERS cites no authority supporting the notion that art 9, § 24 somehow protects a retirement board’s “discretion” to “distribute” 13th checks from the IEF. Moreover, as Wayne County has already explained, 13th check distributions are *not* accrued financial benefits. (See Wayne County’s Brief on Appeal, pp 23-30). Logically, then, art 9, § 24 cannot possibly protect the Retirement Commission’s discretion to make those distributions – even if art 9, § 24 could be said to otherwise apply.

Just as Plaintiffs do, MAPERS misconstrues this Court’s decision in *Studier v Michigan Public School Employees’ Ret Bd*, 472 Mich 642; 698 NW2d 350 (2005), as suggesting that 13th checks are accrued financial benefits. But, as Wayne County has already explained, the Court’s decisions – in *Studier* and later in *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295; 806 NW2d 683 (2011) – actually support the opposite conclusion, i.e., that 13th checks are not accrued financial benefits because they do not grow over time, and are not earned in the year service is rendered. (See Wayne County’s Brief on Appeal, pp 23-28).

MAPERS claims that because the Retirement Commission considers a participant’s length of service and years of retirement when deciding the amount of a retiree’s 13th check, it is somehow earned on account of service rendered in each fiscal year. But this Court has concluded that a benefit cannot be one that arises “on account of service rendered in each fiscal year” unless it can be “fund[ed] . . . in the year that the service was rendered.” *Advisory Opinion*, 490 Mich at 315. By their very nature, 13th checks cannot be funded in the year

service was rendered because the discretionary decision whether to even issue a 13th check in a given year is not made until *after the employee retires*.² See also *Hannan v Detroit City Council*, unpublished opinion per curiam of the Court of Appeals, issued September 1, 2000; 2000 Mich App LEXIS 980 (Docket No. 211704) (finding that art 9, § 24 does not apply to benefits that affect “retirees and not those that are currently working and accruing financial benefits”) (App 319a-323a).

Similarly, despite MAPERS’ argument to the contrary, 13th checks do not “increase or grow over time.” As *Advisory Opinion* makes clear, during a county employee’s working years the 13th check “cannot be said to be growing or accumulating because it does not even come into existence . . . until after the employee has retired.” *Id.* at 314. Moreover, Plaintiffs’ own records show that 13th check payments fluctuate from year to year, at times even decreasing. (See Wayne County’s Brief on Appeal, p 7).

MAPERS’ argument that art 9, § 24 protects the 13th check is also fundamentally flawed because it mistakenly assumes that participants have a vested right in the 13th check. By way of example, MAPERS’ lead case is a case in which the status of the benefit as a vested pension benefit was not even disputed by the parties. See *Ass’n of Professional and Technical Employees v City of Detroit*, 154 Mich App 440, 441-442; 398 NW2d 436 (1986). But benefits only “vest” once an employee has a right to receive that benefit. See *Advisory Opinion*, 490 Mich at 314-315. When it comes to 13th checks, only some retirees are even eligible for them, while several groups of retirees are not (and, of course, none are *entitled* to them). (See Wayne County’s Brief on Appeal, p 7). In fact, each year the Retirement Commission has the discretion to not even issue 13th checks. (*Id.* at 7-8).

² This is in contrast to an employee’s regular pension, which is calculated and funded during his or her working years.

B. There is no merit to MAPERS' argument that the 2010 ordinance violated the Public Employment Relations Act ("PERA").

MAPERS also spends a significant portion of its amicus brief arguing that the Retirement Commission's discretion to issue a 13th check is somehow protected by the Public Employment Relations Act, MCL 423.201 *et seq.* ("PERA"). This is yet another new issue that Plaintiffs never raised in the Court of Appeals and do not mention in their brief in this Court. Nor did Plaintiffs ever allege a violation of PERA in their complaint.

Even if they had done so, it is doubtful that Plaintiffs would have had standing to allege a PERA violation. PERA does not provide a legal cause of action to Plaintiffs, and nothing in PERA suggests that the Legislature intended to confer standing on the Wayne County Retirement Commission to vindicate purported *employment* rights of Wayne County employees. Nor can Plaintiffs allege any special injury or substantial interest that is different from the citizenry at large. See *Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372; 792 NW2d 686 (2010) ("[A] litigant has standing whenever there is a legal cause of action. . . . Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.").

MAPERS' PERA argument – i.e., that the 13th check is a mandatory subject of bargaining and thus cannot be changed without bargaining – is also meritless. *First*, a change in retiree benefits is not a term or condition of employment. *Butler v Wayne County*, 289 Mich App 664, 675; 798 NW2d 37 (2010) ("[R]etirees are, by definition, no longer employed and

cannot be considered employees. Thus, a change in retiree benefits cannot be deemed a change in a term or condition of employment.”) (citations omitted).

Second, none of the collective bargaining agreements relevant to this case establish a *contractual right* to the 13th check – as even the Court of Appeals conceded. *Wayne County Employees Retirement Sys v Charter County of Wayne*, 301 Mich App 1, 34; 836 NW2d 279 (2013) (observing “the discretionary distribution language that has always been part of the IEF ordinance and the lack of any CBA language requiring disbursement of a 13th check”). (See also Wayne County’s Brief on Appeal, p 7).³

Finally, MAPERS incorrectly suggests that the mere mention in a CBA of eligibility for a post-retirement benefit such as the 13th check somehow creates a pre-retirement contractual obligation, even where the ordinance governing the 13th check has never done so. Contrary to MAPERS’ claim, *Studier* holds that legislation only creates contractual obligations where the legislature (in this case, the Wayne County Board of Commissioners) expressly states that it is doing so. *Studier*, 472 Mich at 662 (“In order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract.”) (citations omitted). In the case of the 13th check, Wayne County’s retirement ordinance does not, and has never, created a contractual obligation to forever provide distributions from the IEF, thereby binding Wayne County to such an obligation in perpetuity.

In the end, the 13th check has always been a financial benefit that the Retirement Commission can choose *not to provide*. Indeed, Wayne County retirement ordinance has *always*

³ To the extent MAPERS asserts that under certain CBAs retirees are “entitled” to 13th checks, that is simply false. While MAPERS cites the “chart of relevant collective bargaining agreements” in the County’s appendix (App 236a-240a), the chart illustrates how certain retirees are either “eligible” or “not eligible” for 13th checks. None of the CBAs *require* payment of 13th checks to *anyone*.

granted the Retirement Commission *discretion* to issue 13th checks (or not) – which is something that even members of the Retirement Commission have previously acknowledged. (See Wayne County’s Brief on Appeal, p 7). Thus, the 13th check is merely a discretionary bonus – not a vested financial benefit protected by contract, and certainly not an accrued financial benefit protected by the Michigan Constitution. As a result, the Retirement Commission’s discretion to issue the 13th check cannot conceivably be protected either by art 9, § 24 or PERA.⁴

C. Wayne County paid its annual required contribution (“ARC”) in accordance with Const 1963, art 9, § 24 and PERSIA.

Just as Plaintiffs did in their brief, MAPERS also makes a strained, and ultimately unsuccessful, attempt to argue that Wayne County failed to pay its annual required contribution (“ARC”) to the retirement system in accordance with art 9, § 24 and MCL 38.1140m, and that it did so only by “re-purposing” IEF assets.

Like Plaintiffs, MAPERS devotes much of its brief to restating many of the laws applicable to the retirement system and its assets. Many of MAPERS’ restatements of the law are accurate – such as its discussion of the difference between current service cost and unfunded actuarial accrued liabilities – and Wayne County takes no issue with these, or the fact that PERSIA supersedes any conflicting provisions of the 2010 ordinance. But as fully discussed in Wayne County’s reply to Plaintiffs’ brief, there is simply no basis for MAPERS’ claim that the credit and offset provisions of the 2010 ordinance – through which Wayne County clearly *did*

⁴ In arguing otherwise, MAPERS misleadingly cites to a “*recommended*” decision and order issued by former MERC Administrative Law Judge Doyle O’Connor. What MAPERS fails to mention is that Wayne County filed exceptions to that recommended decision, and that *the matter is currently pending before the MERC.*

pay its ARC – violate either the Michigan Constitution or PERSIA. (See Wayne County’s Reply to Plaintiffs’ Brief on Appeal, pp 5-7).

MAPERS’ first mistake is its assertion that all benefits provided by the retirement system are protected by art 9, § 24. But as Wayne County has already discussed, art 9, § 24 does not apply to IEF assets because 13th checks are not “accrued financial benefits.” Thus, the transfer of IEF assets as a partial offset of Wayne County’s ARC is not governed or restricted by art 9, § 24.

Nor does the 2010 ordinance’s credit and offset provision violate PERSIA. Contrary to MAPERS’ assertion (which mimics Plaintiffs’ claim), Wayne County has never suggested that PERSIA does not apply to the IEF, or that IEF assets are not part of the “retirement system trust.” Of course they are. But that is not the issue here. The issue is whether anything in PERSIA *prohibits* the credit and offset. Contrary to MAPERS’ conclusory assertions, and for all of the reasons discussed in Wayne County’s brief on appeal and reply to Plaintiffs’ brief, the answer is no.

The primary focus of MAPERS’ PERSIA analysis is on MCL 38.1140m, which provides that “[i]n a plan year, any current service cost payment may be offset by a credit for amortization of accrued assets, if any, in excess of actuarial accrued liability.” As MAPERS observes, the Retirement Commission has discretion under MCL 38.1140m to permit such a credit and offset to Wayne County’s ARC. However, the credit and offset authorized by MCL 38.1140m has nothing to do with the one provided by the 2010 ordinance. MCL 38.1140m’s credit and offset involves the use of “accrued assets” held within a defined benefit plan. IEF assets, on the other hand, are not included in the Retirement Commission’s calculation of Wayne County’s ARC, and are instead held separately and used *solely for the purpose of making discretionary 13th*

check distributions.⁵ Accordingly, the transfer of IEF assets back into the defined benefit plans as a partial offset to Wayne County's ARC is neither contemplated nor prohibited by MCL 38.1140m. (See Wayne County's Brief on Appeal, pp 12, 36). Even the Court of Appeals conceded as much. See *Wayne County*, 301 Mich App at 52 ("[W]e have not invalidated the offset pursuant to MCL 38.1140m") and 54 ("MCL 38.1140m appears to only address ARCs relative to defined benefit plans").

Like Plaintiffs, MAPERS incorrectly asserts that MCL 38.1140m provides the "only manner" in which a credit and offset may be conducted using retirement system assets. Such an argument ignores Wayne County's legislative authority to modify its retirement system unless specifically prohibited by statute or the Michigan Constitution. (See Wayne County's Reply to Plaintiffs' Brief, pp 1-5). As to *that* issue, MAPERS makes passing reference to PERSIA's "exclusive benefit" rule. But despite MAPERS' assertion, the transfer of IEF assets back into the defined benefit plans assets (with or without a corresponding offset to Wayne County' ARC) *is* for the "exclusive benefit" of retirement system participants and their beneficiaries and does not violate MCL 38.1133(6) (now MCL 38.1133(8)). (See Wayne County's Brief on Appeal, pp 32-44; Wayne County's Reply to Plaintiffs' Brief, pp 7-9).

⁵ At page 25 of its amicus brief, MAPERS asserts, without support, that the "Retirement Commission and its actuary have always considered the IEF assets to be defined benefit assets for purposes of the Retirement System's annual actuarial valuation and for the determination of the employer's annual contribution." That assertion is puzzling because Plaintiffs have *repeatedly* admitted that IEF assets are *not* included in the actuarial calculation of the County's ARC. (See Preliminary Injunction Transcript, 46:15-19 (Racine), App 207a ("And Your Honor we stipulate to the fact that the inflation equity fund reserve is not included in the funding value calculation of the ARC."); Ps' Resp to Ds' First Set of Discovery, Requests for Admissions Nos. 14, 15 and 28, App 218-219a ("Plaintiffs/Counter-Defendants admit . . . that the IEF reserve is not included in the calculation of the ARC."), 223a (same).

D. The 2010 ordinance did not “usurp” the Retirement Commission’s authority to manage the retirement system.

MAPERS also argues that the 2010 ordinance interferes with the Retirement Commission’s authority to administer and manage the retirement system, but that argument fails for the same reasons that Plaintiffs’ own identical argument fails. As fully discussed in Wayne County’s brief on appeal (pp 20-23) and reply to Plaintiffs’ brief (pp 1-5), the transfer of assets from the IEF to the defined benefit plans was a structural *modification* of the retirement system – a business decision relating to plan *design* that had nothing to do with the Retirement Commission’s administration and management of the system’s assets. See *Hunter v Caliber Systems, Inc*, 220 F3d 702, 718-720 (CA 6, 2000) (explaining that an employer’s decision to “transfer plan assets” is a “business decision,” and not “plan management or administration, or those acts designed to carry out the very purpose of the plan”); *Wayne County*, 301 Mich App at 54 (recognizing that ordinance provisions concerning “retirement plan parameters and structural aspects of the plan . . . are legislative in nature and within the purview of the County Board”).

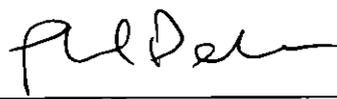
III. CONCLUSION

In the end, MAPERS’ arguments that Wayne County either did not pay its ARC or did so in violation of art 9, § 24 and PERSIA are just as unconvincing as those advanced by Plaintiffs. Wayne County paid its ARC and it did so in compliance with the Michigan Constitution, PERSIA, the Wayne County Retirement Ordinances, and all other applicable laws.

Respectfully submitted,

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Dated: September 2, 2014

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PROOF OF SERVICE

Jill K. Merlo states that she is an employee of Dickinson Wright PLLC, and that on

September 2, 2014, she served *two copies* of the following documents:

(1) Defendant-Counterplaintiff-Appellant Charter County of Wayne and Defendant-Appellant Wayne County Board of Commissioners' Reply to Brief of *Amicus Curiae* Michigan Association of Public Employee Retirement Systems; and

(2) Defendant-Counterplaintiff-Appellant Charter County of Wayne and Defendant-Appellant Wayne County Board of Commissioners' Reply to Brief of *Amicus Curiae* National Conference on Public Employee Retirement Systems (NCPERS).

Upon:

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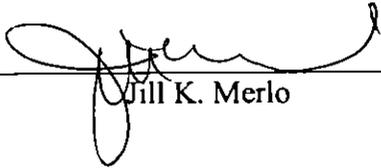
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by enclosing the same in a sealed envelope bearing proper postage and address and by causing the same to be deposited in a U.S. Mail receptacle maintained by the United States Postal Service in Detroit, Michigan.

I declare under penalty of perjury that the statement above is true to the best of my information, knowledge and belief.



Bill K. Merlo

September 2, 2014

VIA HAND DELIVERY

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa, P.O. Box 30052
Lansing, MI 48909

Re: *Wayne County Employees Retirement System et al. v. Charter County of Wayne et al.*, Docket No. 147296

Dear Mr. Royster:

Enclosed for filing are an original and twenty-four copies of the following documents, along with a proof of service:

(1) Defendant-Counterplaintiff-Appellant Charter County of Wayne and Defendant-Appellant Wayne County Board of Commissioners' Reply to Brief of *Amicus Curiae* Michigan Association of Public Employee Retirement Systems; and

(2) Defendant-Counterplaintiff-Appellant Charter County of Wayne and Defendant-Appellant Wayne County Board of Commissioners' Reply to Brief of *Amicus Curiae* National Conference on Public Employee Retirement Systems (NCPERS).

Please file the briefs in your usual fashion and return a time-stamped copy of each to the messenger. Thank you.

Very truly yours,



Phillip J. DeRosier

PJD

cc (via mail and w/ encl.):

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