

STATE OF MICHIGAN
IN THE SUPREME COURT

AFT MICHIGAN, AFT, AFL-CIO
ET AL.,

Supreme Court No. 148748

Court of Appeals No. 313960

Court of Claims No. 12-104-MM

Plaintiffs-Appellants,

v

STATE OF MICHIGAN,

Defendant-Appellee,

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APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

**THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE
CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER
STATE GOVERNMENTAL ACTION IS INVALID**

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TABLE OF AUTHORITIES

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Introduction

The State of Michigan attempts to defend 2012 PA 300 through some intellectual slight-of-hand, an inaccurate phrasing of the Plaintiffs' arguments and a glossing over of controlling law. Under PA 300 the State of Michigan now claims that it requires members of the Public School Employees Retirement System to surrender their rights under the Fifth Amendment to the United States Constitution and Article IX section 24 of the Michigan Constitution of 1963. It pyramids that error by stating that 2010 PA 75 has been repaired through the adoption of an unconstitutional condition. And it seeks to avoid the consequences of the clear and unequivocal promises of MPSERS by saying that members of the Retirement System should have known better than to believe what they were plainly told. This Court should decline to adopt these arguments.

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Argument

A. 2012 PA 300 Imposes an Unconstitutional Condition

Persons may choose to pay for post employment retiree health care but they have no choice about the terms of the option. 2012 PA 300 allows the Michigan Public School Employees Retirement System ("MPERS") to keep all of a person's contributions, in some cases for decades, and repay them at minimal interest long after the individual may have ceased making the payments. MPERS keeps the money and keeps the increase in value of the money. That is a Taking without just compensation. The Attorney General asserts that 2012 PA 300 requires a person to waive their objection to the Taking as a condition of the receipt of post employment retiree health care. That is an unconstitutional condition and it is unenforceable. Sections 43e and 91a(8) of 2012 PA 300 are unconstitutional because the refund provisions are unconstitutional.

1.

A person may choose to make contributions to pay for post employment retiree health care but never receive the benefit. That is not a wild speculation; there will be a number of persons who never receive retiree health care because they have changed professions or left the State. These individuals will have made contributions for an extended period. They will get their money back only when they reach age 60; will be paid over five years; will receive but 1.5% on the value of their contributions. MCL 38.1391a(8). Meantime, MPERS is required to assume that it will achieve an 8% return on its investments. MCL 38.1404(a)(2).

The retention of interest earned is a Taking. *Brown v Legal Foundation of Washington*, 538 US 216; 123 S Ct 1406; 155 L Ed 2d 376 (2003). The Defendant does not deny that.

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However, it asserts, this is not a Taking because individuals are voluntarily participating in a program which they should know requires them to waive their rights under the Fifth Amendment. "Members who participate do so at their own risk" says the Attorney General at page 11 of his brief. It is astounding that the State of Michigan would acknowledge such an adversarial relationship with its citizens. If you want post employment retiree health care, says the Attorney General, you have to accept terms which the State of Michigan may not impose.

2.

The Defendant may not require the waiver of rights guaranteed by the Constitution as a condition of the receipt of a discretionary state provided benefit. This policy has been articulated by the United States Supreme Court, adopted by the United States Court of Appeals for the Sixth Circuit and by this Court.

"Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right -- here the right to receive just compensation when property is taken for a public use -- in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. See *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)."

Dolan v City of Tigard, 512 US 374, 385, 114 S Ct 2309, 2316-17 (1994)

See also *Koontz v St Johns River Water Mgmt Dist*, 133 S Ct 2586, 2594-95 (2013) :

"We have said in a variety of contexts that "the government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation of Wash.*, 461 U. S. 540, 545, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983). See also, e.g., *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U. S. 47, 59-60, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006); *Rutan v. Republican Party of Ill.*, 497 U. S. 62, 78, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990). In *Perry v. Sindermann*, 408 U. S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), for example, we held that a public college would violate a professor's freedom of speech if it declined to renew his contract because he was an outspoken critic of the college's administration. And in

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Memorial Hospital v. Maricopa County, 415 U. S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974), we concluded that a county impermissibly burdened the right to travel by extending healthcare benefits only to those indigent sick who had been residents of the county for at least one year. Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."

And *RSWW, Inc v City of Keego Harbor*, 397 F3d 427, 434 (CA6, 2005) :

"Under the unconstitutional conditions doctrine, 'a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or an entertainment permit, on an agreement to refrain from exercising one's constitutional rights' *G & V Lounge, Inc. v. Mich. Liquor Control Comm'* 23 F.3d 1071, 1077 (6th Cir. 1994).

This Court recognizes this doctrine:

"Though not precisely in point here, for Michigan cases holding that arbitrary or unreasonable burdens or conditions imposed by State or local government upon the exercise of a governmentally granted license, franchise or privilege are unconstitutional, see *Chaddock v. Day*, 75 Mich 527 (4 LRA 809, 13 Am St Rep 468); *People v. Rawley*, 231 Mich 374 (39 ALR 1381); and *Robison v. Miner*, 68 Mich 549. More to the point is *Fidelity & Deposit Co. of Maryland v. Tafoya*, 270 US 426 (46 S Ct 331, 70 L ed 664), in which the supreme court of the United States held that while a State may arbitrarily exclude a foreign corporation from doing business within the State, it may not use that power to impose unconstitutional conditions upon the exercise of a State license granted to such corporation to enter and do business within the State. As applied to the instant case, the logic of the *Tafoya* Case and of the several cases therein cited (which see) would seem to be that, even though the State, in the exercise of its police powers, may ban the taking of wild life altogether, it may not permit and condition such taking upon unconstitutional conditions, that is to say, the State may not impose upon the permission to take wild life the condition that the State be allowed to invade the constitutional rights of the individual. Similarly, as relates to another area within the constitutional inhibition, namely, the search of a person's papers, it has been held in *Ex Parte Jackson*, 96 US 727 (24 L ed 877), that when a person exercises the privilege of using the United States mails congress may not attach, as a condition to such use, permission for officials to violate such person's constitutional rights by searching his letters in the mails without search warrant and without probable cause."

People ex Rel Ag v Lansing Mun Judge, 327 Mich 410, 430-31, 42 NW2d 120, 124-25 (1950)

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3.

The Defendant asserts that, as a condition of the receipt of post employment retiree health care (for which the individual pays), he or she must agree to surrender rights guaranteed to them by both the Constitution of the United States and that of the State of Michigan. The person must consent to having the State of Michigan take the value of their invested contributions. That is a patently unconstitutional requirement. In this respect, PA 300 is unconstitutional. PA 300 may not require a surrender of the right to be protected from a Taking without just compensation.

4.

For reasons articulated in Plaintiffs' principal brief, sections 43e and 91a(8) of 2012 PA 300 are unconstitutional because they permit MPSERS to retain the considerable value of interest earned on contributions to MPSERS by persons who never receive post employment retiree health care. And the voluntary nature of a person's participation does not justify the purported waiver of rights guaranteed by the Constitution of the United States and that of the State of Michigan.

B. 2012 PA 300 Did Not Repair 2010 PA 75

1.

The Defendant, wholly failing to understand Plaintiffs' argument, contends that either 2012 PA 300 is unrelated to 2010 PA 75 or repairs the defect the Court of Appeals noted in the latter statute. *AFT Michigan v State of Michigan*, 297 Mich App 597 (2012). Further, Defendant incorrectly asserts that Plaintiffs have somehow argued that 2012 PA 300 deprives members of their right to substantive due process.

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In *AFT Michigan* the Court of Appeals rightly found that 2010 PA 75 deprived members of the Public School Employees Retirement System of their right to substantive due process because the statute mandated the extraction of 3% of wages without assuring that anything would be provided in return. 2012 PA 300 was adopted (on September 4, 2012) barely three weeks after the Court of Appeals issued a decision in *AFT Michigan* (on August 16, 2012).

The Legislature is presumed to be aware of the decisions of the Court of Appeals. *Verizon N, Inc v Mich PSC*, 263 Mich App 567, 571, 689 NW2d 709, 711 (2004) ["The Legislature is presumed to be aware of appellate court decisions. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505; 475 NW2d 704 (1991)."] Therefore, PA 300 was not adopted in a vacuum. The Legislature addressed the provision (43e) which the Court of Appeals found unacceptable by the addition of section 91a(8). Instead of an involuntary extraction of 3% of wages with no guarantee of benefit, the legislation creates a voluntary extraction with no guarantee of benefit. But a refund is promised if the person never receives post employment retiree health care. However, the Legislature failed to address the other problem noted by the Court of Appeals.

2.

Neither 2010 PA 75 nor 2012 PA 300 reverses the decision of this Court in *Studier v Michigan Pub School Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005) (post employment retiree health care not protected by Article IX § 24 of the Constitution of 1963). There is no constitutional guarantee that the State of Michigan will, indeed, provide post employment retiree health care. Defendant says that the statute mandates payment. Brief, 16. But in the same brief the Attorney General argues that no one can be assured that the law will

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not be changed. Brief, 23. Therefore, the Attorney General is incorrect to say that persons paying for post employment retiree health care are assured that they will receive those benefits.

3.

PA 300 provides for a refund of contributions if a person does not receive post employment retiree health care. MCL 38.1391as(8). However, as has been argued, the terms of the refund of the contributions are so unreasonable as to be unconstitutional. Therefore, 2012 PA 300 does not repair the defect found in 2010 PA 75. Sections 43e, MCL 38.1343e, is still unconstitutional because it permits an extraction with no guarantee of benefit and provides for a refund of contributions which itself is unconstitutional.

C. Enforceable Promises Were Made

The Defendant contends that no Member of the Retirement System was entitled to believe what they read in the myriad of publications in which MPSERS promised that, at the time of retirement, a person would receive a pension based on a 1.5% multiplier. Defendant says that Members of the Retirement System are required to know the law and that they should have known the MPSERS could not make promises.

1.

(a) "All men are presumed the know the law" is not a universal premise. It does not apply to situations in which a promise is made which is false:

"It is the general rule that "fraud cannot be predicated upon misrepresentations as to matters of law." 12 R.C.L. p. 295. The writer, however, adds that the rule "may be rendered inapplicable by the existence of peculiar facts and circumstances." *Id.* 296. The cases cited afford little help in determining the question here presented. The rule is founded on the maxim that "All men are presumed to know the law." Experience teaches us that this maxim finds but little support in fact. It may be doubted if it was ever intended to excuse fraud. In *Longmeid v. Holliday*, 6 Exch. 761, 766, it was said:

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“If any one knowingly tells a falsehood, with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit.”

Rosenberg v Cyrowski, 227 Mich 508, 513, 198 NW 905, 906 (1924)

And

“It is the general rule that ‘fraud cannot be predicated upon misrepresentations as to matters of law.’ * * * The writer, however, adds that the rule ‘may be rendered inapplicable by the existence of peculiar facts and circumstances.’ * * * The rule is founded on the maxim that ‘All men are presumed to know the law.’ Experience teaches us that this maxim finds but little support in fact. It may be doubted if it was ever intended to excuse fraud.”

Waldorf v Zinberg, 106 Mich App 159, 167, 307 NW2d 749, 753 (1981)

(b)

The MPSERS statements in its publications could not be more clear. *Retirement would be based on a 1.5% multiplier.* Now the State of Michigan says that assertion is no longer true; that persons should not have believed what they were told. That is tantamount to fraud. The suggestion that Members should have known better is fallacious. They did not know better and had no reason to doubt what MPSERS told them.

2.

Defendant asserts that MPSERS cannot, as a matter of law, have made the promises contained in the Publications. Defendant says such an action would have been *ultra vires* and unenforceable. However, the promises *were* made. MPSERS produced extremely clear booklets and notices. And each one was specific and persuasive. Retirement would be computed at 1.5%. Whether MPSERS had the authority to make the promise is not relevant. The promises were made.

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3.

The promises are enforceable because a contract was formed between the Member of the Retirement System and the State of Michigan acting through MPSERS. This contract did not arise under legislation or the Michigan Constitution; the Attorney General incorrectly represents the Plaintiffs' argument. The contract arose because there were statements clearly made on which it was intended that persons rely.

4.

The Defendant does not actually deny that promises were made. And for good reason; the Publications could not be more clear. Instead, it claims that the disclaimers were sufficient. They were not. For reasons addressed in Plaintiffs' principal brief, the disclaimers do not plainly inform a reader that the contents of the Publications should not be believed. Rather, the reader is told, clearly, the terms of their retirement. The disclaimer warns only that the publication is not the text of the law; if the publication is incorrect, the law governs. No part of any publication warns that the reader should not assume that the reader should not assume that the terms of their retirement—very carefully explained—may be changed at will.

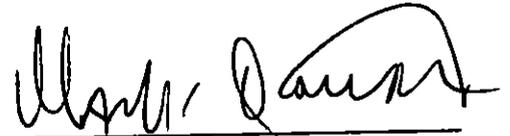
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Conclusion

2012 PA 300 imposes an unconstitutional condition on the receipt of a state provided benefit; fails to repair 2010 PA 75 because of that unconstitutional condition; breaches a promise made to tens of thousands of Members of the School Employees Retirement System. This Court should declare the contested provisions to be unenforceable.



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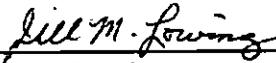
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CERTIFICATE OF SERVICE

The undersigned certifies that she sent the foregoing Appellants' Reply Brief to James A. White and Kathleen Corkin Boyle of White Schneider, Young & Chiodini, PC, 2300 Jolly Oak Rd., Okemos, MI 48864;
and Frank J. Monticello, Joshua O. Booth and Patrick Fitzgerald, of the Office of Attorney General, P O Box 30754, Lansing, MI 48909, by regular mail and by e-mail transmittal on September 12, 2014.

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Dear Clerk:

Enclosed for filing with the Court please find 25 copies of the Appellants' Reply Brief. Kindly return one copy time-stamped in the self-addressed, stamped envelope provided.

Very truly yours,

Mark H. Cousens/jml

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cc (enc.): Frank J. Monticello
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