

STATE OF MICHIGAN

SUPREME COURT

ASSOCIATED BUILDERS AND CONTRACTORS,
~~GREATER MICHIGAN CHAPTER, a Michigan~~
~~Non-Profit Corporation,~~

Plaintiff/Appellant,

-vs-

Lower Docket Case No.
12-000406-CZ

Court of Appeals Docket No.
313684

CITY OF LANSING,

Defendants/Appellees,

Ingham
C. Conady

Publ Opn
5-27-14

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**APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN
SUPREME COURT BY PLAINTIFF/APPELLANT ASSOCIATED
BUILDERS AND CONTRACTORS, GREATER MICHIGAN CHAPTER
("ABC"), FROM THE OPINION AND ORDER OF THE COURT OF
APPEALS DISMISSING ABC'S CHALLENGE TO THE
CONSTITUTIONALITY OF THE CITY OF LANSING'S PREVAILING
WAGE ORDINANCE**

FILED

JUL - 8 2014

LARRY S. ROYSTER
CLERK
MICHIGAN SUPREME COURT

MASUD LABOR LAW GROUP

**APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN
SUPREME COURT**

NOW COMES the Plaintiff/Appellant, Associated Builders and Contractors, Greater Michigan Chapter (“ABC”), by and through its attorneys, Masud Labor Law Group, and submits to this honorable Michigan Supreme Court this Application for Leave to Appeal, pursuant to M.C.R. 7.302.

Defendant/Appellee City of Lansing maintains a prevailing wage ordinance, Ord. No. 855, 8-31-92, regulating the wages and benefits construction contractors provide their employees when performing work for the City. ABC filed a complaint in the Ingham County Circuit Court alleging that Lansing’s ordinance constitutes an unenforceable *ultra vires* act under Michigan Supreme Court precedent specifically holding that municipalities lack the authority under the Michigan Constitution, as effectuated in the Home Rule City Act, to regulate wage and benefit levels of third parties (e.g., construction contractors). Circuit Court Judge Clinton Canady III agreed with ABC and struck down the ordinance as unconstitutional, consistent with Michigan Supreme Court precedent.

On appeal instituted by the City of Lansing, the Michigan Court of Appeals reversed in a split decision. In doing so, the majority of the panel acknowledged the Supreme Court’s precedent directly on point but then deliberately cast it aside, pronouncing it as “inapplicable” because its “reasoning” is no longer valid according to the majority. Purportedly free from Supreme Court precedent, the Court of Appeals then impermissibly ruled in direct contradiction to the Supreme Court’s precedent that the City of Lansing has the constitutional authority to regulate the wage and benefit rates of third parties within their jurisdiction. The ruling not only constitutes an “about face” in Michigan precedent as previously set by the Supreme Court, but it unquestionably sets a new public policy in the state because it takes from the State the exclusive

power to regulate wages and benefits. The majority of the Court of Appeals panel has set a new public policy – municipalities now have the ability to set wage and benefit rates for businesses within their jurisdictions above and beyond what the State may decree. The Court of Appeals ruling cannot stand. Under the basic, time-honored jurisprudential standard of *stare decisis* requiring lower courts to obey the rulings of higher courts, the two person majority of the Court of Appeals has clearly overstepped its bounds in this case and with potentially disastrous consequences.

Order Being Appealed

ABC has brought this Application for Leave to Appeal seeking reversal of the May 27, 2014, Order of the Michigan Court of Appeals.

Grounds for Appeal

The Court of Appeals committed an error of law and worked material injustice to ABC when it (1) refused to follow Michigan Supreme Court precedent directly on point and (2) determined that the City of Lansing possessed municipal power to regulate the wages and benefits of third parties doing business with the City. Its Order should be reversed on those grounds. There are additional grounds upon which this Application should be granted. They include:

1. The case involves a substantial question as to the validity of a municipal act;
2. The case is against a political subdivision of the state, specifically the City of Lansing; and
3. The issue concerns disregard by the Court of Appeals for principles of *stare decisis* in that the Court of Appeals has essentially determined that precedent of the Michigan Supreme Court is obsolete – a decision it is not empowered to make.

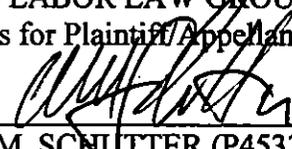
Accordingly, this honorable Michigan Supreme Court has jurisdiction of ABC's timely filed Application for Leave to Appeal pursuant to M.C.R. 7.302(B)(1)(2)(3) and (5).

Relief Sought

Plaintiff/Appellant ABC respectfully requests that this honorable Michigan Supreme Court review this matter, overrule the Court of Appeals decision, and remand the case back to the Court of Appeals with instruction that it follow Supreme Court precedent holding that municipalities in Michigan do not have the authority to regulate the employment terms of third parties such as ABC's members.

Dated this 7th day of July, 2014.

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**BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL TO THE
MICHIGAN SUPREME COURT BY PLAINTIFF/APPELLANT ASSOCIATED
BUILDERS AND CONTRACTORS, GREATER MICHIGAN CHAPTER, ("ABC"),
FROM THE OPINION AND ORDER OF THE COURT OF APPEALS DISMISSING
ABC'S CHALLENGE TO THE CONSTITUTIONALITY OF THE CITY OF LANSING'S
PREVAILING WAGE ORDINANCE**

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THE APPELLANT SAYS: YES

THE APPELLEE SAYS: NO

THE INGHAM COUNTY
CIRCUIT COURT SAID: YES

THE COURT OF APPEALS
SAYS: NO

- 2) IN DECIDING THAT THE CITY OF LANSING POSSESSES THE STATUTORY AUTHORITY TO REGULATE THE WAGES AND BENEFITS OF THIRD PARTY CONTRACTORS WITHIN ITS JURISDICTION, DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR BY REACHING THE CONCLUSION THAT MUNICIPALITIES HAVE BEEN DELEGATED SUCH AUTHORITY UNDER THE MICHIGAN CONSTITUTION AS EFFECTUATED BY THE HOME RULE CITY ACT?

THE APPELLANT SAYS: YES

THE APPELLEE SAYS: NO

THE INGHAM COUNTY
CIRCUIT COURT SAID: YES

THE COURT OF APPEALS
SAYS: NO

- 3) ALTHOUGH REMAND TO THE COURT OF APPEALS WITH AN ORDER TO FOLLOW THE SUPREME COURT'S PRECEDENT IN *LENNANE* IS CERTAINLY APPROPRIATE IN THIS CASE, IN THE EVENT THE SUPREME COURT WERE TO RECONSIDER ITS PRECEDENT NEGATED BY THE COURT OF APPEALS, SHOULD IT OVERRULE THAT PRECEDENT?

THE APPELLANT SAYS: NO

THE APPELLEE SAYS: YES

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INTRODUCTION

Plaintiff-Appellant, Associated Builders and Contractors, Greater Michigan Chapter (“ABC”), is a Michigan non-profit corporation comprising various employers operating in the construction industry. Defendant-Appellee, the City of Lansing (“Lansing” or “City”) is a “body corporate” established pursuant to the Home Rule City Act, MCL § 117.1 *et seq.* (“HRCA”). On behalf of its members, ABC challenged Lansing’s Prevailing Wage and Benefit Standards Ordinance (“PWO” or “Ordinance”) *Exhibit A*, before the Ingham County Circuit Court on the basis that the Ordinance unlawfully regulates the payment of wage and fringe benefit rates ABC contractors pay to their employees working on certain city construction projects.¹ Although the Ordinance was struck down by the Circuit Court, *Exhibit B*, a three-judge panel of the Michigan Court of Appeals reversed and reinstated it. The decision was two-to-one and included a written decision of the majority, *Exhibit C*, and a written opinion of the dissent, *Exhibit D*.

The basis for ABC’s legal challenge to the Ordinance is longstanding Michigan Supreme Court precedent which holds that a municipality (such as Lansing) lacks authority to regulate the level of wages and benefits provided by private businesses to its employees, whether through an ordinance or otherwise. The Supreme Court has made it crystal clear that such regulation is a matter of state – not municipal – concern. Thus, by enacting its PWO, Lansing exceeded its delegated home rule powers. The Circuit Court agreed that it was bound by the Supreme Court’s pronouncement on the subject and dutifully declared by way of written order dated November 14, 2012, that Lansing’s Ordinance *ultra vires* and the Court enjoined Lansing from further enforcement of it. Two of the judges on the Court of Appeals panel, on the other hand,

¹ Although ABC also sought a ruling on the City’s companion “Living Wage Ordinance,” the trial court determined at page 3 of its Opinion and Order that the ordinance had not actually been enacted and was “therefore not at issue here.” Thus, ABC proceeds in this Application for Appeal only on the issue of the City’s PWO.

determined that it was not so confined. Looking to changes in the legal landscape, the majority of the Court of Appeals panel declared *Lennane* to no longer be applicable to cases involving municipal regulation of third party wage and benefit rates. Consequently, it flipped the rule 180 degrees, ruling that, henceforth, the regulation of third party wage and benefit rates is no longer an exclusive state concern, but rather constitutes a matter of legitimate municipal concern.

But that is not how our system of justice works. It is axiomatic that lower courts are bound by the decisions of higher courts. A lower court is not permitted to disregard factually indistinguishable legal precedent of a higher court just because circumstances have rendered the higher court's decision obsolete in the judgment of the lower court. Regrettably, that is precisely what has occurred in this case. The Court of Appeals pronounced a Michigan Supreme Court case directly on point to no longer have any effect because, in its view, the precedent no longer fits the times. In doing so, it has set a substantial and important public policy for the State of Michigan contrary to what the Supreme Court has previously interpreted it to be.

The Court of Appeals has blatantly overstepped its authority by rendering Michigan Supreme Court precedent null and void on the issue of whether municipalities may regulate the wages and benefits of third parties within their boundaries. ABC therefore requests that this Supreme Court reverse the decision of the Court of Appeals and reinstate the Circuit Court's decision striking down the City of Lansing's impermissible Ordinance.

STATEMENT OF FACTS

ABC is a trade association whose members are general contractors, subcontractors, builders, suppliers, and other businesses engaged in or associated with the construction industry. Its membership is comprised of over three hundred member companies, located in twenty three Michigan counties. ABC's fundamental purpose is to foster the "merit shop" philosophy of free

enterprise and to encourage open competition and free market principles in the awarding and administering of public and private construction contracts. On behalf of its members, ABC is opposed to all legislation and laws which unjustly stifle free competition in the construction industry. Most ABC members deal individually with their employees regarding wages, hours, and other conditions of employment and generally are not parties to collective bargaining agreements with labor organizations. Many of ABC's members have performed, or have sought to perform, construction projects within Lansing and further remain interested in performing such construction projects.

Lansing enacted its PWO in contradiction to ABC's free enterprise objectives. The PWO states in relevant part:

Sec. 206.18. Prevailing wage and benefit standards prescribed.

(a) No contract, agreement or other arrangement for construction on behalf of the City and involving mechanics and laborers, including truck drivers of the contractor and/or subcontractors, employed directly upon the site of the work, shall be approved or executed by the City unless the contractor and his or her subcontractors furnish proof and agree that such mechanics and laborers so employed shall receive at least the prevailing wages and fringe benefits for corresponding classes of mechanics and laborers, as determined by statistics compiled by the United States Department of Labor and related to the Greater Lansing area by such Department.

(b) Any person, firm, corporation or business entity, upon being notified that it is in violation of this section and that an amount due to his, her or its employees, shall have 30 days from the date of the notice to pay the deficiency by paying such employee or employees, whichever is appropriate, the amounts due. If the person, firm, corporation or business entity fails to pay within the 30-day period, he, she, or it shall be subject to the penalty provided in Section 206.99.²

(c) The provisions of this section shall be inserted in all bid documents requiring the payment of prevailing wages.

² Section 206.99 provides that failure to abide by the Ordinance is a misdemeanor offense. It also provides for an award of back wages, plus interest, and costs imposed against the employer.

(d) The enforcement agency for this section shall be as determined by the Mayor.

Exhibit A.

As a result of Lansing's PWO, contractors awarded construction contracts with Lansing have been required to pay wage and fringe benefits to their employees at levels mandated by Lansing. Consequently, until the PWO was stuck down by the Ingham County Circuit Court, many of ABC's members seeking or doing business with Lansing were required to adjust their employee compensation agreements in order to comply with that Ordinance. The relief was short lived, as the Court of Appeals ruling reinstates these burdens on ABC members.

ARGUMENT

- I. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT DELIBERATELY REFUSED TO FOLLOW (AND THEREBY NEGATED) THE CRYSTAL CLEAR PRECEDENT OF THE SUPREME COURT IN *LENNANE* HOLDING THAT MUNICIPALITIES DO NOT POSSESS DELEGATED AUTHORITY TO REGULATE THIRD PARTY WAGES OR BENEFITS.**

In *Attorney General, ex rel. Lennane v. City of Detroit*, 225 Mich 631; 196 NW 391 (1923), the Michigan Supreme Court ruled that the City of Detroit did not possess the authority to regulate the wage and benefit rates of contractors doing business with the City. Examining the HRCA (the statute through which cities derived their various municipal powers from the Legislature), the Court determined that such regulation was a matter of state concern – not municipal concern – and that, even if viewed as an agent of the State, a municipality does not possess the authority to fix state policy within their municipal boundaries. In short, the Supreme Court ruled that regulating the wages and benefits of private third parties fell outside the City's

authority under the HRCA and/or the Michigan Constitution.

The present case is directly on point. Under *Lennane*'s precedent, ABC sued the City of Lansing because the City, through its PWO, requires ABC members to adjust the compensation terms they maintain with their employees whenever they work on City of Lansing funded projects. Seeing the case as "on all fours" with *Lennane*, the trial court granted summary disposition to ABC consistent with its duty to follow Supreme Court precedent. On appeal however, the Court of Appeals criticized and then rejected *Lennane*. This blatant disregard for Supreme Court precedent should not be allowed to stand. Thus, the Supreme Court should remand the case back to the Court of Appeals and require it to obey the Supreme Court's precedent as articulated in *Lennane*.

A. Standard of Review.

ABC contends that the Court of Appeals committed reversible legal error when it knowingly and deliberately bypassed Michigan Supreme Court precedent in order to reverse the trial court's grant of summary disposition to ABC. The Supreme Court will review and remand cases where the Court of Appeals commits plain error by not applying Supreme Court precedent and, in doing so, reviews such matters *de novo* as a question of law. *People of Michigan v. Lamont Stinnett* 480 Mich 865; 737 NW2nd 760 (2007); *Roberts v Mecosta County General Hospital* 466 Mich 57, 62; 642 NW2nd 663 (2002).

B. Interpreting both the Michigan Constitution and the HRCA, the Michigan Supreme Court ruled in *Lennane* that regulating third party wage and benefit rates is not a municipal concern but, rather, a state concern over which municipalities have no authority to regulate.

Article IV, Section 1, of the Michigan Constitution provides that the Legislature possesses exclusive authority to make and pass laws. Municipalities derive their authority to

make and pass laws within their jurisdictions either from a grant of power by the Legislature or through the Constitution itself. *City of Taylor v. Detroit Edison Co.*, 475 Mich 109, 115-116; 715 NW2d 28 (2006). Absent a delegation of such state power however, a municipality does not possess the authority to make and pass laws. *Bivens v. City of Grand Rapids*, 443 Mich 391, 397; 505 NW2d 239 (1993) (“Municipal corporations have no inherent power. They are created by the state and derive their authority from the state.”) (internal citations omitted); *Sinas v. Lansing*, 382 Mich 407, 411; 170 NW2d 23 (1969).

Municipalities like the City of Lansing receive their delegation of the power to make laws from the Michigan Constitution as effectuated through the HRCA. The HRCA was enacted in 1909. Under that statute, the State has delegated to municipalities the authority to pass ordinances limited to matters of “municipal concern.” This limited power is granted to municipalities pursuant to Section 4(j)(3) of the Act, which states that a home rule city may, in its charter, provide:

[f]or the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants *and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.*

MCL § 117.4(j)(3) (Emphasis added). Thus, the seminal issue in this case is whether Lansing’s PWO constituted a proper exercise of the prescribed lawmaking authority delegated to the City of Lansing from the State. More specifically, the question is whether Lansing’s regulation of employee wage and benefit levels under the PWO properly addresses matters of “municipal concern” consistent with Section 4(j)(3) of the HRCA or whether its regulation improperly addresses matters of “state concern” over which the City has no authority.

According to the Michigan Supreme Court, the answer to the foregoing question is crystal clear – such regulation is a matter of state concern not within the regulatory reach of municipalities. In *Lennane, supra*, the Michigan Supreme Court determined that a City of Detroit wage regulation (extremely similar to Lansing’s PWO) exceeded the City of Detroit’s authority to promulgate ordinances pursuant to the HRCA. The Supreme Court specifically found that wage regulations are uniquely a matter of state concern to be regulated exclusively through the state’s police power, if at all. According to the Supreme Court, because the City of Detroit exceeded its grant of Home Rule authority and intruded upon the exclusive authority of the State, the City’s wage regulation constituted an *ultra vires* act.

The City of Detroit’s charter, like Lansing’s PWO, required contractors doing business with the City to pay construction workers at least an established *prevailing wage* as specified by the City. The applicable City of Detroit charter provision stated in relevant part:

No contract for any public work shall be let which shall not, as part of the specification on which contractors shall make their bids, require contractor or subcontractor to pay all persons in his employ doing common labor and engaged in the public work contracted for not less than two dollars and twenty-five cents per diem, to pay all persons in his employ doing the work of a skilled mechanic and engaged on the public work the highest *prevailing wage* in that particular grade of work, and to require of such employees the same service day and service week required herein of all city employees. Any contractor who shall have entered into such contract with the city and shall have violated any provision of this section as made a part of his contract shall be debarred from any further contracts for public work, and any contract let to him contrary to this provision shall be void. Whenever it shall appear that any employee of any contractor for public work engaged thereon shall have received less than the compensation herein provided, the common council may cause to be paid to him such deficit as shall be due him and shall cause the amount so paid to be deducted from the balance due to the contractor from the city.

(Emphasis added). *Id.* at 634-635.³

³ The City of Detroit also maintained an ordinance which was nearly identical to the charter provision. Because the charter and ordinance language were nearly identical, the Court declined to quote the ordinance separately in its decision. *Lennane* at 633. Thus, for all intents and purposes, the Court used the word “charter” as encompassing both regulations.

The Attorney General, on behalf of numerous contractors, filed suit seeking to prohibit the City of Detroit from enforcing the charter provision. *Id.* at 633. The Attorney General argued that the provisions of the Charter violated both the Michigan and United States Constitution so that the City of Detroit lacked the authority to regulate contractor wage rates thus rendering the charter provisions *ultra vires* and, therefore, unenforceable. *Id.* at 635. The trial court agreed with the Attorney General's arguments and granted the relief sought. *Id.*

On direct appeal, the Michigan Supreme Court determined that the Charter constituted an *ultra vires* act because the City of Detroit had not been granted such power under either the State Constitution or the HRCA. According to the Court, the Michigan Constitution did not provide municipalities *carte blanche* power to pass and maintain laws the same as the sovereign state. The Court first recognized that the State may have certain "state concerns" and municipalities may have unique "municipal concerns," but that each is not to intrude upon the power possessed by the other. *Id.* at 636. The Court also recognized that a municipality could act as "an agent of the State" in certain instances, such as in matters of public health and police activities, *Id.* at 637, but that the agency relationship does not allow a municipality to fix public policy for the State. *Id.* at 638. Finally, the Court reasoned that the general "police power" rests with the State and that only where a delegation of such power has been made in some way to municipalities could municipalities engage in police power regulation. *Id.*

As to the specific question before it – whether a municipality may regulate third party wages and benefits – the Court ruled as follows:

In the provisions under consideration the city has undertaken to exercise the police power not only over matters of municipal concern but also over matters of State concern; it has undertaken not only to fix a public policy for its activities which are purely local but also for its activities as an arm of the State. The

provisions apply alike to local activities and State activities. *If we assume, as we have for the purposes of the case, without deciding the question, that the city possesses such of the police power of the State as may be necessary to permit it to legislate upon matters of municipal concern, it does not follow that it possesses all the police power of the sovereign so as to enable it to legislate generally in fixing a public policy in matters of State concern. This power has not been given it either by the Constitution or the home-rule act.*

(Emphasis added). *Id.* at 640-641. Thus, by enacting its prevailing wage requirements of contractors doing work for the City, the City of Detroit was determined by the Supreme Court to have overstepped its bounds of authority under the Michigan Constitution as effectuated through the HRCAs.

C. **Since Lansing's PWO is precisely the same type of regulation as that found to be outside the scope of municipal authority as determined by the Supreme Court in *Lennane*, the Court of Appeals was obligated by the doctrine of *stare decisis* to follow it.**

Whether wage rates of third parties are within the power of a municipality to regulate has clearly been decided by the Michigan Supreme Court. *Lennane* unequivocally held that the level of wages paid to employees of a third party is *not* a matter of municipal concern over which cities have control. Rather, it is a matter of state concern not to be shared with municipalities. Because of *Lennane's* binding effect, the Court of Appeals should have been bound by *stare decisis* to affirm the lower court's ruling that Lansing's PWO is *ultra vires* and unenforceable.

A review of the facts of *Lennane* shows it to be virtually indistinguishable from the present case. The Detroit charter (and identical ordinance) sought to prescribe a particular wage rate of contractors doing work for the City of Detroit. The Lansing PWO likewise prescribes particular wage rates for contractors performing work for the City of Lansing. The only difference is that the City of Lansing PWO goes one step further in its regulation – it also sets minimum fringe benefit levels contractors must provide their employees working on City-funded

projects.

The relevant Constitutional provisions at issue in both cases are also virtually the same.

The Michigan Constitution at the time *Lennane* was decided provided that:

[u]nder such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village, and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this State.

Const 1908, Art 8, §21. The current 1963 Constitutional provision at issue reads almost identically to the predecessor 1908 Constitution. It provides:

Under general laws the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. *No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.*

Const 1963, Art 7, § 22 (Emphasis added to show difference).

Finally, the applicable language of the HRCA read at the time *Lennane* was decided as follows:

{f}or the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the Constitution and general laws of this State.

1 Comp. Laws 1915, § 3307(t) (Emphasis added). *Significantly, the HRCA reads exactly the same now as it did when Lennane was decided.*

As demonstrated above, the only differences between *Lennane* and the present case is

that (1) Lansing's power grab extended one step beyond that attempted by the City of Detroit in *Lennane* and (2) the Michigan Constitution now provides that any enumeration of municipal powers in the Constitution is not to be interpreted as limiting any other powers. Of course, under *Lennane*, Detroit was without authority to regulate even a basic wage scheme, let alone a complicated fringe benefit system. Thus, as to the first "difference" between the cases, the fact that Lansing has sought to regulate *additional* areas of compensation provided by contractors to their employees makes the impermissible regulation even more egregious under the *Lennane* analysis. If anything, it creates further reason to strike down the regulation. It certainly does *not* create a distinction taking the present case out from under *Lennane's* holding.

The second "difference" is also meaningless. Even though there is an additional sentence in the Michigan Constitution providing that any numbered listing of municipal powers in the Constitution is not to be read as limiting the general grant of municipal authority found in Article 7, Section 22, there is no such enumeration of powers in the Constitution at issue in this case just as there was no such issue in *Lennane*. Even if there were a list of municipal powers in the Constitution hypothetically at issue here, ABC has not and would not argue that certain municipal powers expressed in the Constitution impliedly reject other powers ("*expressio unius est exclusio alterius*" – the express mention of items excludes all others), *i.e.*, that such a numbered list of specific municipal powers would foreclose the City of Lansing from regulating in some other area like the wages and benefits paid by contractors performing work for the City. Thus, this added language to the 1963 Constitution does not provide a meaningful distinction between the *Lennane* case involving the City of Detroit and the present case involving the City of Lansing.

Because there is no meaningful difference between *Lennane* and the present case, the

Court of Appeals was obliged to follow it. Had it done so, it would certainly have ruled that the City of Lansing overstepped its authority under the Constitution and the HRCA by enacting its PWO with striking similarity to the regulation struck down in *Lennane*.

In short, the Michigan Supreme Court has settled the issue of whether the State's police power to regulate wages (unquestionably a matter of general state concern) has been delegated to municipalities by either the Constitution or HRCA. The Court has spoken plainly in the negative. Municipalities may *not* regulate wages or benefit rates of contractors or other businesses by way of ordinance or any other means. The black letter rule of law established by the Michigan Supreme Court in its 1923 *Lennane* decision remains true today. Since *Lennane* and the present case are indistinguishable – indeed, they are the mirror image of each other, the Court of Appeals committed reversible error by refusing to apply *Lennane's* holding to ABC's case before it.

II. THE COURT OF APPEALS COMMITTED REVERSIBLE LEGAL ERROR NOT ONLY BY DISREGARDING *LENNANE*, BUT ALSO BY REACHING THE ERRONEOUS CONCLUSION THAT THE CITY OF LANSING HAS THE STATUTORY AUTHORITY TO REGULATE THE WAGES AND BENEFITS OF THIRD PARTY CONTRACTORS UNDER THE HRCA.

A. Standard of Review

This case concerns the Court of Appeals erroneously reasoned reversal of a trial court's grant of summary disposition to Plaintiff/Appellant ABC. The substance of the case concerns the constitutionality of a municipal ordinance which necessarily involves interpretation of the ordinance in relation to the Michigan Constitution, a Michigan statute, and prior Michigan case law. The Supreme Court reviews *de novo* decisions on summary disposition and questions of constitutional law. *Bronner and Bronner v. City of Brighton*, 495 Mich 209, 220-221; ____

NW2d ___ (2014).

- B. The Court of Appeals wrongly decided that the Supreme Court's reasoning in *Lennane* has been superseded and, thus, incorrectly rendered *Lennane* "inapplicable" to not only this case, but all other potential prevailing wage ordinance cases to which *Lennane* should apply.**

The majority of the Court of Appeals panel essentially ruled with three-step reasoning; (1) the Michigan Constitution of 1963 provides for a much more liberal reading of powers granted to municipalities as compared to that under the Constitution of 1908, (2) this liberal reading has resulted in more municipal powers being recognized over time, and (3) the Supreme Court's holding in *Lennane* is therefore no longer applicable. *Exhibit C* p. 9. Yet, whatever differences exist in relation to the focal lens by which Michigan courts are to view municipal powers, the fact remains that a municipality must be granted power from the Legislature in some way for the power to exist. The Michigan Supreme Court determined decades ago that the power to regulate third party wages and benefits was *not* conferred to municipalities under the Michigan Constitution or the HRCA. Thus, in the absence of the Supreme Court reversing its own precedent in *Lennane*, it is only through a clear amendment to the Constitution or the HRCA providing such power that the power of a municipality to regulate third party wage and benefit rates could come about. Since neither has happened, the Court of Appeals is clearly wrong in deciding, contrary to *Lennane*, that the City of Lansing possesses the power to regulate wage and benefit rates of contractors performing on city projects.

The basis for the majority's opinion that *Lennane* has been "superseded" and is therefore "inapplicable," rests on the fact that the Michigan Constitution was amended 1963 to provide for liberal construction of municipal power and that the Supreme Court has since then recognized and applied such construction to cases brought before it. *Exhibit C*, pp. 6-9. Yet, as is pointed

out by dissenting Judge David H. Sawyer in his opinion, what the majority overlooks is the fact that any purported power must attach to a municipal concern. *Exhibit D*, p. 1. In every case cited by the majority, the grant of power related to a municipal concern as expressed in a statute or as determined by a court. Of course, when it comes to the regulation of third party wage and benefit rates by a municipality, there has never been any such expression or finding. In fact, as demonstrated above, the opposite is true. The Supreme Court has determined in *Lennane* that regulation of third party wages is a matter of state concern – not municipal concern.

In its ruling, the majority of the Court of Appeals panel has effectively ignored the stated limitation on municipal authority expressed in section 117.4(j)(3) of the HRCA and as put into practice by the Supreme Court in *Lennane* – that a municipality has been delegated authority to pass laws and ordinances “relating to its municipal concerns.” MCL 117.4(j)(3). For example, the majority cites *AFSCME v. Detroit*, 468 Mich 388, 410; 662 NW2d 695 (2003) and *Rental Property Owners Association of Kent County v. City of Grand Rapids*, 455 Mich 246; 566 NW2d 517 (1997) for proposition that municipalities enjoy the right to exercise the State’s police power even absent an express delegation of that power to municipalities by the State. *Exhibit C*, p. 6. But the majority has blown past critical language from these cases demonstrating their consistency with *Lennane*’s holding that municipalities must identify a municipal concern as the lynchpin for their delegated municipal power.

In *AFSCME*, *supra*, the majority’s quote from the Supreme Court case (“... home rule cities enjoy not only those powers specifically granted, but they *may* also exercise all powers not expressly denied” (emphasis added)) clearly shows through use of the word “may,” that the municipal power is qualified power, meaning it depends upon other circumstances. In *Rental Property*, *supra*, the Supreme Court provided the answer to what those circumstances are.

There, the Supreme Court stated quite specifically that “[t]he enactment and enforcement of ordinances related to *municipal concerns* is a valid exercise of municipal power as long as the ordinance does not conflict with the constitution or general laws.” *Id.* at 253 (Emphasis added) (Internal citation omitted). The Supreme Court’s quotation from the HRCA reveals an important limitation on municipal power – the enactment and enforcement of municipal regulations must be tied to a municipality’s “*municipal concerns*.” If the regulation is not related to a municipal concern, the regulation is not a valid exercise of municipal power; rather the regulation evidences an unlawful usurpation of power.

The majority also offers misplaced reliance on *City of Taylor v. Detroit Edison Co.*, 475 Mich 109, 116; 715 NW2d 28 (2006), *Detroit v. Walker*, 445 Mich 682, 690; 520 NW2d 135 (1994) and *Rental Property*, *supra* at 253, for the proposition that the HRCA grants general rights and powers, subject only to certain enumerated restrictions. In essence, the majority seems to maintain that municipal power need not have its origin in a delegation of power from the State, so that the City of Lansing may regulate third party wages because no specific law specifically prevents Lansing from doing so. But again, the majority is wrong. Municipalities are empowered to regulate only on matters linked to a grant of authority from the State. *Bivens*, *supra* at 397 (“An ordinance enacted by the governing body of a home rule city is valid only if it is consistent with the powers conferred by the state in its constitution and statutes.”). In the present case, Lansing was authorized to regulate only in matters of municipal concern. According to the Supreme Court, regulating outside parties’ wage and benefit relationships, which is the point of Lansing’s PWO, is not a municipal concern, but a state concern, so that it was therefore out of Lansing’s delegated powers.⁴ In short, the existence of a municipal concern

⁴ In fact, *Detroit v. Walker*, *supra*, reiterates this point. The Supreme Court specifically stated that municipal power continues to be limited in the same basic way as was true in *Lennane*, that

is a threshold requirement for liberally construed municipal regulation. The majority's failure to understand that has caused it to erroneously misconstrue the effect of Supreme Court precedent since *Lennane* was decided.

The majority of the Court of Appeals panel has also erred in its discussion of municipal authority to wield state police power. The majority correctly contends that courts have recognized that, "unless expressly limited by statute or our Constitution, the police power possessed by cities is of the same scope as the police power possessed by the state." *Exhibit C*, p. 7. The majority incorrectly stated, however, that holdings of this sort pose a "significant contradiction to the reasoning employed in *Lennane*." *Id.* The majority was incorrect in large measure because the cases cited, *Belle Isle Grill Corp v. Detroit*, 256 Mich App 463, 481; 666 NW2d 271 (2003) and *People v. Sell*, 310 Mich 305, 315; 17 NW2d 193 (1945) don't support the majority's contention that a conflict exists with *Lennane*. In both cases, the courts acknowledged that the authority to exert the police power was still contingent upon the matter being considered a municipal concern.

In *Belle Isle*, a restaurant owner sued the City of Detroit for breach of contract when the local police department issued an "operations order" preventing cars from "cruising" during warm weather on Belle Isle, thus impeding traffic. Upholding the order, the Court of Appeals simply acknowledged that cities have the same types of police power as the State when enacting laws *pertaining to their municipal concerns* ("Under the provisions of *Const 1963* and the Home Rule City Act, municipalities have been granted the authority to enact laws *pertaining to municipal concerns* including those involving 'the public peace and health and for the safety of

is, "cities are empowered to form for themselves a plan of government suited to their unique needs and, *upon local matters*, exercise the treasured right of self-governance." *Id.* at 690 (Emphasis added). From this quote, an enumerated restriction certainly exists. Municipal power is limited to "local matters," a reference tantamount to "municipal concerns."

persons and property.’”) (Emphasis added, citations omitted). *Id.* at 480-481. Similarly in *Sell*, as pointed out in Judge Sawyer’s dissenting opinion, *Exhibit D* at page 2, the Supreme Court also determined that the ordinance was a municipal concern (“Ordinances and statutes of similar import to the ordinance involved in the present case ... have been held constitutional as a valid exercise of *municipal police power*.”) (Emphasis added). *Id.* at 319-320. Moreover, *Sell*, which involved an ordinance imposing criminal sanctions for selling commodities under ration by the federal government during World War II, is not to be looked to for any general legal principles because, as the Supreme Court said within its decision, “[t]his ordinance should not be judged by the same tests as those applied to an ordinance enacted in peace time.” *Id.* at 319. See also, Judge Sawyer’s dissenting opinion. *Exhibit D*, p. 2, Fn. 1.

There is additional error in the majority’s analysis. The majority puts great emphasis on completely irrelevant cases. The majority cites four cases – *Brimmer v. Village of Elk Rapids*, 365 Mich 6, 12-13; 112 NW2d 222 (1961), *Gildersleeve v. Lamont*, 331 Mich 8, 12; 49 NW2d 36 (1951), *Kane v. Flint*, 342 Mich 74, 77-78; 69 NW2d 156 (1955) and *Olson v. Highland Park*, 312 Mich 688, 695; 20 NW2d 773 (1945) – as “buttressing” its opinion that *Lennane* is not applicable to prevailing wage ordinance cases. *Exhibit C*, pp. 7-9. Yet each of those cases involved a city’s municipal power to regulate wages or benefits of the *city’s own workers*! The case ABC has brought involves a city’s authority to regulate employment terms and conditions of *outside third parties*, i.e., wage and benefit rates paid by contractors to their employees on city funded projects. Thus, the cases cited by the majority (e.g., cities maintain a municipal concern over the wages of their own employees) are entirely different from the *Lennane* case and/or the case brought before it by ABC and the City of Lansing (cities do *not* have a municipal concern over the wages of third parties). The cases cited by the majority therefore add nothing to the

analysis of the issues of the present case.

The fact of the matter is that the provision in the 1963 Constitution calling for liberal construction of municipal authority does not grant any new substantive rights to municipalities beyond those in existence under the 1908 Constitution. The difference between the 1908 and 1963 constitutional provisions is that the latter merely broadened the interpretive lens through which the courts analyze the scope of municipal powers. Yet, the fact that Michigan courts today broadly interpret laws in favor of municipal power does not change the fact that the underlying power must exist within the confines of constitutional delegation in the first place. Again, municipalities may only pass regulations relating to their municipal concerns. The relevant provision of the Michigan Constitution reads:

Under general laws the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances *relating to its municipal concerns*, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

Const 1963, Art 7, § 22 (Emphasis added).

Because the current Michigan Constitution retains the mandate that municipal regulations must exist within a “municipal concern,” and because our current 1963 Constitution does not broaden the definition of “municipal concern” to include regulation of third party wage rates, it cannot reasonably be concluded that adoption of the 1963 Michigan Constitution overruled *Lennane*.

Not only is there no evidence that adoption of the 1963 Constitution changed the meaning of what does and does not constitute “municipal concern,” but the *Lennane* court effectively analyzed the regulatory wage rate ordinance before it under the same kind of “liberal construction” as exists under the current Constitutional language. It assumed for purposes of that

case that municipalities were delegated greatly enlarged police powers. The court stated:

[i]f we assume, *as we have for the purposes of the case*, without deciding the question, that the city possesses such of the police power of the State as may be necessary to permit it to legislate upon matters of municipal concern, it does not follow that it possesses all the police power of the sovereign so as to enable it to legislate generally in fixing a public policy in matters of State concern.”

Lennane at 641 (emphasis added). Yet even in premising its decision through liberal construction of the HRCA in favor of municipal power, the Court could not find that municipalities possessed the power to regulate third party wage levels. To the contrary, the Supreme Court ruled that such regulations do not fall within the gambit of municipal concerns. Therefore, even assuming *arguendo* that the 1963 Michigan Constitution could have affected *Lennane's* continued viability (which it did not), because the *Lennane* court analyzed the matter of municipal regulation of third party wage levels the same way that Michigan courts should today, *Lennane* cannot logically or reasonably be said to have been overruled by adoption of the 1963 Michigan Constitution.

At the end of the day, the majority of the Court of Appeals panel is simply wrong in its novel theory that a change to liberal reading of municipal power justifies a lower court finding that “the reasoning employed in *Lennane* has been rejected.” *Exhibit C*, p. 9. There is no ruling by any other court expressing that conclusion or even permitting such an action. Thus, it stands that a change in the interpretive focus looking at what specific powers municipalities possess in the future is not sufficient to provide the Court of Appeals the ability to render nugatory a ruling on a specific municipal power determined by the Supreme Court in the past. The only way the majority could effectively depart from the Supreme Court’s holding municipal power decision in *Lennane* would be to show that the *specific holding* of *Lennane* has been overruled, either by *specific ruling* by the Supreme Court itself or through *specific legislation*. But that is a tall order.

Even the City of Lansing refrained throughout this litigation from arguing the Michigan Supreme Court's decision in *Lennane* has been overruled by a subsequent ruling of the Supreme Court or through some specific legislation. This is for good reason, as research reveals there are no such cases or statutes.

Finally, the Legislature could have amended the HRCA at any time to provide for the power of municipalities to regulate third party employment terms, but it has chosen not to, thus indicating the Supreme Court's decision in *Lennane* was in keeping with the intent of the 1963 Constitution as effectuated by the HRCA. The Legislature is presumed to be aware of the Supreme Court's *Lennane* decision. "It is a well-established rule of statutory construction that the Legislature is presumed to be aware of judicial interpretations of existing law." *Ford Motor Co. v. City of Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006). Had the Legislature believed the *Lennane* ruling was contrary to the intent of the drafters of the 1963 Constitution or the HRCA, it could have easily amended the HRCA to provide for specific "legislative overruling" of the decision at any time. It has never done so. Because the Legislature has refrained from amending the provision at issue, Michigan courts should view that "silence or acquiescence [as] an indication that the Legislature agreed with the accuracy of [the *Lennane* Court's] interpretation" of the HRCA. *Wikman v. Novi*, 413 Mich 617, 638; 322 NW2d 103 (1982), citing *Magreta v. Ambassador Steel Co. (on rehearing)*, 380 Mich 513; 158 NW2d 473 (1968); *In Re Clayton Estate*, 343 Mich 101; 72 NW2d 1 (1955).

Of course, this is not to say the Legislature has forgotten the HRCA. To the contrary, the Legislature has amended various provisions of the HRCA since *Lennane* was decided to

specifically provide additional municipal powers it thought cities may not have possessed.⁵ More than that, and instructive to the point that the Legislature is presumed to have acquiesced to the *Lennane* holding, the Legislature actually overruled the specific holding of a case cited within *Lennane*! In *Clements v. McCabe*, 210 Mich 207; 177 NW 72 (1920), cited and discussed by *Lennane, supra*, at 639-640, the Supreme Court ruled that municipalities were not delegated the authority under the Michigan Constitution or the HRCA to zone city land for residential use only. *Clements*. at 216. Apparently in disagreement with that decision, the Legislature subsequently enacted the City and Village Zoning Act (subsequently repealed and replaced with the current Michigan Zoning Enabling Act, MCL 125.3101, *et. seq.*) providing municipalities the authority to zone property. Had the Legislature thought *Lennane* reached the wrong conclusion and that the Michigan Constitution, as effectuated by the HRCA, did indeed delegate to cities the authority to regulate wages and benefits contractors pay their employees on city projects, it could have done precisely what it did in *Clements* – it could have provided a legislative fix. Again, it did not do so.

As previously stated, the HRCA has *not* been amended in a manner which might possibly lead to the conclusion that *Lennane* has been overruled. The HRCA states in relevant part:

For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances *relating to its municipal concerns* subject to the constitution and general laws of this state.

MCL § 117.4(j)(3) (Emphasis added). This language is verbatim to that which existed when the Court determined *Lennane* in 1923. See, *Lennane* at 638. It is, therefore, as Judge Sawyer wrote

⁵ See, *e.g.*, 1978, Act 499, Imd. Eff. Dec. 11, 1978. This amendment added Section 117.4k to the HRCA and provided the authority for cities to appropriate funds for support of private, non-

in his dissent:

... what is lacking is any provision in the constitution or statute that expressly grants a city the authority to enact the type of ordinance at issue here that represents a change in law after the ruling in *Lennane*. That is, there is no particular reason to believe that the people in enacting the 1963 Constitution had any disagreement with the holding in *Lennane*. Nor has the Legislature seen fit to amend the Home Rule City Act, MCL 117.1 *et seq.* to explicitly grant the authority which *Lennane* concluded that cities lack.

Exhibit D, p. 1.

Despite the majority decision of the Court of Appeals panel concluding to the contrary, the essential underlying considerations present at the time the Michigan Supreme Court decided *Lennane* remain true today. Indeed, the current Michigan Constitution still specifically provides that “[e]ach such city and village shall have power to adopt resolutions and ordinances relating to its *municipal concerns*, property and government, subject to the constitution and law.” *Const* 1963, Article VII, §22 (emphasis added). Similarly, the HRCA still merely allows a municipality to pass “laws and ordinances relating to its *municipal concerns* subject to the constitution and general laws of this state.” *MCL* § 117.4j(3) (emphasis added). As the Michigan Constitution and the HRCA remain fundamentally unchanged, the Supreme Court’s decision in *Lennane* is still good law and is directly applicable to the present case. The majority decision of the Court of Appeals decision to the contrary rendering the Supreme Court’s *Lennane* decision “inapplicable” or “superseded” is simply incorrect and should be reversed.

III. DECLARING THE SUPREME COURT’S DECISION IN *LENNANE* TO HAVE BEEN “SUPERSEDED” AND “INAPPLICABLE” TO MUNICIPAL PREVAILING WAGE CASES, THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR BECAUSE IT BLATANTLY VIOLATED THE UNIVERSAL JUDICIAL PRINCIPLE OF *STARE DECISIS*.

profit institutions related to artistic and cultural activities within their jurisdictions.

A. Standard of Review.

Under the doctrine of *stare decisis*, once a principle of law is determined, it is to be followed in subsequent similar cases. Furthermore, as an inferior court, the court of appeals is bound by the doctrine of *stare decisis* to adhere to precedent of the Michigan Supreme Court. The Court of Appeal's decision in this case violates that doctrine as a matter of law. It is reviewed *de novo* by the Supreme Court. *People v. Williams, supra; Roberts, supra.*

B. Not only was the Court of Appeals wrong to conclude that the Supreme Court's reasoning in *Lennane* has been superseded by case law and that the precedent is therefore obsolete, but it is not for the Court of Appeals to make such a ruling, as only the Supreme Court can judicially determine whether its holdings are no longer valid.

The Michigan Supreme Court determined in *Lennane* that the power to regulate wage rates of contractors performing work for municipalities was a matter of police power that had not been delegated to municipalities. Thus, absent an express grant of power in the 1963 Constitution or through the HRCA, that decision must stand unless and until the Supreme Court were to decide to modify its own precedent. There has been no such modification. Therefore, even if the underlying reasoning of the majority of the Court of Appeals could hold some merit in a theoretical sense, the lower Court's decision that *Lennane* is obsolete and inapplicable is not within its power to decide. Case law is abundantly clear that the Court of Appeals cannot overrule Supreme Court precedent. *Lubertha Ratliff v. General Motors Corp.*, 127 Mich App 410, 416-417; 339 NW2d 196 (1983):

The issue raised by the defendant in essence asks this Court to address the constitutionality of [a prior Michigan Supreme Court decision]. This we decline to do. *This Court is bound by the doctrine of stare decisis and is powerless to overturn a decision of the Supreme Court. Schwartz v. City of Flint* (after remand), 120 Mich App 449, 462; 329 NW2d 26 (1982); *People v. Recorder's Court Judge #2*, 73 Mich App 156, 162; 250 NW2d 812 (1977), lv den 400 Mich 825 (1977).

(Emphasis added). It is up to the Supreme Court to decide whether its precedent has become obsolete.

This isn't the first time the Court of Appeals has had a case involving *Lennane*, but it is the first time the Court of Appeals has blown past its holding. In 2009, another panel of the Court of Appeals was presented a case involving the City of Detroit's attempt to enforce a "living wage" ordinance. *Rudolph v. Guardian Protective Servs.*, 2009 Mich App LEXIS 1989 (2009), (unpublished). *Exhibit E*. Unlike the current panel, however, the *Rudolph* panel ruled that *Lennane* constituted binding precedent on the matter and that the Court had no alternative but to rule the Detroit ordinance *ultra vires* and, therefore, unenforceable.

In *Rudolph*, the trial court came face to face with the Supreme Court's decision in *Lennane*. Finding the case to be directly on point, it ruled that it was bound by *stare decisis* to find the living wage ordinance invalid. *Id.* at *1. On appeal, the Court of Appeals also addressed its obligation to the doctrine of *stare decisis*. The Court stated that *stare decisis* requires a court "to reach the same result when presented with the same or substantially similar issues in another case with different parties," citing *Topps-Toeller, Inc. v. City of Lansing*, 47 Mich App 720; 209 NW2d 843 (1973). *Id.* at *2. The Court of Appeals also referenced that *stare decisis* mandates that all lower courts are bound by a decision issued by a majority of the Michigan Supreme Court and that such courts "remain bound by our Supreme Court's precedent until such time as the Supreme Court overrules or modifies it[.]" citing *People v. Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987) and *State Treasurer v. Sprague*, 284 Mich.App 235, 242; 772 NW2d 452 (2009). *Id.* Examining whether Detroit's implementation of a wage ordinance constituted a valid exercise of its police power, the Court recognized that the regulation struck down in *Lennane* and the regulation before it were virtually indistinguishable as "both [were]

clearly intended to accomplish substantially similar goals and would entail exercise of the same power.” *Id.* at *3. Consequently, the Court of Appeals held that *stare decisis* mandated the conclusion that the City of Detroit’s living wage ordinance was unenforceable as an *ultra vires* act. *Id.*

Here, the City of Lansing has attempted to accomplish markedly comparable goals utilizing the same means as failed in *Lennane*. When ABC sued, Ingham County Circuit Court Judge Clinton Canady III correctly determined, as the trial court did in *Rudolph*, that *Lennane* constitutes binding precedent on the issue of whether municipal power extends to regulation of third party wage and benefit rates. *Exhibit B*, p. 6. Yet, on appeal, two members of this panel of the Court of Appeals diverged from every court examining the issue⁶ and instead declared the Supreme Court’s reasoning in *Lennane* to no longer be valid or, in the words of the Court, that *Lennane*’s reasoning has been “superseded.” *Exhibit C*, p. 9. But simply because the legal landscape may have changed, does not mean that the lower court can disregard Supreme Court precedent as the majority of the Court of Appeals panel has done here.

The binding effect of *Lennane* must be applied despite the majority panel’s conclusion

⁶ Because *Rudolph* is not a published decision, it obviously was not binding on this current panel of the Court of Appeals. Still, this fact does not negate the obvious persuasive value of the decision. MCR 7.215. *Rudolph*’s holding should have been highly persuasive to this panel given the limited case law on the subject and the fact that the factual and legal issues inherent in *Rudolph* constituted the mirror image of this case. *People v. Green*, 260 Mich App 710, 720 n. 5; 680 NW2d 477 (2004) (unpublished decision properly viewed as persuasive in light of the limited case law in a specific area); *Paris Meadows, LLC v. City of Kentwood*, 287 Mich App 136, 145 n.3; 783 NW2d 133 (2010) (factually similar unpublished case law “provides instructive and persuasive value”). Additionally, the fact that *Rudolph* was denied leave to appeal to the Supreme Court leads to the conclusion that the Supreme Court is satisfied with its decision in *Lennane*. *Rudolph v. Guardian Protective Servs.*, 486 Mich 868; 780 NW2d 571 (2010). Thus, this panel of the Court of Appeals should have paid heed to *Rudolph* and similarly held that the Supreme Court’s decision in *Lennane* has not been overruled and remains binding precedent on the issue of whether municipalities have the authority to regulate wage and/or benefit rates of third parties within their jurisdictions. Because it did not, the Supreme Court should grant leave and reverse.

that the Supreme Court's holding is obsolete due to the passage of time along with changes in constitutional framework from 1908 to 1963. Indeed, "[i]f a precedent of [the Michigan Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals [or trial courts] should follow the case which directly controls, leaving to [the Michigan Supreme Court] the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 US 477, 484 (1989).⁷ Thus, even though the majority of the panel was inclined to agree with the City of Lansing's underlying position on what the law *should be* in regard to the scope of municipal concerns as the City currently believes them to be, the Court of Appeals was nevertheless bound as a matter of law to follow the Supreme Court's unambiguous holding in *Lennane* just as the trial court and appellate court did in *Rudolph, Exhibit E*, and as Judge Canady III did; *Exhibit B*, and Dissenting Judge Sawyer would have done in the present case. *Exhibit D*.

A decision from the Michigan Supreme Court unequivocally demonstrates the Supreme Court's exclusive authority to overrule its own decisions. In *Boyd v. W.G. Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993), an Illinois resident, Willie Boyd, entered into an employment contract in Michigan, but executed his job duties out of state. While working in Indiana, Boyd suffered a personal injury and died. Boyd's widow filed for workers' compensation benefits in Michigan, but her claim was denied because Boyd was not a Michigan resident. The Workers' Compensation Appellate Commission (WCAC) based its decision on the plain language of Section 845 of the Workers' Compensation Act which stated:

The bureau shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a *resident of this state* at

⁷ Discussing *Rodriguez*, a judge of the Michigan Court of Appeals referred this doctrine as "vertical *stare decisis*." *Bora Petrovski v. Vasko Nestorovski*, 283 Mich App 177, 207-208; 769 NW2d 720 (2009).

the time of injury and the contract of hire was made in this state.

Id. at 517 (emphasis added). The Court of Appeals denied leave to appeal. In denying the widow benefits, both the WCAC and the Court of Appeals effectively ignored precedent from the Michigan Supreme Court in *Roberts v. LXL Glass*, 259 Mich 644; 244 NW 188 (1932). In that underlying case, the Michigan Supreme Court interpreted the predecessor Workers' Compensation Act to provide coverage to injured employees regardless of whether they were Michigan residents so long as their contract of employment was entered into in Michigan. *Boyd* at 517-519.

On appeal, the Supreme Court noted that various decisions of the Court of Appeals had “begun to interpret Section 845 in contravention of *Roberts*,” and that although the relevant portion of the Act dealing with the residency requirement (Section 845) remained unchanged, these decisions were based on the fact that the overall Workers' Compensation Act had been amended in various, substantial ways after *Roberts* was decided. *Id.* at 521-523. The Michigan Supreme Court characterized the various Court of Appeals' decisions as taking the position that *Roberts* was “no longer valid precedent because it [was] ‘too old.’” *Id.* at 522-523. The Supreme Court then rebuked the Court of Appeals attempt at overruling *Roberts*:

[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority. While the Court of Appeals may properly express its belief that a decision of this Court was wrongly decided or is no longer viable, that conclusion does not excuse the Court of Appeals from applying the decision to the case before it. Because this Court has never overruled Roberts, it remains valid precedent. The rule of law regarding extraterritorial jurisdiction as expressed by Roberts should have been applied by the bureau in the present case.

Id. (Internal citations omitted) (Emphasis added).⁸ Thereafter, in a display of *stare decisis* in

⁸ *Boyd* is also instructive for the point that, absent legislative action to overturn court precedent, lawmakers are presumed to have adopted court precedent interpreting a statute, particularly a

action, the Michigan Supreme Court in *Karaczewski v. Farbman Stein & Co.*, 478 Mich. 28; 732 NW2d 56 (2007) overruled *Boyd's* underlying holding and changed the law in Michigan to require an employee to be a Michigan resident to recover workers' compensation benefits. Juxtaposing *Karaczewski* to *Boyd* reveals the proper way the law develops in Michigan.

Conspicuously absent from the Opinion of the majority of the Court of Appeals panel is any mention of the *Boyd* case, despite the case having been briefed substantially by ABC. Instead, the majority of the panel relies exclusively on a prior decision of the Court of Appeals, *Adams Outdoor Advertising, Inc., v. City of Holland*, 234 Mich App 681; 600 NW2d 339 (1999) ("*Adams/Holland*") for the contrary contention that the Court of Appeals has the authority to declare a Supreme Court case directly on point to nonetheless be antiquated and irrelevant based on a rejection of reasoning of the Supreme Court in the underlying case. But the majority is wrong. A reading of that case demonstrates that the Court of Appeals was relying on the *precise pronouncements of the Supreme Court* as to whether its prior rulings were still applicable under a HRCA analysis. In no way does the *Adams/Holland* case stand for the proposition that the *Court of Appeals* may determine a Supreme Court case no longer valid based on the lower Court's analysis of the Supreme Court's reasoning in other cases:

In *Adams/Holland*, the plaintiff billboard company sued the City of Holland alleging its ordinance aimed at regulating existing billboards and forbidding new billboards within the city limits violated the HRCA and/or the zoning enabling act. *Id.* at 686. After discussing that the

statute which has been amended since the interpretation. Citing *Consumers Power Co v. Muskegon Co.*, 346 Mich 243, 251, 665; 78 NW2d 223 (1956), the Supreme Court in *Boyd* stated at 548: "... the doctrine of *stare decisis* applies with full force to decisions construing statutes or ordinances, especially where the Legislature acquiesces in the Court's construction through the continued use of or failure to change the language of a construed statute" and that "the principles of *stare decisis* are particularly applicable when the Legislature has reenacted the statute language without change." Again, the HRCA has been amended numerous times since 1923 when *Lennane* was decided.

HRCA is to be viewed liberally toward the grant of municipal power, the Court of Appeals then analyzed several Supreme Court cases specifically involving those very issues. It identified that two Supreme Court decisions, *DeMull v. City of Howell*, 368 Mich 242; 118 NW2d 232 (1962) and *Central Advertising Co. v. Ann Arbor*, 391 Mich 533; 218 NW2d 27 (1974) had set forth rules that municipalities do not have the authority to engage in particular types of billboard regulation.⁹ It also identified that the most recent Supreme Court case on the subject, *Adams Outdoor Advertising v. East Lansing*, 439 Mich 209; 483 NW2d 38 (1992) (“*Adams/East Lansing*”) had ruled that *DeMull, supra*, did not foreclose whether the HRCA provided some regulatory power over billboards and, further, that the act impliedly provided the City of East Lansing the authority to require removal of existing, non-conforming billboards over time. *Adams/Holland* at 688.¹⁰ Since the case before the Court of Appeals dealt with the City of Holland’s ordinance prohibiting new billboards and regulating existing billboards (as opposed to outlawing them), the Court of Appeals ruled consistent with the Supreme Court’s holding in *Adams/East Lansing* that the City of Holland possessed the power to maintain its ordinance. Since the Supreme Court decision in *Central Advertising* dealt with a municipal ordinance effectively eliminating existing billboards altogether, the Court of Appeals logically concluded that the case was limited to its particular facts and not relevant to the case at hand. *Adams/Holland* at 689-690.

⁹ In *DeMull*, the Supreme Court ruled that the zoning act prohibited cities from restricting the use of existing billboards. *DeMull* at 250-251. In *Central Advertising*, the Supreme Court ruled that, while the HRCA allows a city to regulate billboards, it does not provide authority for cities to effectively ban billboards altogether. *Central Advertising* at 536.

¹⁰ There is no discussion in *Adams/East Lansing* concerning the Supreme Court’s prior ruling in *Central Advertising, supra*. Perhaps it is because *Central Advertising* concerned regulation so pervasive that it effectively prohibited any existing billboards whatsoever – a different matter than what was before the Supreme Court in *Adams/East Lansing*.

Clearly, the Court of Appeals in *Adams/Holland* merely applied specific Supreme Court precedent to the facts before it. More importantly, the Court of Appeals did *not* render any pronouncement of the Supreme Court to be “inapplicable” to subsequent cases on point under the rationale that the Supreme Court’s prior reasoning had become outdated or impliedly rejected by other decisions. Indeed, it specifically stated otherwise when it concluded that “... we (the Court of Appeals) limit *Central Advertising* to its facts and narrow holding. *Id.* at 690.

The majority of the Court of Appeals panel in the present case cites to *Adams/Holland* for the proposition that “the reasoning employed in *Lennane* should not be applied in the case at bar.” *Exhibit C*, p. 9. But that conclusion bears no resemblance to the *Adams/Holland* case. Actually, *Adams/Holland* stands for the proposition ABC has made throughout this matter – that the lower courts must follow specific Supreme Court precedent in factually similar cases and that only the Supreme Court can determine whether its prior precedent is no longer valid.

Finally, the majority makes an unconvincing statement that it really isn’t jettisoning *Lennane* to the garbage bin in prevailing wage ordinance cases but, rather, has simply recognized that “the doctrine of *stare decisis* is not applicable where the controlling authorities have changed after the Supreme Court issues its decision in *Lennane*.” *Exhibit C*, p. 9. But, as discussed above, there has not been a change in “controlling authorities” in cases involving prevailing wage ordinances. The only cases on point – *Lennane* and *Rudolph* – hold that prevailing wage regulation is a matter of state concern over which municipalities do not have authority to regulate. The majority of the panel has not identified a single case – let alone a Supreme Court case – identifying that prevailing wage ordinances are proper subjects of local concern under the HRCA.

At the end of the day, the majority of the Court of Appeals panel has ruled similar to the panel in the ill-fated *Boyd* case. For whatever reason, the two person majority on this Court of Appeals panel believes the lower Court sits at the same level as that of the Michigan Supreme Court. But, of course, it does not. As the Supreme Court articulated in *Boyd*, it is the Supreme Court's obligation – *not the Court of Appeals' prerogative* – to “overrule or modify case law if it becomes obsolete.” *Id.* at 522-523. Just as the *Roberts* case holding had to be followed by the lower courts in *Boyd*, the *Lennane* case holding should have been followed by this panel of the Court of Appeals, whether it agrees with the *Lennane* decision or not. Its failure to do so constitutes reversible error. It is as Judge Sawyer wrote in his dissent:

[E]ven if I were to accept all of the majority's arguments why the ordinance in this case is within defendant's authority to adopt were it not for the holding in *Lennane*, this Court would lack the authority to uphold the ordinance. To do so would overstep our bounds. It is not for us to reject the continued viability of *Lennane*. It is for the defendant to persuade the Supreme Court to do so.

Exhibit D, p. 2.

In short, even though the majority of this panel of the Court of Appeals believes that evolution of the Michigan Constitution and general interpretation of the powers granted municipalities under the HRCA have negated the continued viability of *Lennane*, the Court of Appeals was nevertheless bound to follow *Lennane* under the doctrine of vertical *stare decisis*. It refused. *Accordingly, the Supreme Court should remand the case back to the Court of Appeals with explicit instructions to apply Lennane's holding to the facts of this case.*

IV. EVEN IF THE SUPREME COURT WERE TO RECONSIDER THE SUBSTANCE OF ITS RULING IN *LENNANE* (WHICH IT NEED NOT DO SINCE REMAND IS APPROPRIATE), THE COURT SHOULD NOT OVERTURN ITS LONGSTANDING PRECEDENT THAT CITIES LACK THE AUTHORITY TO REGULATE THIRD PARTY WAGE AND FRINGE BENEFIT RATES.

A. Standard of Review.

ABC believes it would be both unnecessary and improper for the Supreme Court to consider reversing its precedent directly on point with the case presented. Nevertheless, should the Court consider to do so, it would review the matter *de novo* as a question of law. *Andre Bezeau v. Palace Sports & Entertainment*, 487 Mich 455, 461; 795 NW2d 797 (2010).

B. While the Michigan Supreme Court (unlike the Court of Appeals) maintains the power to overrule Michigan Supreme Court precedent, all appropriate factors weigh in favor of maintaining its precedent in Lennane.

The appropriate result in this case is for the Supreme Court to protect the judicial process in the same way it did in *Boyd, supra*, by rebuking the Court of Appeals for overstepping its bounds. It is therefore respectfully requested that the Supreme Court remand the case back to the Court of Appeals for a ruling consistent with the Supreme Court's holding in *Lennane*. Indeed, the Supreme Court has already considered leave to appeal in the predecessor *Rudolph* case, a case directly on point with this case, and decided not to grant leave and to allow *Lennane* to stand. *Rudolph, supra*, 486 Mich 868. Even so, in the unlikely event the Supreme Court is to inclined to entertain a review of its own precedent in *Lennane*, it still should *not* overrule its prior decision.

In *Robinson v. City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), the Supreme Court explained the appropriate, indeed only, method for potentially overruling its own precedent. It elucidated a four part analysis: Was the case wrongly decided in the first instance? Does the case defy practical workability? Do significant reliance interests preclude overturning the case? And, have changes in the law rendered the decision unjustified? *Id.* at 464. On balance, these four factors weigh in favor of the Supreme Court not overruling *Lennane*.

First, there is no compelling evidence that *Lennane* was wrongly decided. The Supreme Court in *Lennane* looked to the police power of the State and properly concluded that the Michigan Constitution and the HRCA provide municipalities the power to act not only in regard to its purely local concerns, but also as an agent of the State. Still, the Court ruled a municipality may not fix public policy for the State unless provided the power to do so through some identifiable delegation. This holding is sound. Indeed, the Michigan Supreme Court has ruled as recently as 2006 that municipalities derive their authority to make and pass laws within their jurisdictions either from a grant of power by the Legislature or through the Constitution itself. *City of Taylor, supra* at 115-116. Looking to the Michigan Constitution and the HRCA, *and applying a liberal focus to both*, the Court concluded that no grant of authority to cities to regulate third party wage rates existed. Nothing in that decision is patently erroneous. Indeed, the ruling has stood unchallenged for 80 years.

Moreover, consistent with *Lennane*, the State has exerted its public policy over minimum wage rates by enacting a statewide minimum wage and overtime law. See Michigan Minimum Wage Law, PA 154 of 1964. In fact, it just recently re-wrote that law. See, PA 138 of 2014. If in furtherance of its public policy aims the State wished to carve out special areas of the state for a different set of wage rules or standards, it could certainly do so. It has not previously and it did not recently. The result is a uniform and easily understood law with which all citizens, including corporations, can comply without difficulty. The state public policy protected by *Lennane* also places no restriction whatsoever on municipalities in their proprietary role. As the majority of the Court of Appeals panel pointed out through reference to four different cases, the Michigan Supreme Court has acknowledged the right of cities to regulate the compensation terms of its own employees. *Brimmer, Gildersleeve, Kane, and Olson, supra*. See also, *Exhibit C*, pp. 7-9.

Even if *Lennane* were considered to be wrongly decided (which it was not), the other factors of the *Robinson* test demonstrate why the Supreme Court should not overrule it. “The mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate.” *Robinson* at 465.

Second, the *Lennane* decision does not “defy practical workability.” The rule that only the State holds the power to regulate third party wage and benefit rates is obviously simple to administer. Indeed, as explained above, it is an ideal rule. All employees and business can take stock in the fact that they need only concern themselves with state regulation in such matters and don’t have to worry about a labyrinth of local laws affecting their employment circumstances. This is particularly true in the construction industry. In the construction industry where ABC members make their living, companies perform many jobs in many cities every day. They often transition employees from one project in one city to another project in another city all in a single day. If each city were allowed to determine which wages and benefits and at what amounts must be paid to construction employees, the result would be an unworkable hodgepodge of laws across the landscape of the state. This would effectively kill the universal construction industry practice of performing work in several cities on a regular basis. Thus, the *Lennane* ruling does not defy practical workability – it enhances it.

Third, there are significant reliance interests precluding the overturning of *Lennane*. In *Robinson*, the Supreme Court indicated that the purpose of this inquiry is to prevent “practical, real-world dislocations.” *Id.* at 466. Overturning *Lennane* would grant to cities the ability to regulate any and all persons and businesses within their jurisdictions relative to their wages and benefits. As alluded to in the paragraph above, a patchwork of inconsistent laws in this regard would wreak havoc across the state. And where would it end? If municipalities have the power

to regulate third party wages and benefits within their jurisdiction, wouldn't they possess the authority to regulate other areas of state public policy if *Lennane* were overruled? The State has set public policy rules for determining when and how wage payments to employees are to be made. See Michigan Payment of Wages and Fringe Benefits Act, PA 390 of 1978. If *Lennane* were to be overruled, these areas would also become fertile ground for municipalities to regulate. Thus, an ABC contractor with multiple employees transitioning in a week's time from project to project in Bay City, Midland, and Saginaw for example, could be forced to comply with not only with the State's two wage regulation statutes referenced above, but also with three additional sets of varying wage and benefit rules ranging from rates of pay, benefit levels, manner of payment, timing of payment, deductions from payment, and virtually any other compensation rule the cities might enact. In order to prevent these kinds of real-world dislocations, the Court should not overturn *Lennane's* holding that the regulation of third party wages (and benefits) is a matter of state concern only and that municipalities may not fix state public policy in that regard as an agent for the State.

Finally, there have not been changes in the law sufficient to render the decision unjustified. While the HRCA has certainly been liberally interpreted since *Lennane* to provide for more municipal power, there are no cases, constitutional provisions, or Michigan statutes which expressly provide municipalities with the power to regulate wage and benefit rates of third parties. This is true even though the Legislature has been aware of *Lennane's* holding since 1923. It could have and still can change the rule with a simple amendment to the HRCA – something it has done in regard to other would-be municipal powers over and over again since the HRCA was passed in 1909. Accordingly, there has been no change in the law sufficient to justify an overruling of *Lennane*.

Again, the appropriate result in this case is *not* for the Supreme Court to reexamine the validity of its prior decision in *Lennane*, but rather to remand the case back to the Court of Appeals for a ruling consistent with the Supreme Court's holding in that case. Thereafter, just as Judge Sawyer suggests in his dissenting opinion, it would properly be up to the City of Lansing to file an application for leave to appeal and to hope to convince the this Honorable Supreme Court to overrule its own precedent. *Exhibit D*, p. 2. Accordingly, Plaintiff/Appellant ABC respectfully requests that this appropriate process be undertaken and that the Supreme Court not undertake the unnecessary task of reexamining its decision in *Lennane*.

CONCLUSION

The two judge majority on this panel of the Court of Appeals claims it technically did not overrule *Lennane* but, instead, simply found it "inapplicable" to this case. Yet the result of its wrongly reasoned decision is precisely that – the case is effectively overruled. *Lennane* concerned whether the City of Detroit was authorized under the Michigan Constitution, as effectuated by the HRCA, to maintain a prevailing wage ordinance requiring contractors to adjust their employment compensation terms to city prescribed levels when working on city projects. The present case concerns whether the City of Lansing is authorized under the Michigan Constitution, as effectuated by the HRCA, to maintain a prevailing wage ordinance requiring contractors to adjust their employment compensation terms to city prescribed levels when working on city projects. The facts and issues are exactly the same! The conclusion of the majority of this panel of the Court of Appeals that *Lennane* is somehow inapplicable to this case is obviously nonsensical.

Clearly, the majority of the Court of Appeals panel has decided this case differently from that of *Lennane* because it believes *Lennane* is no longer viable under the majority's view of the

legal landscape. But that is not within its power to decide. The only lawful ways to change what the majority considers to be a stubborn judicial fact is for the Legislature to amend the HRCA to specifically provide the municipal power to regulate third party wage rates or for the Supreme Court to overrule its own precedent. Because neither has occurred since the time *Lennane* was decided and since the only change in circumstances between then and now relates merely to the focal lens by which the delegation of authority to cities is interpreted, the Court of Appeals was duty bound by the doctrine of vertical *stare decisis* to follow *Lennane* in this case. As articulated above, the Michigan Court of Appeals in *Rudolph* recently analyzed the dispositive issue in *Lennane* and applied the Supreme Court's ruling as *binding precedent* to virtually identical facts and circumstances in the case before. The Court of Appeals was correct to do so then and the Ingham County Circuit Court was correct to follow *Rudolph's* persuasive application of *Lennane* to Lansing's similarly designed PWO. The decision of two justices of the Court of Appeals to break ranks and discard *Lennane* in violation of the principles of *stare decisis* should not be allowed to stand.

Because the Michigan Supreme Court has ruled that municipal concerns of municipalities do not include the regulation of third party wage and benefit rates, the unenforceability of the Lansing's *ultra vires* PWO should have been affirmed. It was not. As such, it works injustice to ABC members and serves as an affront to this Honorable Supreme Court's standing as the supreme judicial body in the state of Michigan.

RELIEF REQUESTED

WHEREFORE, Plaintiff/Appellant ABC respectfully requests that this Honorable Supreme Court review this matter and, finding conclusions of law of the Court of Appeals to be legally erroneous, grant ABC's Application for Leave to Appeal.

Dated this 7th day of July, 2014.

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