

SULLIVAN, WARD, ASHER & PATTON, P.C.

STATE OF MICHIGAN

IN THE SUPREME COURT OF APPEALS

(On Appeal from the Court of Appeals and Circuit Court for the County of Oakland)

BOARD OF TRUSTEES OF THE CITY OF
PONTIAC POLICE AND FIRE RETIREE
PREFUNDED GROUP HEALTH AND
INSURANCE TRUST,

SUP CT NO. 151717

Plaintiff/Appellee,

COURT OF APPEALS NO. 316418

V.

OAKLAND COUNTY CIRCUIT
COURT
NO. 12-128625-CZ

CITY OF PONTIAC, MICHIGAN,

Defendant/Appellant.

**PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN RESPONSE TO
APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF ORIGINAL ISSUES PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE EMERGENCY MANAGER’S EXECUTIVE ORDER, BY ITS OWN TERMS, OPERATED PROSPECTIVELY ONLY.

Plaintiff-Appellee and the Court of Appeals say “Yes.”

Defendant-Appellant says “No.”

The trial court did not directly address this threshold issue.

II. DOES EXECUTIVE ORDER 225 VIOLATE THE EMERGENCY MANAGER LAW - P.A. 4 BECAUSE IT IS NOT TEMPORARY AND IT SINGLES OUT ONE CLASS OF EMPLOYEES?

Plaintiff-Appellee and the Court of Appeals say “Yes.”

Defendant-Appellant says “No.”

The trial court said “No.”

III. DID DEFENDANT’S FAILURE TO PAY ITS ANNUAL CONTRIBUTION TO THE PF VEBA VIOLATE MICHIGAN’S CONSTITUTION?

Plaintiff-Appellee and the Court of Appeals say “Yes.”

Defendant-Appellant says “No.”

The trial court said “No.”

INTRODUCTION

This supplemental brief on behalf of Plaintiff-Appellee is filed pursuant to the following dictates of the Supreme Court, as set forth in its Order of September 30, 2015:

On order of the Court, the application for leave to appeal the March 17, 2015 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). **The parties shall file supplemental briefs within 42 days of the date of this order addressing the meaning and applicability of the language “to continue to make contributions” in the Emergency Manager’s August 1, 2012 order No. 225.** The parties should not submit mere restatements of their applications papers

Order, 9-30-15, attached hereto as Exhibit A [emphasis added]. This issue corresponds with Argument I, below.

SUPPLEMENTAL ARGUMENT I

THE COURT OF APPEALS CORRECTLY HELD THAT THE EMERGENCY MANAGER’S EXECUTIVE ORDER, BY ITS OWN TERMS, OPERATED PROSPECTIVELY ONLY

In Plaintiff’s initial brief filed with this Court, it was argued that the interpretation of the Emergency Manager’s Executive Order is governed by principles of statutory interpretation given the EM’s statutory authority. In this regard, former MCL 141.1519 set forth the enumerated powers of an emergency manager and granted the emergency manager the ability to reject or modify a contract, including a collective bargaining agreement. MCL 141.1519(1) (j), (k).

At issue here is the proper interpretation and application of Executive Order 225, issued on August 1, 2012, by the Defendant City of Pontiac’s Emergency Manager. Defendant asserts that the Executive Order 225 retroactively terminated the city’s annual actuarially required contribution to the trust for fiscal year ending June 30, 2012, notwithstanding that the

contractual rights to those benefits had vested and those contributions were overdue. The order read in part as follows:

“Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations. The Order shall have immediate effect.”

See: Defendant’s Exhibit F to Application for Leave to Appeal.

As to whether this quoted language and the language of former MCL 141.1519 unambiguously gave the Emergency Manager the authority to retroactively and unilaterally remove the obligation to pay contractually overdue contributions, *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26; 852 NW 2d 78 (2014) is of import.

There, the Michigan Supreme Court held that a 2010 amendment to the Motor Vehicle Dealer Act, which expanded from six to nine miles the area within which vehicle manufacturers must notify existing dealerships of their intent to open a competing franchise, could not be retroactively applied to a 2007 dealership agreement between Defendant Chrysler and the Plaintiff-franchisee LaFontaine Saline Inc. “Applying the amendment retroactively would alter the parties’ existing contract rights,” the Supreme Court stated.

The Supreme Court offered the following supporting rationale and controlling analysis of determining whether legislation may be applied retroactively to alter pre-existing contractual rights:

Retroactive application of legislation “ ‘presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions.’ ” We have therefore required that the Legislature make its intentions clear when it seeks to pass a law with retroactive effect. In determining whether a law has retroactive effect, we keep four principles in mind. First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights

acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute.

496 Mich at 38-39 [footnotes with citations omitted].

Looking first to the specific language of the Act, the Supreme Court in *LaFontaine Saline* observed that the statutory language before it made no reference warranting application of the Act retroactively:

Nothing in the language of MCL 445.1566(1)(a) suggests the Legislature’s intent that the law apply retroactively. The Legislature “ ‘knows how to make clear its intention that a statute apply retroactively.’ ” In fact, it has done so with other provisions of the MVDA, which explicitly provide that they apply to pre-existing contracts.

496 Mich at 39 [footnotes omitted].

The Supreme Court then emphasized that there would be no legislatively presumed intent to apply a statute retroactively where such would create a new obligation or take away existing contractual rights. *Id.*, at 41-42. As applied to the facts before it:

Because Chrysler explicitly reserved its right to establish such dealerships within LaFontaine’s “Sales Locality” as referred to in the 2007 Dealer Agreement, Chrysler’s right is contractual in nature, limited only by LaFontaine’s statutory anti-encroachment rights in the MVDA’s relevant market area provision. Accordingly, retroactive application of the 2010 Amendment would not merely “operate in furtherance of a remedy or mode of procedure,” and therefore cannot be characterized as remedial or procedural. **Rather, the expansion of the relevant market area creates substantive rights for dealers that had no prior existence in law or contract, and diminishes a manufacturer’s existing rights under contracts executed before the 2010 Amendment.** Application of the 2010 Amendment would give LaFontaine the substantive right to object where it previously could not—that is, the right to object to a proposed like-line dealership more **Because retroactive application of the 2010 Amendment would interfere with Chrysler’s contractual right to establish dealerships outside of a six-mile radius of LaFontaine, such retroactive application is impermissible on these facts.**

Id. [emphasis added].

Accord: *Hughes v Judges' Retirement Board*, 407 Mich 75, 85-86; 282 NW 2d 160 (1979),
Campbell v Judges' Retirement Board, 378 Mich 169, 181; 143 NW 2d 755 (1966).

Defendant's legal arguments fail to follow the analytical framework set forth in *Lafontaine Saline, supra*, and erroneously mischaracterize Executive Order 225's language as unambiguously applying retroactively to abrogate Plaintiff's vested contractual rights to receive delinquent contributions. The language is not unambiguous, as argued by Defendant. The Order's removal of the obligation "to continue to make contributions" to the Trust does not explicitly provide that it applies retroactively to abolish preexisting, delinquent contributions. *Lafontaine Saline, supra*. Nor, as a matter of law, may the Court validly uphold a "presumed" intent to apply the Order retroactively because enforcement of such a presumption, would, as in *Lafontaine Saline*, eliminate Plaintiff's existing rights under the collective bargaining agreement. 496 Mich at 41-42.

Finally, following the framework set forth in *Lafontaine Saline* would not lead to absurd results, as erroneously argued by Defendant.

"[A] result is only absurd if it is quite impossible that [the Legislature] could have intended the result" *Johnson v Recca*, 492 Mich 169, 193; 821 NW 2d 520 (2012). It is not "quite impossible" that the Executive Order could have intended the result advocated by Defendant here. The words of former MCL 141.1519 and Executive Order 225 mean what they say, and those words are absolutely silent regarding an intent to abrogate vested contractual rights. Moreover, protection of vested rights of municipal funds arising from negotiated agreements absent explicit legislative directive is not an absurd result as a matter of law.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee respectfully requests that this Honorable Court deny leave to appeal.

Respectfully submitted,

**SULLIVAN, WARD,
ASHER & PATTON, P.C.**

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EXHIBIT A

Order

September 30, 2015

151717

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PONTIAC POLICE AND FIRE RETIREE
PREFUNDED GROUP HEALTH &
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Plaintiff-Appellee,

v

CITY OF PONTIAC,
Defendant-Appellant.

Michigan Supreme Court
Lansing, Michigan

Robert P. Young, Jr.,
Chief Justice

Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein,
Justices

SC: 151717
COA: 316418
Oakland CC: 2012-128625-CZ

On order of the Court, the application for leave to appeal the March 17, 2015 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.305(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order addressing the meaning and applicability of the language "to continue to make contributions" in the Emergency Manager's August 1, 2012 order No. 225. The parties should not submit mere restatements of their applications papers.



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 30, 2015

Clerk

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