S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

AFT MICHIGAN, HENRY FORD COMMUNITY COLLEGE ADJUNCT FACULTY ORGANIZATION, AFL CIO, AFT, ALPENA MONTMORENCY ALCONA ISD PARAPROFESSIONALS, ALPENA MONTMORENCY ALCONA ISD TEACHERS, ARENAC EASTERN FEDERATION, BAY ARENAC SKILLS CENTER FEDERATION, BROWN CITY EMPLOYEES ORGANIZATION, BROWN CITY FEDERATION OF TEACHERS, CHEBOYGAN OTSEGO PRESQUE ISLE SUPPORT PERSONNEL, CHEBOYGAN OTSEGO PRESQUE ISLE INTERMEDIATE PARAPROFESSIONALS, CHESANING UNION AUXILIARY SERVICE EMPLOYEES, CLARE GLADWIN ISD FEDERATION, CRAWFORD AUSABLE BUS DRIVERS FEDERATION, CRAWFORD AUSABLE CUSTODIANS SECRETARIAL FEDERATION, CRAWFORD AUSABLE FEDERATION OF TEACHERS, CRAWFORD AUSABLE SUPPORT STAFF FEDERATION, CRESTWOOD FEDERATION OF TEACHERS, CTR FEDERATION, DEARBORN FEDERATION OF SCHOOL EMPLOYEES, DEARBORN FEDERATION OF TEACHERS, DETROIT ASSOCIATION OF EDUCATIONAL OFFICE EMPLOYEES, DETROIT FEDERATION OF PARAPROFESSIONALS, DETROIT FEDERATION OF TEACHERS, EAST DETROIT FEDERATION OF TEACHERS, ECORSE FEDERATION OF TEACHERS, FAIRVIEW FEDERATION OF TEACHERS, FEDERATION OF TEACHERS, GLEN LAKE FEDERATION OF TEACHERS, HALE FEDERATION OF TEACHERS, HAMTRAMCK FEDERATION OF TEACHERS, HEMLOCK FEDERATION OF TEACHERS, HENRY FORD

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COMMUNITY COLLEGE ADJUNCT
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PARK FEDERATION OF
PARAPROFESSIONALS, HIGHLAND PARK
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FEDERATION OF TEACHERS, IOSCO ISD
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COMMUNITY COLLEGE ADMINISTRATIVE
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FEDERATION OF SUPPORT STAFF, LES
CHENEAUX FEDERATION OF TEACHERS,
LAKE CITY SUPPORT STAFF FEDERATION,
LAKE CITY TEACHERS AND
PARAPROFESSIONALS FEDERATION, LAKE
SHORE FEDERATION OF EDUCATIONAL
SECRETARIES, LAKE SHORE FEDERATION
OF TEACHERS, LAKE SHORE FEDERATION
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FEDERATION OF PARAPROFESSIONALS,
MACOMB INTERMEDIATE FEDERATION OF
TEACHERS, MELVINDALE NAP
FEDERATION OF TEACHERS, MELVINDALE
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MIDLAND ISD FEDERATION OF
PARAPROFESSIONALS, MIDLAND ISD
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FEDERATION OF PARAPROFESSIONALS,
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RELATED PERSONNEL, ONAWAY
FEDERATION OF TEACHERS, PLYMOUTH
CANTON COMMUNITY SCHOOL
SECRETARIAL UNIT, PLYMOUTH CANTON
FEDERATION OF PLANT ENGINEERS,
ROMULUS FEDERATION OF

PARAPROFESSIONALS, ROSEVILLE FEDERATION OF TEACHERS, RUDYARD FEDERATION OF AIDES, RUDYARD FEDERATION OF TEACHERS, SAGINAW ISD FEDERATION OF TEACHERS, TAWAS AREA FEDERATION OF TEACHERS, TAYLOR FEDERATION OF TEACHERS, UTICA FEDERATION OF TEACHERS, VAN DYKE EDUCATIONAL ASSISTANTS FEDERATION, VAN DYKE PROFESSIONAL PERSONNEL, WARREN WOODS FEDERATION OF PARAPROFESSIONALS, WASHTENAW INTERMEDIATE SCHOOL EMPLOYEES FEDERATION, WATERFORD ASSOCIATION OF SUPPORT PERSONNEL, WAYNE COUNTY COMMUNITY COLLEGE FEDERATION OF TEACHERS, WAYNE COUNTY COMMUNITY COLLEGE PROFESSIONAL AND ADMIN ASSOCIATION, WAYNE COUNTY RESA SALARIED STAFF, WEXFORD MISSAUKEE ISD FEDERATION OF TEACHERS, WHITEFISH TOWNSHIP FEDERATION OF TEACHERS, CHEBOYGAN OTSEGO PRESQUE ISLE ISD TEACHERS and HEMLOCK AUXILIARY SERVICE EMPLOYEES,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN,

Defendant-Appellant.

No. 303702
Court of Claims
LC No. 10-000091-MM

TIMOTHY L. JOHNSON, JANET HESLET, RICKY A. MACK and DENISE ZIEJA,

Plaintiffs-Appellees/Cross-Appellants,

v

PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, PUBLIC SCHOOL EMPLOYEES

No. 303704
Court of Claims
LC No. 10-000047-MM

RETIREMENT SYSTEM BOARD, TRUST FOR PUBLIC EMPLOYEE RETIREMENT HEALTH CARE and DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET,

Defendants-Appellants/Cross-Appellees,

and

DIRECTOR OF DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET, DIRECTOR OF RETIREMENT SERVICES OFFICE and STATE TREASURER,

Defendants.

DEBORAH MCMILLAN, THOMAS BRENNER, THERESA DUDLEY, KATHERINE DANIELS and COREY CRAMB,

Plaintiffs-Appellees/Cross-Appellants,

v

No. 303706
Court of Claims
LC No. 10-000045-MM

PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM BOARD, TRUST FOR PUBLIC EMPLOYEE RETIREMENT HEALTH CARE and DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET,

Defendants-Appellants/Cross-Appellees,

and

DIRECTOR OF DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET, DIRECTOR OF RETIREMENT SERVICES OFFICE and STATE TREASURER,

Defendants.

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

SAAD, J., (*concurring in part and dissenting in part).*

I concur with the majority's conclusion that the plaintiff labor organizations in case no. 303702 have standing to pursue this action on behalf of their members. I also concur with the majority's conclusion that plaintiffs' claims are ripe for judicial review. The majority also correctly concludes that MCL 38.1343e does not impair or diminish accrued financial benefits of a pension plan in violation of 1963 Const art 9, § 24 because benefits earned after July 1, 2010, had not yet accrued when the statute was enacted.

However, I respectfully disagree with the majority's key holdings that MCL 38.1343e violates the Contracts Clauses of the Michigan and United States Constitutions, the Taking Clause of the Fifth Amendment and Const 1963, art 10, § 2, and the Due Process Clause of the Fourteenth Amendment and Const 1963, Art 10, §2. Accordingly, I dissent from the majority's decision to affirm the trial court's orders granting summary disposition in favor of plaintiffs in each of the cases before us.

I. NATURE OF THE CASE

In 1975, the Michigan Legislature amended the Public School Employees Retirement Act, 1945 PA 136, to provide health care benefits for retired employees of the Michigan public schools. The act provided that the Michigan Public School Employees Retirement System (MPSERS) would pay health care premiums for retired employees and their dependants under any group health plan authorized by the retirement commission. MCL 38.325b(1). In 1979, the Legislature enacted the Public School Employees Retirement Act of 1979, 1980 PA 300, MCL 38.1301, *et seq*, setting forth the health care coverage provision in MCL 38.1391(1). Pursuant to MCL 38.1341, public schools must contribute to MPSERS a percentage of the total amount of their payroll to pay the cost of health care premiums for retirants and their dependents. In other words, Michigan taxpayers have, for years, paid for public school employees' retiree health care benefits.

Over the years, the number of retiree participants in the MPSERS program has grown significantly and, therefore, so has the expense to the taxpaying public, which knows little about this unseen but enormous cost to the public education system. Indeed, the Director of the Office of Retirement Services of the Michigan Department of Technology, Phillip Stoddard, estimated that, for the year beginning October 1, 2010, the cost of health care for retirees and their dependents would exceed $920,000,000. Thus, it now costs school districts (meaning taxpayers) almost a billion dollars a year for retiree health care alone. Faced with these unsustainable increasing costs, the Legislature has passed various amendments to increase the co-pays and deductibles that retirees pay for their health care. These modifications that require retired public school employees to contribute to their health care costs have survived constitutional challenge from education workers. Indeed, our Supreme Court has ruled that the Legislature created and may revoke this tax payer-funded benefit and that retiree health care benefits are not a constitutionally protected contract right, nor a vested right under the Michigan constitution.

With the enactment of MCL 38.1343e, the Legislature now requires current public school employees not only to pay co-pays and deductibles upon retirement, but also to pay dollars directly into the program from which they will reap generous retiree health care benefits. Again, the public school employees object by claiming constitutional infirmities which, in truth, do not exist. I respectfully disagree with the majority's ruling because the challenged legislation is constitutional.

II. IMPAIRMENT OF CONTRACT

The majority's holding that MCL 38.1343e violates the Contracts Clauses is incorrect because, as a matter of law, MCL 38.1343e has not "operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co v Spannaus*, 438 US 234, 242; 98 S Ct 2716; 57 L Ed 2d 727 (1978). Indeed, MCL 38.1343e cannot possibly implicate these constitutional provisions because it does not affect, much less impair, any contract. Simply put, to constitute an impairment of contract, there must first be a contract that is impaired. Thus, to state a claim, MCL 38.1343e must have altered either (1) a contract between the state itself and the public school employees, or, (2) the public school employees' contracts with some third party. MCL 38.1343e does neither. And, because no contract has been impaired, this claim must fail.

I begin with the established principle that legislative enactments are presumed to be constitutional absent a clear showing to the contrary. *Michigan Soft Drink Ass'n v Dept of Treasury*, 206 Mich App 392, 401; 522 NW2d 643 (1994). "The party challenging the constitutionality of legislation bears the burden of proof." *Id*. The majority holds that MCL 38.1343e violates the Contracts Clauses of the United States and Michigan Constitutions. US Const, art 1, § 10 and Const 1963, at 1, § 10. US Const, art 1, § 10 provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." Similarly, Const 1963, art 1, § 10 states: "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." "Our state constitutional provision is not interpreted more expansively than its federal counterpart." *Attorney Gen v Michigan Public Service Comm*, 249 Mich App 424, 434; 642 NW2d 691 (2002). The constitutional prohibition on impairment of contracts is not absolute and must be accommodated to the state's inherent police power to safeguard the vital interests of the people. *Health Care Ass'n Workers Compensation Fund v Director of the Bureau of Worker's Compensation, Dep't of Consumer and Industry Services*, 265 Mich App 236, 240-241; 694 NW2d 761 (2005).

First, under the Michigan Supreme Court's ruling in *Studier v Michigan Public School Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005), the public school employees have no contract with the state for retiree health care benefits, nor do the public school employees have vested rights in retiree health care benefits.[1] Second, the collective bargaining

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[1] In *Studier*, the Michigan Supreme Court held that MCL 38.1391(1) does not create a contract with public school retirees for retiree health care benefits. The plaintiffs, six public school retirees, argued that increases in their prescription drug copayments and deductibles violated US

agreements (CBAs) between the public school employees and various school districts are not even touched, much less impaired. Though the Johnson plaintiffs argue that their breach of contract count is based on CBAs with their local school districts entitling them to compensation at rates established in the agreements, in their complaint, they did not allege that any CBAs existed or that such agreements formed the basis of the breach of contract count and they did not attach any contracts to their complaint.[2] Further, the state is not a party to the CBAs and cannot be bound by them. *Equal Employment Opportunity Comm v Waffle House, Inc*, 534 US 279, 294; 122 S Ct 754; 151 L Ed 2d 755 (2002); *Baraga Co v State Tax Comm*, 466 Mich 264, 266; 645 NW2d 13 (2002).

Const, art I, § 10, and Const 1963, art 1, § 10, both of which prohibit a law that impairs an existing contractual obligation. *Studier*, 472 Mich at 647-648. The Supreme Court noted that, in general, "one legislature cannot bind the power of a successive legislature." *Id*. at 660. This principle can be limited where it is in tension with the constitutional prohibitions against the impairment of contracts. *Id*. at 660-661. However, "such surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments." *Id*. at 661. Thus, a strong presumption exists that statutes do not create contractual rights. *Id.* Absent a clear indication that the Legislature intended to bind itself contractually, a law is presumed not to create contractual or vested rights. *Id*. To form a contract, the language of a statute must be plain and susceptible of no other reasonable construction than the Legislature intended to bind itself. *Id*. at 662. Absent an expression of such an intent, "courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party." *Id.* at 662.

Applying these principles, the *Studier* Court concluded that the plaintiffs had failed to overcome the strong presumption that the Legislature did not intend to surrender its legislative powers by entering a contractual agreement to provide retiree health care benefits to public school employees. *Studier*, 472 Mich at 663. "Nowhere in MCL 38.1391(1), or in the rest of the statute, did the Legislature provide for a written contract on behalf of the state of Michigan or even use terms typically associated with contractual relationships, such as 'contract,' 'covenant,' or 'vested rights.'" *Id*. at 663-664 (footnotes omitted). Had the Legislature intended to surrender its power to amend the statute to remove or diminish the benefits provided, it would have done so explicitly. *Id*. at 665.

Studier is directly controlling here. Further, though the *Studier* Court did not specifically address MCL 38.1391(4), the Court referred generally to "the rest of the statute" in stating that no written contract on behalf of the state was created. In any event, MCL 38.1391(4), like MCL 38.1391(1), contains no language expressing any intent by the Legislature to surrender its powers, nor does it contain any terms typically associated with contractual relationships. Therefore, no contracts entitling plaintiffs to receive retiree health care benefits exist.

[2] Johnson notes that an employment contract necessarily exists for every employee who performs services in exchange for compensation regardless whether there was a CBA and, thus, that the failure to plead the existence of CBAs was not fatal to plaintiffs' claims. The majority echoes this notion, asserting that defendants cannot "plausibly deny" that plaintiffs worked under CBAs. Again, however, plaintiffs did not merely fail to allege that any CBAs existed; they failed to allege that *any* employment contract for wages was impaired by the operation of MCL 38.1343e.

In any case, obviously, the CBAs do not address the retiree health care system because this is a benefit created by the state. By virtue of MCL 38.1343e, the state now requires public school employees to contribute money to help defray the cost of retiree health care benefits. This statutory mandate is between the state and each worker, and this has nothing to do with any contract. Regardless of what wage level is negotiated in CBAs for principals, teachers or non-instructional workers, that level is not affected. If, for example, a school district has contracted with a teacher to pay him $80,000 per year, the state's mandate that the employee pay three percent under MCL 38.1343e does not alter the school district's contractual obligation. Indeed, the state Legislature could change the mandate to four percent or one percent and the school district would nevertheless be required by contract (CBA) to pay the teacher $80,000 per year. MCL 38.1343e simply sets forth a mechanism to ensure that each member of MPSERS makes this contribution by requiring school districts to deduct the contribution from the member's pay and submit it to the retiree health care system. But the particular methodology is quite apart from the terms of any labor agreement and, indeed, the state could have enforced this mandate by a lump sum or periodic payments made directly by each member. That the state chose a pay check deduction method simply does not convert a permissible legislatively-mandated contribution into an unconstitutional impairment of contract. Clearly, this case concerns the state's demands or financial assessment upon each public school employee, and has nothing to do with any contract between each employee and the state, or a third party. Accordingly, this constitutional theory to challenge this legislation should be rejected.

III. TAKING CLAUSES

I also dissent from the majority's holding that the Johnson and McMillan plaintiffs established that MCL 38.1343e effectuates a taking under the United States and Michigan Constitutions. Quite simply, MCL 38.1343e is not a taking of private property for which the government must give just compensation. Further, no case law holds that a "taking" occurs when the Legislature requires a public school employee to contribute money as a condition for receiving benefits in a state-created retirement health care program, designed for the benefit of the employee.

US Const, Am V provides that private property shall not "be taken for public use, without just compensation." This prohibition applies against the states through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc v Beckwith*, 449 US 155, 160; 101 S Ct 446; 66 L Ed 2d 358 (1980); *K & K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570, 576 n 3; 575 NW2d 531 (1998). Also, Const 1963, art 10, § 2 states: "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." The Taking Clauses do not prohibit the taking of private property; rather, they place a condition on the exercise of that power. *First English Evangelical Lutheran Church of Glendale v Los Angeles County*, 482 US 304, 314; 107 S Ct 2378; 96 L Ed 2d 250 (1987); *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 261; 792 NW2d 781 (2010). "This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 US at 315 (emphases in original).

Here, plaintiffs do not seek "just compensation" for the "taking of property" arising from an otherwise proper governmental interference. *First English*, 482 US at 315. Rather, they alleged that MCL 38.1343e is unconstitutional as applied to them and sought a declaratory ruling to that effect. The trial court granted the requested relief, ordering defendants to "cease and desist from enforcing or implementing MCL 38.1343e and from deducting 3% of members' compensation," in addition to requiring defendants to return the contributions already deducted with interest. This declaratory ruling invalidating the statute was not an award of just compensation for a taking effectuated by an otherwise proper governmental action. Thus, the relief requested and granted in these cases is not that contemplated under the Taking Clauses, and the rulings should be reversed.

The majority's application of the Taking Clauses to plaintiffs' claims is legally unsupportable. Again, requiring a monetary contribution to a retiree health care plan does not trigger the clauses because no constitutionally protected property interest is invaded. The percentage deductions from plaintiffs' compensation are not physical appropriations of property. Money is fungible and, quite simply, it is artificial to view the deductions as a taking of property requiring just compensation. *United States v Sperry Corp*, 493 US 52, 57-58, 63 n 9; 110 S Ct 387; 107 L Ed 2d 290 (1989). The deductions are merely the Legislature's chosen means to effectuate the employees' obligation under MCL 38.1343e to contribute to their own retirement system in which, under existing law, MCL 38.1391, they will participate upon retirement.

I recognize that, in limited situations, a specific fund of money may be considered property for Taking Clause purposes, *Webb's Fabulous Pharmacies*, 449 US at 156, but no such fund exists here. Further, it is well-established that a specific property right or interest must be at stake in order to find a regulatory taking. See *Eastern Enterprises v Apfel*, 524 US 498, 541-542, 554-556; 118 S Ct 2131; 141 L Ed 2d 451 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy noted that although the statute at issue imposed a financial burden, it did so without operating on or altering an identified property interest. *Id*. at 540.

> The [statute] does not appropriate, transfer, or encumber an estate in land (*e.g.,* a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so. [*Id*.]

In *Eastern Enterprises*, Justice Kennedy would have held that the Taking Clause did not apply. *Id*. at 547-550. Contrary to the majority's assertion that "only Justice Kennedy made such a statement," Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, agreed with Justice Kennedy that the Taking Clause did not apply because the case involved "not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties." *Id*. at 554 (Breyer, J., dissenting). Justice Breyer noted that in *Webb's Fabulous Pharmacies*, the monetary interest at issue "arose out of the operation of a

specific, separate identifiable fund of money. And the government took that interest for itself." *Id*. at 555.[3]

The majority labors to find a taking by denominating money as property, despite contrary law and despite our Supreme Court's holding constitutional prior modifications of the MPSERS to co-pays and deductibles—also money. The majority reasons that increasing the dollars a retiree must pay is different than requiring current public school workers to contribute money to pay for current retirees who, incidentally, may have been coworkers yesterday and whom current workers may join tomorrow. Regardless, of course, this distinction has no relevance because it is a retiree health care system in which all may share and to which the Legislature has said all must contribute.

Again, MCL 38.1343e states a condition that, after the effective dates of the statute, public school employees must contribute money to a program the Legislature created for those employees upon retirement. Thus, any property interests in the wage levels contained in plaintiffs' respective CBAs were not *retroactively* affected. See *McCarthy*, 626 F3d at 286, and cases cited therein. Further, unlike in *Webb's Fabulous Pharmacies* and *Phillips v Washington Legal Foundation*, 524 US 156; 118 S Ct 1925; 141 L Ed 2d 174 (1998), no extraction of interest generated in a specific fund of money has occurred. The essence of plaintiffs' claim is that the state may not take future wages established by their CBAs. Though this is a fallacy because the state demands payment from each worker irrespective of any negotiated wage levels, if there is a remedy, the proper remedy lies in contract, not taking, and a valid taking claim will lie only when the property rights exist independently of the claimants' so-called contracts with the government. *Niagara Mohawk Power Corp v United States*, 98 Fed Cl 313, 315 (2011). See also *Peick v Pension Benefit Guaranty Corp*, 724 F2d 1247, 1276 (CA 7, 1983); *Klamath Irrigation District v United States,* 67 Fed Cl 504, 534, modified on other grounds 68 Fed Cl 119

[3] And, a point the majority avoids is that, on the basis of the analysis expressed by the five justices in *Eastern Enterprises*, lower federal courts have repeatedly held that the imposition of an obligation to pay money does not constitute a taking of private property. See *Parella v Retirement Bd of the Rhode Island Employees' Retirement System*, 173 F3d 46, 50 (CA 1, 1999); *Commonwealth Edison Co v United States*, 271 F3d 1327, 1329, 1340 (CA Fed, 2001) ("while a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment"); *Adams v United States*, 391 F3d 1212, 1225 (CA Fed, 2004) ("We decline to treat a statutory right to be paid money as a legally-recognized property interest, as we would real property, physical property, or intellectual property.") In *McCarthy v City of Cleveland*, 626 F3d 280, 286 (CA 6, 2010), the court held "that the Takings Clause 'is not an appropriate vehicle to challenge the power of [a legislature] to impose a mere monetary obligation without regard to an identifiable property interest'" (quoting *Swisher Int'l, Inc v Schafer*, 550 F3d 1046, 1057 (CA 11, 2008)). The *McCarthy* court noted that although some lower federal courts have followed the *Eastern Enterprises* plurality's taking analysis, those courts "have done so only where a specific private property interest is *retroactively* affected." *McCarthy*, 626 F3d at 286 (emphasis in original).

(2005). Importantly, however, the fact that a contract theory may not yield a recovery or provide a full remedy in a given case "does not give life to a takings theory." *Niagara Mohawk*, 98 Fed Cl at 316, quoting *Home Savings of America, FSB v United States*, 51 Fed Cl 487, 495-496 (2002). In other words, that a contracts clause claim provides no relief does not resurrect an equally spurious taking claim. Which brings us to the plaintiffs' substantive due process claim, which well-established law says cannot be maintained simply because the "taking" and "impairment" claims provide no remedy.

IV. SUBSTANTIVE DUE PROCESS

I also dissent from the majority's holding that the AFT plaintiffs established that MCL 38.1343e is unconstitutional under the Due Process Clause of the Fourteenth Amendment and Const 1963, Art 10, §2. Because the Taking and Contracts Clauses provide explicit textual sources of constitutional protection regarding the type of governmental conduct at issue (but provide no relief for the reasons already stated), plaintiffs are precluded from asserting generalized substantive due process claims. That the majority holds otherwise is clearly contrary to our constitutional jurisprudence. *Sacramento Co v Lewis*, 523 US 833, 842; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). The clause should not be invoked to "do the work" of other constitutional provisions, even when they offer a plaintiff no relief. *Stop the Beach Renourishment, Inc v Florida Dep't of Environmental Protection*, ___ US ___; 130 S Ct 2592, 2608; 177 L Ed 2d 184 (2010) (plurality opinion of Scalia, J.). The Johnson and McMillan plaintiffs expressly alleged contract and taking claims. AFT's complaint alleges only a substantive due process claim, but the label placed on a claim is not dispositive. *Flying J Inc v City of New Haven*, 549 F3d 538, 543 (CA 7, 2008); *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). The gravamen of an action is determined by considering the entire claim. *Maiden v Rozwood*, 461 Mich 109, 135; 597 NW2d 817 (1999). Because the underlying allegations are that MCL 38.1343e operates to extract a percentage of plaintiffs' compensation, the claims fall within the explicit sources of protection provided by the Taking or Contracts Clauses. Resort to the generalized notion of substantive due process is thus improper. *Cummins*, 283 Mich App at 704. Accordingly, I would hold that the trial court plainly erred in granting summary disposition to plaintiffs on the substantive due process claims.

V. CONCLUSION

To discharge its solemn duty under the Constitution, courts must invalidate clearly unconstitutional legislation, but must also defer to the Legislature when the public policy is one that may offend the litigants, but not the Constitution.

Here, because the challenged public policy does not even touch upon, much less impair contracts and no property is taken by the state in the sense contemplated by the Fifth Amendment and because substantive due process is not a catch-all for failed constitutional claims, it would have been prudent and in keeping with our Court's limited charge under the Constitution to uphold this legislation as constitutional because -- it is.

/s/ Henry William Saad