

STATE OF MICHIGAN
COURT OF APPEALS

AFT MICHIGAN, AFT, AFL-CIO, ALPENA-MONTMORENCY-ALCONA ISD PARAPROFESSIONALS/TEACHERS, ARENAC EASTERN FEDERATION, BAY ARENAC SKILLS CENTER FEDERATION, BROWN CITY EMPLOYEES FEDERATION, BROWN CITY FEDERATION OF TEACHERS, CHEBOYGAN OTSEGO PRESQUE ISLE INTERMEDIATE PARAPROFESSIONALS AND BUS PERSONNEL, CHEBOYGAN OTSEGO PRESQUE ISLE ISD TEACHERS, CHEBOYGAN OTSEGO PRESQUE ISLE SUPPORT PERSONNEL, CHESANING UNION AUXILIARY SERVICE EMPLOYEES, CLAREGLADWIN ISD FEDERATION, CRAWFORD AU SABLE BUS DRIVERS FEDERATION, CRAWFORD AU SABLE CUSTODIANS/SECRETARIAL FEDERATION, CRAWFORD AU SABLE SUPPORT STAFF FEDERATION, CRAWFORD AU SABLE FEDERATION OF TEACHERS, CRESTWOOD FEDERATION OF TEACHERS, 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, GLEN LAKE FEDERATION OF TEACHERS, HALE FEDERATION OF TEACHERS, HAMTRAMCK FEDERATION OF TEACHERS, HEMLOCK FEDERATION OF TEACHERS, HEMLOCK AUXILIARY SERVICE EMPLOYEES, HENRY FORD COMMUNITY COLLEGE ADJUNCT FACULTY ORGANIZATION, HENRY FORD COMMUNITY COLLEGE FEDERATION OF

FOR PUBLICATION
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TEACHERS, HIGHLAND PARK FEDERATION
OF PARAPROFESSIONALS, HIGHLAND
PART FEDERATION OF TEACHERS, IMLAY
CITY FEDERATION OF TEACHERS, INKSTER
FEDERATION OF TEACHERS, IOSCO ISD
INTERMEDIATE FEDERATION OF
AUXILIARY EMPLOYEES, IOSCO
FEDERATION OF TEACHERS, KINGSLEY
FEDERATION OF TEACHERS, KIRTLAND
COMMUNITY COLLEGE FEDERATION OF
TEACHERS, LAKE CITY SUPPORT STAFF
FEDERATION, LAKE CITY TEACHERS AND
PARAPROFESSIONALS FEDERATION, LAKE
SHORE FEDERATION OF EDUCATIONAL
SECRETARIES, LAKE SHORE FEDERATION
SUPPORT STAFF, LAKE SHORE
FEDERATION OF TEACHERS, LAMPHERE
FEDERATION OF PARAPROFESSIONALS,
LAMPHERE FEDERATION OF TEACHERS,
LANSING COMMUNITY COLLEGE
ADMINISTRATIVE ASSOCIATION, LES
CHENEAU FEDERATION OF SUPPORT
STAFF, LES CHENEAU FEDERATION OF
TEACHERS, MACOMB INTERMEDIATE
FEDERATION OF PARAPROFESSIONALS,
MACOMB INTERMEDIATE FEDERATION OF
TEACHERS, MELVINDALE/NAP
PARAPROFESSIONALS, MELVINDALE/NAP
FEDERATION OF TEACHERS, MIDLAND
FEDERATION OF PARAPROFESSIONALS,
MIDLAND ISD FEDERATION OF
PARAPROFESSIONALS, MIDLAND ISD
FEDERATION OF TEACHERS, NORTHVILLE
FEDERATION OF PARAPROFESSIONALS,
ONAWAY FEDERATION OF SCHOOL
RELATED PERSONNEL, ONAWAY
FEDERATION OF TEACHERS, PLYMOUTH-
CANTON COMMUNITY SCHOOLS
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 PROFESSIONAL &
ADMINISTRATIVE ASSOC, WAYNE
COUNTY COMMUNITY COLLEGE
FEDERATION OF TEACHERS, WAYNE
COUNTY RESA SALARIED STAFF,
WEXFORD-MISSAUKEE ISD FEDERATION
OF TEACHERS, WHITEFISH TOWNSHIP
FEDERATION OF TEACHERS,

Plaintiffs-Appellants,

and

MICHIGAN EDUCATION ASSOCIATION,

Plaintiff,

v

STATE OF MICHIGAN,

Defendant-Appellee,

and

STATE TREASURER, JOHN E. DIXON, PUBLIC
SCHOOL EMPLOYEES RETIREMENT
SYSTEM, PUBLIC SCHOOL EMPLOYEES
RETIREMENT SYSTEM BOARD, PHIL
STODDARD, DEPARTMENT OF
TECHNOLOGY MANAGEMENT AND
BUDGET, and TRUST FOR PUBLIC
EMPLOYEE RETIREMENT HEALTH CARE
FUND,

Defendants.

No. 313960
Court of Claims
LC No. 12-000104-MM

MICHIGAN EDUCATION ASSOCIATION,

Plaintiff-Appellant,

and

AFT MICHIGAN, AFT, AFL-CIO, ALPENA-MONTMORENCY-ALCONA ISD PARAPROFESSIONALS/TEACHERS, ARENAC EASTERN FEDERATION, BAY ARENAC SKILLS CENTER FEDERATION, BROWN CITY EMPLOYEES FEDERATION, BROWN CITY FEDERATION OF TEACHERS, CHEBOYGAN OTSEGO PRESQUE ISLE INTERMEDIATE PARAPROFESSIONALS AND BUS PERSONNEL, CHEBOYGAN OTSEGO PRESQUE ISLE ISD TEACHERS, CHEBOYGAN OTSEGO PRESQUE ISLE SUPPORT PERSONNEL, CHESANING UNION AUXILIARY SERVICE EMPLOYEES, CLARE-GLADWIN ISD FEDERATION, CRAWFORD AU SABLE BUS DRIVERS FEDERATION, CRAWFORD AU SABLE CUSTODIANS/SECRETARIAL FEDERATION, CRAWFORD AU SABLE SUPPORT STAFF FEDERATION, CRAWFORD AU SABLE FEDERATION OF TEACHERS, CRESTWOOD FEDERATION OF TEACHERS, 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, GLEN LAKE FEDERATION OF TEACHERS, HALE FEDERATION OF TEACHERS, HAMTRAMCK FEDERATION OF TEACHERS, HEMLOCK FEDERATION OF TEACHERS, HEMLOCK AUXILIARY SERVICE EMPLOYEES, HENRY FORD COMMUNITY COLLEGE ADJUNCT FACULTY ORGANIZATION, HENRY FORD COMMUNITY COLLEGE FEDERATION OF TEACHERS, HIGHLAND PARK FEDERATION OF PARAPROFESSIONALS, HIGHLAND PART

FEDERATION OF TEACHERS, IMLAY CITY
FEDERATION OF TEACHERS, INKSTER
FEDERATION OF TEACHERS, IOSCO ISD
INTERMEDIATE FEDERATION OF
AUXILIARY EMPLOYEES, IOSCO
FEDERATION OF TEACHERS, KINGSLEY
FEDERATION OF TEACHERS, KIRTLAND
COMMUNITY COLLEGE FEDERATION OF
TEACHERS, LAKE CITY SUPPORT STAFF
FEDERATION, LAKE CITY TEACHERS AND
PARAPROFESSIONALS FEDERATION, LAKE
SHORE FEDERATION OF EDUCATIONAL
SECRETARIES, LAKE SHORE FEDERATION
SUPPORT STAFF, LAKE SHORE FEDERATION
OF TEACHERS, LAMPHERE FEDERATION OF
PARAPROFESSIONALS, LAMPHERE
FEDERATION OF TEACHERS, LANSING
COMMUNITY COLLEGE ADMINISTRATIVE
ASSOCIATION, LES CHENEAX
FEDERATION OF SUPPORT STAFF, LES
CHENEAX FEDERATION OF TEACHERS,
MACOMB INTERMEDIATE FEDERATION OF
PARAPROFESSIONALS, MACOMB
INTERMEDIATE FEDERATION OF
TEACHERS, MELVINDALE/NAP
PARAPROFESSIONALS, MELVINDALE/NAP
FEDERATION OF TEACHERS, MIDLAND
FEDERATION OF PARAPROFESSIONALS,
MIDLAND ISD FEDERATION OF
PARAPROFESSIONALS, MIDLAND ISD
FEDERATION OF TEACHERS, NORTHVILLE
FEDERATION OF PARAPROFESSIONALS,
ONAWAY FEDERATION OF SCHOOL
RELATED PERSONNEL, ONAWAY
FEDERATION OF TEACHERS, PLYMOUTH-
CANTON COMMUNITY SCHOOLS
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 PROFESSIONAL &
ADMINISTRATIVE ASSOC, WAYNE COUNTY
COMMUNITY COLLEGE FEDERATION OF
TEACHERS, WAYNE COUNTY RESA
SALARIED STAFF, WEXFORD-MISSAUKEE
ISD FEDERATION OF TEACHERS,
WHITEFISH TOWNSHIP FEDERATION OF
TEACHERS,

Plaintiffs,

v

STATE OF MICHIGAN, STATE TREASURER,
JOHN E. DIXON, PUBLIC SCHOOL
EMPLOYEES RETIREMENT SYSTEM,
PUBLIC SCHOOL EMPLOYEES RETIREMENT
SYSTEM BOARD, PHIL STODDARD,
DEPARTMENT OF TECHNOLOGY
MANAGEMENT AND BUDGET, and TRUST
FOR PUBLIC EMPLOYEE RETIREMENT
HEALTH CARE FUND,

Defendants-Appellees.

No. 314065
Court of Claims
LC No. 12-000104-MM

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

GLEICHER, J. (*concurring*).

I concur with the result reached by the majority. I write separately to clarify my reasons for doing so.

In broad outline, plaintiffs have raised constitutional challenges to two portions of 2012 PA 300. The first involves pension benefits. Pursuant to the act, members of the Michigan Public School Employees' Retirement System (MPERS) must increase their payroll deductions to maintain the 1.5 percent pension factor that formerly applied to all public school employee pensions. And under PA 300, MPERS members must pay an increased healthcare premium

equivalent to 3 percent of their compensation or instead elect to join a “Tier 2” defined contribution benefit plan.

I concur with the majority’s resolution of plaintiffs’ healthcare benefit claim. As the majority explains, the Supreme Court concluded in *Studier v Michigan Pub Sch Employees’ Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005), that public school employees have no constitutional entitlement to healthcare benefits. The *Studier* Court held, “the Legislature intended for payment of health care benefits by the MPSERS under MCL 38.1391(1) to simply be a ‘fringe benefit’ to which public school employees would never have a contractual entitlement.” *Id.* at 667-668. Healthcare benefits do not even qualify as “financial” benefits protected under Const 1963, art 9 § 24, the *Studier* Court further held, because they are not in the form of “monetary payments.” *Id.* at 655. As Justice Cavanagh articulated in dissent, the *Studier* majority found it constitutionally acceptable for our State to promise healthcare benefits to its teachers, and to break this promise at will. *Id.* at 679 (CAVANAGH, J., dissenting).

Nevertheless, in *AFT Michigan v Michigan*, 297 Mich App 597, 604; 825 NW2d 595 (2012), this Court struck down on constitutional grounds a statutory modification of plaintiffs’ healthcare benefit formula. The 2010 act required “that public school districts . . . withhold three percent of each employee’s wages and remit the amount to the MPSERS as ‘employer contributions’ to the trust that funds retiree health care benefits.” *Id.* The *AFT Michigan* Court held that the law impaired contractual rights and allowed the government to take private property without compensation. *Id.*

The Legislature made virtually no change to the language struck down in *AFT Michigan*, but added a provision—§ 91a(5)—permitting members to avoid the three-percent wage withholding by joining a “Tier 2” plan. The majority reasons that “the voluntary nature of 2012 PA 300” allowing public school employees to “opt in or opt out of the legislative scheme” cured the constitutional infirmities discerned by the *AFT Michigan* Court. Plaintiffs fail to persuasively counter this logic. Plaintiff Michigan Education Association (MEA) argues that the act “impose[s] a significant contribution requirement on all MPSERS members, including those who have been members of the retirement system for many years and whose rights to retiree health premium payments have vested.” The MEA concedes, however, that *Studier* negates this argument.

On the other hand, I agree with plaintiffs that *pension* benefits are clothed with constitutional protection from impairment or diminishment. Const 1963, art 9, § 24 serves “to ensure that public pensions be treated as contractual obligations that, once earned, could not be diminished.” *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 311; 806 NW2d 683 (2011). See also *Kosa v Treasurer of State of Mich*, 408 Mich 356, 360; 292 NW2d 452 (1980) (“To gain protection of their pension rights, Michigan teachers effectively lobbied for a constitutional amendment granting contractual status to retirement benefits.”). As the Supreme Court explained in *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659, 662-663; 209 NW2d 200 (1973), “it was the intention of the framers of the constitution” to make the accrued financial benefits of public pensions “contractual rights.”

Plaintiffs contend that the enforceable contract includes the 1.5-percent multiplier formula in effect by statute since 1945. However, no evidence supports that 2012 PA 300 impairs or reduces the benefits earned pursuant to the 1.5-percent multiplier that accrued before 2012 PA 300 took effect. Further, in *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich at 663 (emphasis added), the Supreme Court observed that under Const 1963, art 9, § 24, “the Legislature cannot diminish or impair accrued financial benefits, *but we think it may properly attach new conditions for earning financial benefits which have not yet accrued.*” Plaintiffs have failed to distinguish this language from the case at bar. Although plaintiffs have pointed to caselaw from other jurisdictions that reached a result contrary to the majority opinion, in most of those cases the courts found that statutory language created binding contracts. To date, our Supreme Court has not found any binding contractual obligations residing within legislative enactments. To the contrary, in *Studier*, 472 Mich at 661, the Supreme Court emphasized “the strong presumption that statutes do not create contractual rights.”

Finally, plaintiffs contend that 2012 PA 300 violates the second sentence of art 9, § 24, which states: “Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.” MEA’s brief contends that the act “uses current service contributions levied against the members to finance the unfunded accrued liabilities of MPSERS, *i.e.*, the \$15.6 billion of the State’s unfunded accrued liability that accrued to MPSERS members in the past.”¹ According to plaintiffs, 2012 PA 300 “is an attempt to make the members of MPSERS pay for a large portion of the pension benefits which had already accrued to them prior to” the act’s passage.

The record neither supports nor refutes that at the time 2012 PA 300 was enacted, the MPSERS balance sheet included “unfunded accrued liabilities” that will be paid through a mechanism created by the act. Nor does the record demonstrate whether the Legislature, or MPSERS, has applied current member contributions against unfunded accrued liabilities. If 2012 PA 300 has resulted in the collection of money used to meet pre-2012 unfunded accrued liabilities through a “borrowing scheme” similar to that condemned in *Kosa*, 408 Mich 356, I would agree that *as applied*, the act raises constitutional concerns. In my view, this issue should be addressed with the benefit of a full evidentiary record in a different case. Because the evidence necessary to evaluate this issue is not before this Court, I concur with the majority that based on the challenges raised here, 2012 PA 300 passes constitutional muster.

/s/ Elizabeth L. Gleicher

¹ Earlier in the same brief, the MEA proclaims: “There is no financial crisis regarding MPSERS. It is and has been paying for all pension benefits that come due. The Michigan Legislature has never declared that there was a financial crisis regarding MPSERS. MPSERS has sufficient money to meet its financial commitments to its retirees.”