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, 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

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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 CHENEAUX FEDERATION OF SUPPORT STAFF, LES CHENEAUX 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

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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

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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

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

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,

Defendant-Appellees.

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

K. F. KELLY, J.

Plaintiffs, AFT et al and MEA et al,[1] representative organizations of public school employees, appeal of right the Court of Claims' orders dismissing their challenges to provisions

[1] Referred to collectively as "plaintiffs."

of 2012 PA 300. 2012 PA 300, effective September 4, 2012, amended the Public School Employees Retirement Act (PSERA), MCL 38.1301 *et seq*., and altered future healthcare and retirement benefit plans available to public school employees for services performed after December 1, 2012. Finding no error warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Pursuant to MCL 38.1343g and MCL 38.1384b, PSERA members were asked to make a choice in terms of their future retirement pension benefits:

> 1. Members of the Basic Plan, who historically contributed nothing to their pensions, would now be expected to contribute 4% of their income to their pensions. Those individuals hired between January 1990 and July 2010 and those former Basic Plan members who transferred into the Member Investment Plan (MIP) would increase their contribution to 7%. Members who opted into the Basic Plan and MIP Plan would maintain the current 1.5% pension multiplier.
>
> 2. Members could maintain current contribution rates, freeze existing benefits at the 1.5% multiplier, and receive a 1.25% pension multiplier for future years of service.
>
> 3. Members could freeze existing pension benefits and move into a defined contribution, 401(k)-style, plan with a flat 4% employer contribution for future service.

Additionally, under MCL 38.1343e members were asked to "opt in" or "opt out" of retiree healthcare benefits; members could either contribute 3% of their compensation to receive the future benefit, or they could choose to receive no retiree healthcare benefits at retirement. MCL 38.1391a(8) further provided that a member who opted into the retiree healthcare program, but did not meet the eligibility requirements (i.e., due to failure to work the requisite number of years) would be refunded his or her contribution starting at age 60 over a period of 60 months.

In two separate actions, plaintiffs filed complaints alleging: breach of contract and diminishment of contract, unconstitutional diminishment of members' accrued financial benefits, denial of substantive due process, and unjust enrichment to the state. The Court of Claims consolidated the two cases and considered the parties' competing motions for summary disposition. The Court of Claims concluded:

> As much as I would like to strike the section that deals with the state keeping the money on the healthcare and find that it's an unjust enrichment or a taking. . . My problem is this, if it were the only choice I would strike it down. The problem is we have informed consent and there are a number of choices, so the legislature in putting together this law thought about that. It's very clear to me. They are giving choices and they are saying be careful, because if you leave early, for whatever reason, we're going to hang on to your money and you'll get it at the age of 60 as you retire and you'll get some money back on top of it but it's probably not going to be a lot of money because we're going to use it in the

meantime. Now, I'm not happy about that and it's probably usury, but it's with that party's consent because they certainly have enough time, especially with the striking of the 52 days, to do the research, to do the math, to consult with an accountant, a financial planner, an advisor, and maybe not make that choice so the state doesn't have their money. On the other hand, if they're not a person who can save money, maybe that is the best choice for them.

As to the rest of the sections, again, there is this delineation between vested and non-vested benefits. It does not appear to me that the legislature is touching anything that is vested.

And as to the brochures, here's the problem. I have made rulings against the state for exactly this. Treasury, for example, puts out these advisories about how our tax code is going to change and how people should pay taxes and they've come in here on cases saying that a business did not follow these advisory tax rules and they have charged people with additional taxes because they didn't follow this advisory rule. And I've said, well, this is only advisory, it's not in the tax code yet so, state, you can't have your way and the taxpayer wins. Because there's also disclaimers there.

And I find the same ruling here. There are pamphlets that the state puts out about here's how your pension is going to work and there's disclaimers on it. It's really only advisory in nature about how – here's how your retirement works. I don't believe that a pamphlet can be part of a contract. I think it's nice that it's out there. I think it helps, but unless it is attached to the contract, it's got everybody's signatures, and it's made part of the black and white contract, it's not part of the contract. So I am finding that as informative as those pamphlets are, they're not part of the contract. It's consistent with other rulings that I've made that I have been upheld on.

And so I think what the state has done with Public Act 300 of 2012 is left intact the retirement system with what's been vested and they are making members make elections on unvested pieces. So with the exception of the 52 days, I'm leaving the rest intact.[[2]]

Plaintiffs now appeal as of right[3] and take issue with four separate provisions of 2012 PA 300:

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[2] Although not an issue on appeal, the Court of Claims struck as unreasonable a 52-day election period under MCL 38.1359, finding that such a short time deprived members of the opportunity to make a reasonably informed decision.

[3] The appeals have been consolidated for appellate review. *AFT Michigan v State of Michigan*, unpublished order of the Court of Appeals, entered January 9, 2013 (Docket Nos. 313960 and 314065).

- MCL 38.1343e, requiring a 3% contribution towards retiree healthcare.

- MCL 38.1343g, requiring a 4% contribution to pension to remain in the Basic Plan.

- MCL 38.1384b, providing a "sanction" of reduced multiplier in calculating pension benefits for those individuals who opt-out of § 43g.

- MCL 38.1391a(8), providing the mechanism for refunding contributions to individuals who opted into the retiree healthcare plan but who ultimately fail to qualify to receive such benefits.

II. ANALYSIS

A. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether a contract exists is a question of law that this Court reviews de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Finally, the question of whether 2012 PA 300 violates the constitution is a question of law that is reviewed de novo. *In re Williams*, 286 Mich App 253, 271; 779 NW2d 286 (2009).

B. BREACH OF CONTRACT

Plaintiffs argue that 2012 PA 300 unconstitutionally impairs existing contractual obligations to pension and retiree healthcare benefits in violation of both the federal and state constitutions. We disagree.

The constitutions of the United States and the State of Michigan provide, in relevant part:

> No State shall . . .pass any . . .Law impairing the Obligation of Contracts . . .[US Const, art I, § 10, cl 1.]

> No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted. [Const 1963, art 1, § 10.]

We have recently set forth the process for determining whether a statute violates the contract clauses:

> Currently, whether a state statute violates the Contract Clause is determined by reference to a three-step inquiry . . . First, courts must determine whether the state law has operated as a substantial impairment of a contractual relationship. If it constitutes a substantial impairment, the court must look at whether the justification for the state law is based on a significant and legitimate public purpose. If a legitimate public purpose can be identified, the court looks at whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. With respect to this third inquiry, as

> is customary in reviewing economic and social regulation, ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure unless the State is one of the contracting parties. [*Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership*, 300 Mich App 361, 373-374; 835 NW2d 593 (2013) (footnotes, citations, and internal quotations omitted).]

1. MEMBER HANDBOOKS AND BROCHURES

AFT argues that the various pamphlets, handbooks and informative brochures published by the state evidence a contract between the state and the members, whereby the state specifically indicated that a 1.5% multiplier would be used to calculate pension benefits. Alternatively, AFT argues that there is an "implied in law" contract.

"A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller–Davis Co v Ahrens Const, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). To maintain a cause of action for breach of contract, a party must establish the existence of a contract and then must demonstrate that the contract was breached. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). A valid contract has five elements: "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Calhoun Co v Blue Cross & Blue Shield of Mich*, 297 Mich App 1, 13; 824 NW2d 202 (2012).

An implied-in-law contract is a legal fiction "to enable justice be accomplished" and to avoid unjust enrichment, even if there was no meeting of the minds and no contract was intended. *Detroit v Highland Park*, 326 Mich 78, 100; 39 NW2d 325 (1949). A contract will be implied in law if a party is unjustly enriched. *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 686 (1992). To sustain an unjust enrichment claim, a plaintiff must demonstrate (1) the defendant's receipt of a benefit from the plaintiff and (2) an inequity to plaintiff as a result. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546; 473 NW2d 652 (1991); *Karaus v Bank of New York Mellon*, 300 Mich App 9, 23; 831 NW2d 897 (2012). Stated differently, to prevent unjust enrichment, the law will imply a contract only where the defendant has been inequitably enriched at the expense of the plaintiff. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006). Under those circumstances, courts may imply a contract to prevent unjust enrichment. *Martin*, 193 Mich App at 177. However, courts may imply a contract only where the parties do not have an express contract covering the same subject matter. *Id*.

AFT argues that publications generated by the Retirement System clearly set forth that a member's pension would be based on a 1.5% multiplier. By way of example, AFT points to a 1990 pamphlet, titled "An Introduction to Your Retirement Plan." Under "Pension Formula", the document provides "Your Retirement Plan provides a benefit that is determined by a formula. The formula is your final average salary times 1.5% (.015) times your total years of service credit." However, this same document contains the following disclaimer:

> This booklet was written as an introduction to your retirement plan. You should find it very helpful in the early stages of your planning for retirement. It is designed to answer commonly asked questions in a simple and easy to understand style. However, information in this booklet is not a substitute for the law. If differences of interpretation occur, the law governs. *The law may change at any time altering information in this booklet.* [Emphasis added.]

AFT also points to a 1997 publication which provides:

> Your pension is calculated according to the following formula:
>
> *Your final average compensation*
>
> *X*
>
> *1.5% (.015)*
>
> *X*
>
> *Your years of service credit =*
>
> *Your annual pension*

Again, however, the same publication provides the following disclaimer:

> Remember, this book is a summary of the main features of the plan and not a complete description. The operation of the plan is controlled by the Michigan Public School Employees Retirement Act (Public Act 300 of 1980, as amended). *If the provisions of the Act conflict with this summary, the Act controls.* [Emphasis added.]

The Court of Claims did not err in concluding that the documents did not form an enforceable contract. The pamphlets and brochures were simply an informational explanation of the then-existing formula; the state was not bound, in perpetuity, by its contents. Importantly, the disclaimers contained within each of the documents plainly demonstrates that the Retirement System manifested no intent to be contractually bound by the formula and clearly warned that pensions were a product of legislation, which was subject to change at any time. These same disclaimers also compel a finding that AFT's claim for breach of implied contract must fail.

2. 1980 PA 300

AFT argues that 1980 PA 300 created a contract between the state and public school employees; since 1945 every public school employee was given a clear promise that the retirement multiplier used to calculate pension benefits would be 1.5%. However, this notion was specifically rejected by our Supreme Court in *Studier v Michigan Pub School Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005).

At issue in *Studier* was whether 1980 PA 300 created a contract with public school retirees such that retiree healthcare benefits could not be changed without running afoul of the contract clauses of the federal and state constitutions. *Id.* at 645. Amendments to 1980 PA 300 increased the amount of deductibles that retirees were required to pay and also increased the copays and out-of-pocket expenses that retirees paid for prescription drugs. *Id.* at 646. Several public school retirees brought suit, arguing, inter alia, that the copay and deductible increases impaired an existing contractual obligation. *Id.* at 647-648.

In rejecting that the statute created a contractual right to receive healthcare benefits, our Supreme Court noted that "a fundamental principle of the jurisprudence of both the United States and this state is that one legislature cannot bind the power of a successive legislature." *Id.* at 660. It further noted "the strong presumption that statutes do not create contractual rights." *Id.* at 661. This is in keeping with "'the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state.'" *Id.* quoting *Nat'l R Passenger Corp v Atchison, Topeka & Santa Fe R Co*, 470 US 451, 465–466; 105 S Ct 1441; 84 L Ed 2d 432 (1985).

Thus, "[i]n order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract" and "absent an adequate expression of an actual intent of the State to bind itself, courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party." *Studier*, 472 Mich at 662 (internal quotations omitted). A legislature may demonstrate its intent to be contractually bound by using terms such as "contract, "covenant" or "vested rights." *Id.* at 663. Our Supreme Court noted that nothing in MCL 38.1391 (the statute establishing the healthcare benefits) indicated a contract:

> Indeed, by its plain language, the statute merely shows a policy decision by the Legislature that the retirement system pay "the entire monthly premium or membership or subscription fee" for the listed healthcare benefits on behalf of a retired public school employee who chooses to participate in whatever plan the board and the Department of Management and Budget authorize. However, nowhere in the statute did the Legislature require the board and the department to authorize a particular plan containing a specific monthly premium, membership, or subscription fee or, alternatively, explicitly preclude the board and the department from amending whatever plan they authorize. Additionally, nowhere in the statute did the Legislature require the board and the department to authorize a plan containing specified deductibles and copays. In fact, nowhere in the statute did the Legislature even mention deductibles and copays. Further, nowhere in the statute did the Legislature covenant that it would not amend the statute to remove or diminish the obligation of the MPSERS to pay the monthly premium, membership, or subscription fee; nor did it covenant that any changes to the plan by the board and the department, or amendments to the statute by the Legislature, would apply only to a specific class or group of public school retirees. Again, had the Legislature intended to surrender its power to make such changes, it would have done so explicitly. [*Id.* at 664-665 (footnotes omitted).]

The Supreme Court also noted that previous legislatures had exercised their powers to amend the statute throughout the years, which was further indication that no contractual rights were created. *Id.* at 665-666.

We conclude that *Studier* applies to plaintiffs' claims and that 1980 PA 300 did not create an enforceable contract. There is absolutely nothing in the statute that indicates the legislature's intent to enter into a contract and bind future legislatures. "Had the Legislature intended to surrender its legislative powers through the creation of contractual rights, it would have expressly done so by employing such terms as "'contract,' 'covenant,' or 'vested rights.'" *Id.* at 663-664.

3. CONST 1963, ART 9, § 24

Finally, plaintiffs argue that pension benefits are contractual rights as guaranteed by the state constitution and that 2012 PA 300 unconstitutionally diminishes pension benefits in violation of Const 1963, art 9, § 24. However, as will be discussed at further length below, § 24 protects only those pension benefits that have already accrued, not future benefits.

Accordingly, because there was no breach of contract, it follows that there was no impairment of contract under either the state or federal constitutions.

C. PENSION BENEFITS

Plaintiffs argue that 2012 PA 300 violates Const 1963, art 9, § 24, which provides:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> 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.

Again, we hold that *Studier* is applicable here. At issue in *Studier* was whether healthcare benefits paid to public school retirees constituted "accrued financial benefits" subject to protection from diminishment or impairment under Const 1963, art 9, § 24. *Studier*, 472 Mich at 645.

Our Supreme Court concluded that "healthcare benefits are not protected by Const 1963, art 9, § 24 because they neither qualify as 'accrued' benefits nor 'financial' benefits as those terms were commonly understood at the time of the Constitution's ratification and, thus, are not 'accrued financial benefits.'" *Id.* at 658-659. First, as it related to the term "accrued", the Court held that "the ratifiers of our Constitution would have commonly understood 'accrued' benefits to be benefits of the type that increase or grow over time-*such as a pension payment or retirement allowance that increases in amount along with the number of years of service a public school employee has completed*." *Id.* at 654 (emphasis added). Next, as it related to the term "financial," the Court noted that healthcare benefits did not qualify as financial benefits because "the ratifiers of our Constitution would have commonly understood 'financial' benefits to

include only those benefits that consist of monetary payments, and not benefits of a nonmonetary nature such as healthcare benefits." *Id.* at 655. "[T]he ratifiers would have commonly understood the phrase 'accrued financial benefits' to be one of limitation that would restrict the scope of protection provided by art 9, § 24 to monetary payments for *past* services." *Id.* at 657-658.

Therefore, pursuant to *Studier*, pension benefits are the type that increase or grow over time commensurate with the number of years of service a public school employee has completed and such benefits are protected by Const 1963, art 9, § 24. However, such pension benefits are protected by § 24 only to the extent that they are for *past* services. 2012 PA 300 does nothing to impact or impair members' vested pension benefits. Members will still have the 1.5% multiplier applied to services rendered before December 2012. It is only future service that becomes subject to a reduced 1.25% multiplier should a member elect not to contribute 4% to his or her pension fund.

We also find persuasive our Supreme Court's advisory opinion *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659; 209 NW2d 200 (1973), which addressed the constitutionality of a statute requiring members to pay an increased contribution to pensions with no corresponding increase in benefits.[4] The Court first noted that pensions were no longer considered a mere gratuity since the passage of Const 1963, art 9, § 24. *Id.* at 662-663. It further noted:

> Under this constitutional limitation 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. Even though compliance with the new conditions may be necessary in order to obtain the financial benefits which have accrued, we would not regard this as a diminishment or impairment of such accrued benefits unless the new conditions were unreasonable and hence subversive of the constitutional protection. [*Id.* at 663-664.]

Even absent the advisory opinion's precedential value, when read in conjunction with *Studier*, it is plain that 2012 PA 300 does nothing to diminish or impair a member's vested pension benefits; only future benefits are implicated. 2012 PA 300, therefore, does not run afoul of Const 1963, art 9, § 24, and plaintiffs' claims are without merit.

MEA's argument that 2012 PA 300 violates the second clause of § 24 must also fail. The *Studier* Court explained:

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[4] "It is important to emphasize the fact that an advisory opinion does not constitute a decision of the Court and is not precedentially binding in the same sense as a decision of the Court after a hearing on the merits." *In re Constitutionality of Act No 294 of Public Acts of 1972*, 389 Mich 441, 461; 208 NW2d 469 (1973).

> That art 9, § 24 only protects those financial benefits that increase or grow over time is not only supported but, indeed, confirmed by the interaction between the first and second clauses of that provision. Specifically, the first clause contractually binds the state and its political subdivisions to pay for retired public employees' "accrued financial benefits ...." Thereafter, the second clause seeks to ensure that the state and its political subdivisions will be able to fulfill this contractual obligation by requiring them to set aside funding each year for those "[f]inancial benefits arising on account of service rendered in each fiscal year ...." Thus, because the second clause only requires the state and its political subdivision to set aside funding for "[f]inancial benefits arising on account of service rendered in each fiscal year" to fulfill their contractual obligation of paying for "accrued financial benefits," it reasonably follows that "accrued" financial benefits consist only of those "[f]inancial benefits arising on account of service rendered in each fiscal year ...." [*Id.* at 654-655 (footnotes omitted).]

"In years prior to the Constitution of 1963, the Legislature did not always make adequate appropriations to maintain the MPSERS on an actuarially sound basis. . . . The practical effect of this underfunding was that many pensioners had accumulated years of service for which insufficient money had been set aside in the pension reserve funds to pay the benefits to which their years of service entitled them." *Kosa v Treasurer of State of Mich*, 408 Mich 356, 365; 292 NW2d 452 (1980). The Retirement System used current members' contributions to pay for unfunded accrued liabilities of retirees' pensions that had accrued prior to the passage of the 1963 Constitution. The Supreme Court held that "borrowing" from post-1963 Constitution reserves to pay pre-constitution benefits violated Const 1963, art 9, § 24 by using current service funds to finance unfunded accrued liabilities. *Id.* at 367-368.

The *Kosa* Court analyzed the history of the legislation by looking to the constitutional debates. It noted that "[a] clear distinction must be drawn between the right to receive pension benefits and the funding method adopted by the Legislature to assure that monies are available for the payment of such benefits." *Id* at 371. As one delegate noted, "It is not intended that an individual should . . .be given the right to sue the employing unit to require the actuarial funding of past service benefits . . .What it is designed to do is to say that when his benefits come due, he's got a contractual right to receive them." *Id*. at 370 n 21.

In fact, contrary to plaintiffs' argument, "[t]he second paragraph of art 9, § 24 expressly mandates townships and municipalities to fund all public employee pension systems to a level *which includes unfunded accrued liabilities*," which "'are the estimated amounts which will be needed according to actuarial projections to fulfill presently existing pension obligations . . .'" *Shelby Twp Police & Fire Retirement Bd v Shelby Twp*, 438 Mich 247, 255-256, n 4; 475 NW2d 249 (1991) (emphasis added) quoting *Kosa*, 408 Mich at 364 n 1.

Accordingly, 2012 PA 300 does not violate Const 1963, art 9, § 24 as it relates to members' pensions.

D. HEALTHCARE BENEFITS

Plaintiffs contend that 2012 PA 300 does not cure the constitutional deficiencies found in *AFT Michigan v State*, 297 Mich App 597; 825 NW2d 595 (2012). We disagree.

In *AFT*, several public school employees and their representative organizations brought a challenge to MCL 38.1343e, which required public school districts and reporting units to withhold three percent of the employees' wages and remit the amount to the Retirement System as "employer contributions" to the trust that funded retiree healthcare benefits. *AFT*, 297 Mich App at 603. The plaintiffs argued that the statute resulted in the impairment of contracts and violated their rights under both the takings causes and the due process clauses of the federal and state constitutions. The trial court held that the statute did not violate the contract clauses, but that it did violate the plaintiffs' rights under both the takings clauses and due process clauses of the federal and state constitutions. *Id.* at 606-607.

This Court disagreed with the trial court's conclusion that there was no violation of contract clauses. We held that "MCL 38.1343e operates as a substantial impairment of the employment contracts between plaintiffs and the employing educational entities. The contracts provide for a particular amount of wages and the statute requires that the employers not pay the contracted-for wages, but instead pay three percent less than the contracts provide." *AFT*, 297 Mich App at 610. The Court noted, however, that while there was clearly substantial impairment of the employees' contract, the inquiry into whether there has been a violation of the contracts clause necessarily involved an examination as to "whether the particular impairment is necessary to the public good." *Id.* at 612 (quotations omitted). And, "[b]ecause governmental entities are parties to the contracts and benefit from the impairment, we are to employ heightened scrutiny in our review of the statute." *Id.* The Court looked to cases from other jurisdictions wherein governments implemented temporary actions to deal with budget shortfalls, such as implementing mandatory furlough days. These jurisdictions found such actions tolerable because, although clearly an impairment of contract, such actions were implemented after other attempts to reduce budgetary shortfalls, including layoffs and reductions in services. Additionally, the employees' work hours were reduced to correspond with the reduction in wages. *Id.* at 613-614. In contrast, MCL 38.1343e was not temporary; rather, it was a permanent reduction in salary meant as a long-term mechanism to restructure benefits. *Id.* at 614. "The state has not shown that it first undertook to reduce retiree healthcare benefits, or to require present retirees to contribute to their own healthcare plans, or to restructure the benefits system in any way other than to legislate state-imposed modifications of freely negotiated contracts." *Id.* at 615.

In further finding that the statute was an unconstitutional infringement on the plaintiffs' substantive due process rights, this Court explained:

> Defendants argue that the compelled contributions are not arbitrary because they are assessed against public school employees to support a fund that pays for retiree healthcare for public school employees. This, however, is an overly general characterization that gives the false impression that plaintiff employees are being required to contribute toward the funding of their own retirement benefits. The *mandatory contributions* imposed on current public school employees do not go to fund their own retirement benefits but, instead, to pay for retiree healthcare for already-retired public school employees.

> While the present employees and the retired employees have in common their present or former employment by a public school employer, that does not mean that their interests as individuals (or even as groups of employees) are identical. Defendants have offered no legal basis for the conclusion that it comports with due process to require present school employees to transfer three percent of their incomes in order to fund the retirement benefits of others. Rather, it is a *mandatory, direct transfer* of funds from one discrete group, present school employees, for the benefit of another, retired school employees. The fact that these groups share employers does not render the scheme outside the constitutional protection of substantive due process. [*Id.* at 622-623 (emphasis added).]

Additionally, under *Studier*, there was no guarantee that current employees would enjoy retiree healthcare benefits because such were not "accrued financial benefits" and, therefore, subject to revision and total revocation.

> We cannot envision a court approving as constitutional a statute that requires certain individuals to turn a portion of their wages over to the government in return for a "promise" that the government will return the monies, with interest, in 20 years when the government retains the unilateral right to "cancel" the "promise" at any time and does not even agree that, if they do so, the monies taken will be returned. School employees cannot constitutionally be required to "loan" money to their employer school districts, with no enforceable right to receive anything in exchange and without even a binding guarantee that the "loan" will be repaid. [*Id.* at 625 (footnote omitted).]

In contrast to 2010 PA 75, employee contributions under 2012 PA 2012 are now voluntary. A member may now choose to either continue to participate in the retiree healthcare program and contribute 3% of his or her salary to do so, or the member may simply opt out of the program altogether. Members who opt in but fail to qualify for retiree healthcare benefits will be refunded their investment once they turn 60. At that time, they will receive an allowance over a 60-month period, utilizing the same multiplier as for pension benefits. Thus, the constitutional infirmities found in *AFT* have now been cured. Although plaintiffs argue that this unreasonably impacts members who have already "vested," *Studier* clearly provides that retiree healthcare benefits are not accrued financial benefits implicated by Const 1963, art 9, § 24.

Accordingly, 2012 PA 300 does not violate Const 1963, art 9, § 24 as it relates to retiree healthcare benefits.

E. SUBSTANTIVE DUE PROCESS

As an initial matter, although the State argues that plaintiffs cannot claim constitutional deprivations under both the takings clauses and the substantive due process clauses of the state and federal constitutions, this argument appears to have been specifically rejected in our Court's decision in *AFT*, where this Court addressed the substantive arguments of both issues. In addition, although the state correctly argues that AFT has failed to preserve this issue for appellate view because it did not make such a broad argument in the Court of Claims, MEA has

consistently argued that 2012 PA 300 violates substantive due process. Therefore, a thorough examination of the issue is warranted.

US Const amend XIV provides that "no State shall deprive any person of life, liberty, or property, without due process of law." Const 1963, art 1, § 17 provides that "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

> [A]lthough the text of the Due Process Clauses provides only procedural protections, due process also has a substantive component that protects individual liberty and property interests from arbitrary government actions regardless of the fairness of any implementing procedures. The right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety, morals, and general welfare of the public. In the context of government actions, a substantive due process violation is established only when the governmental conduct is so arbitrary and capricious as to shock the conscience. [*Bonner v City of Brighton*, 298 Mich App 693, 705-706; 828 NW2d 408 (2012) (citations, footnotes, and internal quotations omitted).]

Additionally,

> The party challenging a legislative enactment subject to rational basis review must negative every conceivable basis which might support it. Under rational basis review, it is constitutionally irrelevant what reasoning in fact underlay the legislative decision. We will be satisfied with the government's rational speculation linking the regulation to a legitimate purpose, even unsupported by evidence or empirical data. Thus, if a statute can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny. [*Wells Fargo Bank*, 300 Mich App at 381, quoting *American Express Travel Related Servs Co, Inc v Kentucky*, 641 F3d 685, 688–689 (CA 6, 2011) (internal quotations and citations omitted).]

As previously stated, in striking down 2010 PA 75, as "unreasonable, arbitrary, and capricious and violat[ive of] the Due Process Clause," this Court explained:

> Defendants argue that the compelled contributions are not arbitrary because they are assessed against public school employees to support a fund that pays for retiree healthcare for public school employees. This, however, is an overly general characterization that gives the false impression that plaintiff employees are being required to contribute toward the funding of their own retirement benefits. The *mandatory contributions* imposed on current public school employees do not go to fund their own retirement benefits but, instead, to pay for retiree healthcare for already-retired public school employees.
>
> While the present employees and the retired employees have in common their present or former employment by a public school employer, that does not

> mean that their interests as individuals (or even as groups of employees) are identical. Defendants have offered no legal basis for the conclusion that it comports with due process to require present school employees to transfer three percent of their incomes in order to fund the retirement benefits of others. Rather, it is a *mandatory, direct transfer* of funds from one discrete group, present school employees, for the benefit of another, retired school employees. The fact that these groups share employers does not render the scheme outside the constitutional protection of substantive due process. [*AFT*, 297 Mich App at 622-623 (emphasis added).]

Additionally, this Court acknowledged that, under *Studier*, there was no guarantee that current employees would enjoy retiree healthcare benefits because such were not "accrued financial benefits" and, therefore, subject to revision and total revocation.

> We cannot envision a court approving as constitutional a statute that *requires* certain individuals to turn a portion of their wages over to the government in return for a "promise" that the government will return the monies, with interest, in 20 years when the government retains the unilateral right to "cancel" the "promise" at any time and does not even agree that, if they do so, the monies taken will be returned. School employees cannot constitutionally be *required* to "loan" money to their employer school districts, with no enforceable right to receive anything in exchange and without even a binding guarantee that the "loan" will be *repaid*. [*Id.* at 625 (footnote omitted) (emphasis added.]

The Court noted that § 43e "provides that the government confiscate the income of one discrete group in order to fund a specific governmental obligation to another discrete group." *Id.* at 627.

These constitutional infirmities have been cured by the voluntary nature of 2012 PA 300. Members may now opt in or opt out of the legislative scheme. Their voluntary contributions will be used to pre-fund their benefits. And, although plaintiffs complain that there is no guarantee of future healthcare benefits, under MCL 38.1391a(8), members' contributions are now protected with a refund mechanism. As the Court of Claims noted, it is clear that the Legislature carefully crafted 2012 PA 300 with the infirmities noted by *AFT* in mind.

The state, in enacting 2012 PA 300, has set forth a legitimate governmental purpose to help fund retiree healthcare benefits while ensuring the continued financial stability of public schools. It is undisputed that in recent years public schools have been required to remit increasingly higher percentages of their payrolls to pay for the healthcare of retirees and their dependents. Healthcare costs are expected to continue to rise in the future. By seeking voluntary participation from members, the statute rationally relates to the legitimate governmental purpose of maintaining healthcare benefits for retirees while easing financial pressures on public schools.

That members have no assurance of receiving healthcare benefits upon retirement does not defeat the fact that 2012 PA 300 is reasonably related to a legitimate governmental purpose; instead, plaintiffs' arguments are focused primarily on whether the plan is ideal, which is not our inquiry. Plaintiffs have not negated the conclusion that the legislation reasonably relates to a legitimate governmental purpose.

Accordingly, we hold 2012 PA 300 does not violate members' substantive due process rights under the state or federal constitutions.

F. UNLAWFUL TAKING AND UNJUST ENRICHMENT

Finally, plaintiffs assert that the healthcare contributions of 2012 PA 300 are an unlawful taking of their members property and the state is unjustly enriched. We disagree.

US Const amend V provides "nor shall private property be taken for public use, without just compensation." Similarly, Const 1963, art 10, § 2 provides that "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."

Unjust enrichment is an equitable doctrine. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006). It is the equitable counterpart of a legal claim for breach of contract. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 328; 657 NW2d 759 (2002). "Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another." *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952) (quotation marks and citation omitted). "[I]n order to sustain a claim of ... unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Morris Pumps*, 273 Mich App at 195.

In *AFT*, this Court concluded that 2010 PA 75 violated the takings clauses of the federal and state constitutions, rejecting the defendants' assertion that the takings clauses could not be implicated. Rather, "where the government does not merely impose an assessment or require payment of an amount of money without consideration, but instead asserts ownership of a specific and identifiable 'parcel' of money, it does implicate the Takings Clause. Indeed, the United States Supreme Court has termed such actions violations 'per se' of the Takings Clause." *AFT*, 297 Mich App at 618, quoting *Brown v Legal Foundation of Washington*, 538 US 216, 235; 123 S Ct 1406; 155 L Ed 2d 376 (2003). Thus, "[b]ecause MCL 38.1343e takes private property without providing any form of compensation, the trial court correctly ruled that the statute violates the Takings Clauses of the Fifth Amendment and Const 1963, art 10, § 2." *Id.* at 621.

However, there is no "taking" under 2012 PA 300 because participation in the retiree healthcare system is now voluntary. Unlike in *AFT* where the retiree healthcare contributions were mandatory and involuntary, members under the new legislation now have a choice. Thus, it cannot be argued that members' wages have been seized or confiscated, as was the case in *AFT*. In addition, § 91a(8) of 2012 PA 300 provides for repayment of member contributions for those individuals who have elected into the retiree healthcare system, but otherwise fail to vest in the system. Members are provided a full refund increased by 1.5% multiplied by the total number of years of contributions. While plaintiffs argue that they are deprived of the time-value of this money, that does not negate the fact that the process is entirely voluntary.

Accordingly, 2012 PA 300 neither unlawfully takes members' property nor does it amount to unjust enrichment.

Affirmed. No costs awarded to either party, a public question being involved. MCR 7.216(A)(7) and MCR 7.219(A).

/s/ Kirsten Frank Kelly
/s/ Henry William Saad