STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Jansen, P.J., and Fort Hood and Riordan, JJ

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, and RHONDA KELSO,

Plaintiffs-Appellees,

v

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.
_____/

Supreme Court No. 157335-7

Court of Appeals No. 335555
Consolidated with Docket Nos. 335725 and 335726

Court of Claims No. 16-000017-MM

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid.

REPLY BRIEF OF APPELLANTS RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

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I. Plaintiffs cannot meet the fault and causation elements of the stringent *Monell* standard.

To satisfy the fault and causation requirements of *Monell v Department of Social Services of City of New York*, 436 US 658 (1978), Plaintiffs must show 1) that the State's policy *directed* their alleged constitutional violations; 2) that the State's employees had committed similar constitutional violations in the past and the State's established custom or policy is to look the other way; or 3) even where there is no pattern of past violations, the institution's training policy will—to a "moral certainty"—cause the violation of constitutional rights, such as giving a police officer a gun without training them how to use it. (State Br, pp 21–31.) Here, Plaintiffs do not rely on the first or second methods. No Plaintiff makes any attempt to show that the State of Michigan, the Department of Health and Human Services, or the Department of Environmental Quality *directed* that any of them be "exposed" to "toxic water." (State Br, pp 25–26.) Nor do Plaintiffs attempt to identify a pattern of past alleged constitutional violations of a similar nature by state employees, in which a municipality changed water sources, state employees did not effectively compel the municipality to treat the water properly, and persons served by the municipality were exposed to toxic water. (State Br, pp 26–27.) Instead, Plaintiffs apparently rely on the third method: deliberate indifference *without* a pattern of past violations. (Pls' Br, pp 26–32.)

But Plaintiffs confuse their *Monell* burden of satisfying the third method with their burden of alleging a violation of their substantive due process bodily integrity rights. (Pls' Br, pp 26–32.) Plaintiffs' mistake is highlighted by their extensive reliance on *Guertin v State*, 912 F3d 907 (CA 6, 2019), which discusses "deliberate indifference" in the context of substantive

due process, but *not Monell*. *Id*. at 923–924. Plaintiffs rely on the *Guertin* case because, in their words, it arises "from the same exact facts as those which underlie Plaintiffs' Michigan constitutional claims here." (Pls' Br, p 21.) Yet the court in *Guertin* dismissed the high-level officials—DEQ Director Dan Wyant, MDHHS Director Nick Lyon, and Chief Medical Executive Eden Wells—precisely because they were *so far removed from the constitutional violations alleged by the plaintiffs*. *Guertin*, 912 F3d at 929–931 ("[W]e may only hold Wyant accountable for his own conduct, not the misconduct of his subordinates."). The *Guertin* case confirms that Plaintiffs have failed to meet their *Monell* burden.

The issue under *Monell* is not whether a person has adequately pleaded a constitutional violation—which is what Plaintiffs focus on—but whether the violation allegedly caused by the government employee *is attributable to the government institution*. Plaintiffs' only attempt to satisfy the *Monell* burden's "rigorous requirements of culpability and causation," *Board of County Commissioners of Bryan County, Oklahoma v Brown*, 520 US 397, 415 (1997), is to repeat several times that MDEQ and MDHHS employees were acting "in their official capacities" or pursuant to "official policy." (Pls' Br, pp 26–27.) But a "bald allegation" that they were injured by an official who was "acting pursuant" to a custom or policy does not satisfy the *Monell* standard. *Polk Co v Dodson*, 454 US 312, 326 (1981).

Plaintiffs must show that it was "plainly obvious" a violation of rights would result from a policy, such that the State, MDHHS or MDEQ knew to a "moral certainty" that Plaintiffs' constitutional rights would be violated if the agencies did not override their employees and compel the City of Flint and its engineering firms to treat Flint's water differently. (State Br, pp 27–29, citing *City of Canton, Ohio v Harris*, 489 US 378, 390, n 10 (1989).) Plaintiffs cannot do so. Treating drinking water is a complex and system-specific undertaking. (State Br, pp 3–4.) It

does not support the type of moral certainty required by the standard Plaintiffs seek to meet. The lower courts should have dismissed Plaintiffs' "constitutional tort" claims outright.

II. Unilaterally creating a claim to taxpayer funds under the circumstances of this case would violate the separation-of-powers doctrine.

When weighing whether to unilaterally create a damage remedy against government institutions, the key question for the Court is whether there are "sound reasons to think [the Legislature] might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong." *Ziglar v Abbasi*, 137 S Ct 1843, 1858 (2017). State Defendants thoroughly analyzed this question. (State Br, pp 31–43.) But Plaintiffs' analysis on this question is lacking.

For example, Plaintiffs recognize that "specificity" and "clarity" of the constitutional provision at issue are key because they indicate whether lower courts can consistently apply the Court's holding. (Pls' Br, p 38.) But Plaintiffs provide no analysis of the issue, let alone respond to State Defendants' argument that the substantive due process clause is perhaps the vaguest, least knowable, constitutional doctrine. (State Br, pp 31–32).

Additionally, although Justice Boyle cited *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971), at least 17 times and referred to the hypothetical remedy she and Justice Cavanagh endorsed as "a *Bivens*-type damage remedy," Plaintiffs ignore *Bivens* and its progeny, dismissing it as "irrelevant" to their claims. (Pls' Br, p 44.) But *Bivens is* relevant. It is the federal legal tradition—the inference of a damage remedy from a silent constitution—that forms the basis of potential claims under *Smith*. And the U.S. Supreme Court has rejected *every* request to create a *Bivens* remedy since 1983. (State Br, pp 36–37.)

Additionally, *Bivens* jurisprudence focuses the "alternative remedy" analysis on vindicating the interest asserted by the plaintiff, *not*—as the Court of Appeals concluded below—on whether the plaintiff would be able to successfully sue a specific defendant in another court. (State Br, pp 36–37.) Moreover, seven years after this Court decided *Smith*, the U.S. Supreme Court declined to create a damage remedy against government institutions because "creating a potentially enormous financial burden for the Federal Government" would violate the separation-of-powers doctrine. (State Br, p 39, discussing *FDIC v Meyer*, 510 US 471, 486 (1994).)

Deflecting attention from *Bivens*, Plaintiffs instead create a false constitutional narrative. They openly acknowledge they want this case as an insurance policy in the event the many other defendants they are suing turn out to be "judgment-proof." (Pls' Br, p 40.) So Plaintiffs argue that this Court, because it is popularly elected, has equal authority with the Legislature to mandate the use of taxpayer funds. (Pls' Br, p 46.) Indeed, they argue that the only way for this Court to enforce the Michigan Constitution is to unilaterally create such damage remedies. (Pls' Br, p 42.) Accordingly, Plaintiffs conclude that if the Court does not create the new damage remedy they want, it will be because the Court has decided to "refuse to give effect to the Constitution." (Pls' Br, p 46.) That line of reasoning is without merit.

Despite Plaintiffs' insistence on the "primacy" and "supremacy of the Michigan Constitution," (Pls' Br, p 47), they fail to recognize that the Constitution gives *the Legislature*, not this Court, the sole power to spend taxpayer money. Const 1963, art 9, § 17. Nor do Plaintiffs recognize this Court's power to "give effect" to the Constitution by interpreting it and issuing declaratory, advisory, and injunctive rulings. Plaintiffs' argument that the only way for

the Court to provide a check on the other branches of government is to create a massive financial burden on Michigan's taxpayers, to the benefit of Plaintiffs and their lawyers, is baseless.

There are "sound reasons to think [the Legislature] might doubt the efficacy or necessity of a damages remedy" in this case. *Ziglar*, 137 S Ct at 1858. First, the substantive due process clause is notoriously vague. (State Br, pp 36–37.) Second, the Legislature has already appropriated at least $392,362,929 for Flint's water emergency without authorizing cash payments to Plaintiffs and their lawyers. (State Br, pp 39–40.) Third, the Legislature has already established a claims system that defines the scope of institutional liability. (State Br, pp 37–38.) Finally, Plaintiffs are already pursuing multiple established remedies—including the one established by the Legislature—to redress the very injuries they allege in this case. (State Br, pp 35–37.) Creating a new remedy would not significantly contribute to the existing "system for enforcing the law and correcting a wrong." *Ziglar*, 137 S Ct at 1858. Under these circumstances, to unilaterally create a new claim to taxpayer funds for Plaintiffs—and any other future claimant who couches their alleged personal injuries as "violations of their substantive due process right to bodily integrity"—would violate the separation-of-powers doctrine.

III. Flint's emergency managers set Flint's local policy, not the State's policy.

The Court did not order the parties to brief whether Flint's emergency managers were "state officials" for the purposes of the Court of Claims' jurisdiction, so State Defendants did not do so. Plaintiffs' accusation that they did so (Pls' Br, p 35) is incorrect. What State Defendants argued is that Flint's emergency managers set Flint's local policy, not state policy. (State Br, pp 30–31.) The U.S. Supreme Court has made clear that the *Monell* analysis focuses on what kind of policymaking authority an official has, not on whether a person is labeled a "state" or "local" official. *McMillian v Monroe Co, Ala*, 520 US 781, 786 (1997). Regardless of whether the

Court of Claims has jurisdiction over them, Flint's emergency managers were authorized only "to act for and in the place and stead of the governing body and the office of chief administrative officer of the *local government*." MCL 141.1549(2) (emphasis added). Indeed, Flint's argument that the emergency managers were setting *state* policy rather than Flint's *local* policy has failed at every turn. See *Guertin v State*, 912 F3d at 935–941 (CA 6, 2019); *Boler v Governor*, 324 Mich App 614 (2018), app den 503 Mich 997 (2019); *In re Flint Water Cases*, No. 17-10164, 2019 WL 3530874, at *31 (ED Mich, August 2, 2019); *In re Flint Water Cases*, No. 16-10444 (ED Mich, Oct 31, 2018), attached at App Vol 4, pp 792a–802a.

Because the Court of Appeals below did not cite to the record or differentiate the defendants from one another, it is not clear the extent to which it attributed the decisions of Flint's emergency managers to the State for the purposes of *Monell* or otherwise. But to the extent it did so, it committed reversible error. (State Br, p 30.)

IV. Plaintiffs do not acknowledge or justify the dramatic changes they seek to make to Michigan's inverse condemnation jurisprudence.

State Defendants explained how Plaintiffs' theory of inverse condemnation—which the lower courts endorsed—would upend Michigan's takings jurisprudence. (State Br, pp 47–51.) It would expose the State's day-to-day regulatory decisions to takings claims; expose municipal water systems to takings claims as the aging infrastructure on which they are built continues to corrode; and put courts in the position of deciding "how much corrosion is too much," just as the Court in *Spiek* worried that courts would have to decide how much "traffic flow" is too much. (State Br, pp 47–51, discussing *Spiek v Michigan Dep't of Transp*, 456 Mich 331, 348 (1998).)

Plaintiffs do not respond to these arguments. Instead, they suggest that there is nothing new here, because the approvals, authorizations, and alleged withholding of information about

blood lead levels is precisely the type of "affirmative action" that was "directly aimed" at Plaintiffs' property already contemplated by Michigan's inverse condemnation law. (Pls' Br, pp 48–51.) That is not accurate. Neither former Governor Snyder, the State, MDEQ, nor MDHHS executed a government project knowing that it would allegedly damage the property of Melissa Mays, Michael Mays, Jacqueline Pemberton, Keith Pemberton, Elnora Carthan, or Rhonda Kelso. Plaintiffs' allegation is really that State Defendants failed to regulate effectively. (State Br, pp 45–48.) Plaintiffs assume takings claims can lie based on alleged regulatory failures by state agencies to stop actions undertaken by regulated entities. But Plaintiffs cite no authority in support of such a theory and fail to account for the body of authority that weighs against it. (*Id*.)

Plaintiffs' comparison of their case to *Peterman v State Department of Natural Resources*, 446 Mich 177 (1994) is unpersuasive. In *Peterman*, the Department of Natural Resources performed a construction project in a way they knew would result in "the washing away" of the Petermans' property. *Id*. at 191. Here, neither the State, the MDEQ, nor the MDHHS operated Flint's water system. Nor did they compel the City and the two engineering firms it hired to allegedly mistreat the Flint River—or do these things knowing it would allegedly damage the property of Melissa Mays, Michael Mays, Jacqueline Pemberton, Keith Pemberton, Elnora Carthan, or Rhonda Kelso.

Plaintiffs similarly misread *Spiek v Michigan Department of Transportation*, 456 Mich 331, 348 (1998). They insist that the impact of I-696 on the Spiek's property "was no different than for those living close to any public highway anywhere in Michigan." (Pls' Br, p 51.) That is not accurate. Although the impact *was* different, *Spiek*, 456 Mich at 334–335, it was only different *in degree*, *not in kind*, from that experienced by anyone else living next to a highway, *id* at 348. Here, Plaintiffs allege in their complaint that the "injury to Plaintiff property owners is

unique or special because this group of Plaintiffs had water service lines and plumbing susceptible to damage by corrosive water . . . .” (App Vol 2, p 288a.) But likely all pipes, and certainly all metal pipes, are susceptible to damage by corrosive water. Plaintiffs allegedly experienced corrosion to a higher *degree* than other metal pipe owners, but corrosion is still the same *kind* of harm experienced by all metal pipe owners. Plaintiffs make no response to State Defendants’ argument that allowing such a broad reading of the *Spiek* standard will expose already cash-strapped municipalities to high numbers of takings claims. (State Br, pp 49–51.) That is the unrestrained result this Court sought to avoid in *Spiek*. 456 Mich at 349. The lower courts erred here by allowing Plaintiffs’ expansive inverse condemnation claims to proceed.

V. Equitable exceptions to the Court of Claims Act’s notice provision do not help Plaintiffs—even if this Court allows them to exist.

State Defendants explain why the Court of Appeals erred in recognizing the judicially created “harsh and unreasonable” and “fraudulent concealment” exceptions to the Court of Claims Act’s requirements—especially because, as explained above, Plaintiffs’ claims do not have the constitutional basis they allege. (State Br, pp 53–54, 59–60.) As for the “harsh and unreasonable” exception, Plaintiffs apparently concede that it was an attempt by the Court of Appeals to resurrect an abrogated rule, not the recognition of a longstanding rule established by this Court. (Pls’ Br, pp 61–62.) As for the “fraudulent concealment” provision, Plaintiffs are wrong to insist that it is not possible to apply to the statute of limitations in the Court of Claims Act without also applying it to the notice provision. (Pls’ Br, pp 59–61.) Contrary to Plaintiffs’ insistence, the Court can harmonize MCL 600.6431, MCL 600.6452, and MCL 600.5855 without usurping the Legislature’s role. That is because the statute of limitations applies to legal pleadings while the notice provision applies *only to a notice of intent to sue*—a document that

requires less information and is not subject to the scrutiny of a legal pleading. Persons can file notices of intent to sue even if they do not have enough information to file a legal pleading.

Even if this Court allows those judicially created exceptions to exist, neither exception helps Plaintiffs because Plaintiffs' own legal pleadings demonstrate that they objectively had reason to know of their potential claims more than six months before they filed suit. (State Br, pp 55–58.) Plaintiffs respond that it is "improper" for the Court to consider their previous legal pleadings in which they allege they had reason to know of potential claims because their most recent legal pleading "superseded" those previous pleadings. (Pls' Br, note 11.) But there is no legal or logical support for such a position in this context. Plaintiffs should not be permitted to disregard their own legal pleadings in favor of ad hoc theories created in their brief.

As another example of Plaintiffs disregarding their pleadings, they allege in their legal pleadings that "exposure" of their "person and property" to "Flint River water" is what injured them; that they were first "exposed" on "April 25, 2014;" and they seek to represent people who were also injured in person and property beginning on that date. (App Vol 2, pp 257a–260a, 282a–286a). Plaintiffs soon learned that based on those allegations, it is not possible for the lawsuit they filed more than 20 months later to be timely because a claim's accrual date is determined by "the date on which plaintiffs first incurred the harms they assert." *Frank v Linkner*, 500 Mich 133, 150 (2017). They then changed course, asserting that it would be "speculative" for them to allege when they first incurred the harms they assert because, for some reason, they need discovery from State Defendants to find out. (Pls' Br, p 59.) The lower courts erred by allowing Plaintiffs to benefit from this stark change in direction.

Nor should Plaintiffs be permitted to expand the named plaintiffs in this suit to *any person in Flint* or expand the named defendants to *any state employee*. For example, neither

Melissa Mays, Michael Mays, Jacqueline Pemberton, Keith Pemberton, Elnora Carthan, nor Rhonda Kelso allege that they contracted Legionnaire's disease, experienced fetal deaths, or claim to be next friends to infants who were lead-poisoned. Yet Plaintiffs repeatedly rely on these hypothetical claims of non-parties to support their own insistence that—despite the allegations in their pleadings—the Court of Claims Act's notice provision should not apply to them. (See, e.g., Pls' Br, p 59.) Similarly, Plaintiffs routinely attribute any alleged action by any state employee to State Defendants as if those employees are parties—and they do so without any attempt to satisfy their heavy *Monell* burden. (See, e.g., Pls' Br, p 55.) Again, as explained above and in Defendants' opening brief, the reason this Court has imposed a *Monell* burden on plaintiffs making *Smith* claims is to ensure that the unique claims they assert directly against state institutions do not simply collapse into *respondeat superior* liability. (State Br, pp 21–31.) The lower courts erred by allowing Plaintiffs to prosecute this action as if it is another of Plaintiffs' existing lawsuits against specific state employees.

Once these errors are corrected, the accrual analysis is straightforward. Melissa Mays, Michael Mays, Jacqueline Pemberton, Keith Pemberton, Elnora Carthan, and Rhonda Kelso allege that their persons and property were first harmed by exposure to Flint River water on April 25, 2014 (State Br, pp 51–52), and they had reason to know of their alleged harms more than six months before they eventually filed suit more than 20 months later. (State Br, pp 55–58.) So even if the two equitable exceptions the Court of Appeals recognized do exist in Michigan jurisprudence, neither helps Plaintiffs.

CONCLUSION AND RELIEF REQUESTED

State Defendants request that the Court reverse the Court of Appeals and dismiss Plaintiffs' complaint in its entirety.

Respectfully submitted,

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