IN THE SUPREME COURT
FOR THE STATE OF MICHIGAN

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 (157335-7),

-and-

DARNELL EARLEY and JERRY AMBROSE,

Defendants/Appellants, (157340-2)

/

Supreme Court Nos. 157335-7, 157340-2

Appeal from
Court of Appeals No. 335555
Consolidated Cases: 335725, 335726
HON. KATHLEEN JANSEN, P.J.
HON. KAREN M. FORT HOOD
HON. MICHAEL J. RIORDAN

Court of Claims No. 16-000017-MM
HON. MARK T. BOONSTRA

APPELLANTS' BRIEF BY FORMER EMERGENCY MANAGERS DARNELL EARLEY AND GERALD AMROSE

ORAL ARGUMENT REQUESTED

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Dated: August 7, 2019

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JURISDICTIONAL STATEMENT

The Court has discretionary jurisdiction to review a case on appeal after a decision by the Court of Appeals. Const. 1963, art 6, §6; MCR 7.303(B)(1). Appellants Darnell Earley and Gerald Ambrose, in their official capacities as former Emergency Managers for the City of Flint, timely filed their application for leave to appeal with this Court. This Court granted their application for leave on May 22, 2019. On July 10, 2019, this Court extended the time for Appellants to file their brief to August 7, 2019.

STATEMENT OF THE QUESTIONS PRESENTED

1) Did the Court of Appeals err in calculating the accrual of Plaintiff's cause of action?

   Former Emergency Manager Appellants answer: Yes.
   Appellees' answer: No.
   Trial Court's answer: No.
   Appellate Court's answer: No.

2) Does the fraudulent concealment exception in MCL 600.5855 apply to the statutory notice period in MCL 600.6431(3)?

   Former Emergency Manager Appellants answer: No.
   Appellees' answer: Yes.
   Trial Court's answer: Yes.
   Appellate Court's answer: Yes.

3) When a constitutional tort is alleged, does a "harsh and unreasonable consequences" exception to the notice requirement of MCL 600.6431(3) exist?

   Former Emergency Manager Appellants answer: No.
   Appellees' answer: Yes.
   Trial Court's answer: Yes.
   Appellate Court's answer: Yes.

4) If a "harsh and unreasonable consequences" exception exists, is that exception met by the facts alleged in the plaintiffs' amended complaint?

   Former Emergency Manager Appellants answer: No.
   Appellees' answer: Yes.
   Trial Court's answer: Yes.
   Appellate Court's answer: Yes.

5) Does a constitutional tort for violation of bodily integrity under Const 1963, art 1, § 17 exist, and if it does, did the Plaintiffs' properly allege such a violation, and is a damages remedy available for such a violation?

   Former Emergency Manager Appellants: No as to all questions.
   Appellees' answer: Yes as to all questions.
   Trial Court's answer: Yes as to all questions.
   Appellate Court's answer: Yes as to all questions.

6) For purposes of the plaintiffs' inverse condemnation claim, whether the plaintiffs have alleged direct action by defendants against the plaintiffs' property, and a special or unique injury?

   Former Emergency Manager Appellants answer: No.
   Appellees' answer: Yes.
   Trial Court's answer: Yes.
   Appellate Court's answer: Yes.

7) For purposes of the plaintiffs' inverse condemnation claim, did the Court of Appeals err by defining "persons similarly situated" in relation to a putative class of all residents of the City of Flint, to the population of the State as a whole?

   Former Emergency Manager Appellants: Yes.
   Appellees' answer: No.
   Trial Court's answer: No.
   Appellate Court's answer: No.

STATUTES INVOLVED

600.5827 Accrual of claim.

Sec. 5827.

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

600.5855 Fraudulent concealment of claim or identity of person liable; discovery.

Sec. 5855.

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

600.6431 Court of claims; notice of intention to file claim; contents; time; verification; copies.

Sec. 6431.

(1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

(2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.

(3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

600.6452 Court of claims; filing of claim; time; limitation of actions; right of attorney general to petition for administration of estate or appoint guardian of minor or disabled.

Sec. 6452.

(1) Every claim against the state, cognizable by the court of claims, shall be forever barred unless the claim is filed with the clerk of the court or suit instituted thereon in federal court as authorized in section 6440, within 3 years after the claim first accrues.

(2) Except as modified by this section, the provisions of RJA chapter 58, relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section.

(3) The attorney general shall have the same right as a creditor under the provisions of the statutes of the state of Michigan in such case made and provided, to petition for the granting of letters of administration of the estate of any deceased person.

(4) The attorney general shall have the same right as a superintendent of the poor under the provisions of the statutes of the state of Michigan in such case made and provided, to petition for the appointment of a guardian of the estate of a minor or any other person under disability.

I. INTRODUCTION

This appeal is not about whether the people of the City of Flint were harmed in what is now widely known as the Flint Water Crisis. Instead, this appeal is about something else: whether Plaintiffs may obtain a legal remedy in the Court of Claims against the former Emergency Managers in their official capacity, by claiming that the former Emergency Managers, in their official capacity, violated their bodily integrity rights under the Michigan Constitution, and also subjected their property to an inverse condemnation. Simply put: Plaintiffs cannot do so, especially as applied to the former Emergency Managers.

The seven issues on which this Court granted leave to appeal fall into three broad categories: (A) whether Plaintiffs have satisfied the requirements of MCL 600.6431(3), which require that a claimant must file either a claim or a notice of claim within 6 months of the event giving rise to that claim; (B) whether plaintiffs have properly alleged a bodily integrity claim arising under the Michigan constitution and whether a damages remedy is available for that claim; and (C) whether plaintiffs have properly alleged an inverse condemnation claim. The answer to all three questions is "no."

Important public policy considerations are implicated here. To bring their claim, Plaintiffs seek to have this Court substitute its judgment for that of the Legislature and create exceptions to a clear and unambiguous statutory notice requirement. They seek to establish, for the first time, a concrete constitutional tort claim for which a damages remedy is appropriate. And they seek to have this Court narrow the scope of the public nuisance exception to inverse condemnation claims and recognize an exception to this Court's policy of respecting the policy decisions of the legislature.

This case exemplifies the adage that bad facts make bad law. Plaintiffs are victims of the Flint Water Crisis. But that fact alone does not allow them to seek a legal remedy against Darnell

Earley and Gerald Ambrose, in their official capacities as former Emergency Managers of the City of Flint. The former Emergency Managers respectfully request that this Court reverse the lower courts and find in their favor as to all issues on which leave to appeal has been granted.

II. STATEMENT OF FACTS AND PROCEEDINGS

A. PLAINTIFFS' FACTUAL ALLEGATIONS

As required at this stage of the proceedings, Plaintiffs' well-pled factual allegations are accepted as true and reasonable inferences are drawn in favor of the Plaintiffs. *See, e.g.*, *Johnson v Pastoriza*, 491 Mich 417, 434-35 (2012).

The City of Flint ("Flint") purchased Lake Huron water from the Detroit Water and Sewerage Department from 1964 through 2014. *See* Am. Compl., ¶38, EM Appellants Appendix at 139a. Concerned about rising costs, various local governments, including the City of Flint, began exploring the establishment of the Karegnondi Water Authority as a long-term alternative to DWSD. *Id.*, at ¶39, EM Appellants Appendix at 139a.

By April 2013, Flint was under emergency management. Under the Financial Stability and Choice Act of 2012 ("PA 436"), the Governor can appoint emergency managers to govern local governments in a state of financial emergency. MCL §141.1549(2). In enacting that legislation, the Legislature had determined that insolvent local governments pose a threat to the health, safety, and welfare of all Michiganders and jeopardize the State's credit rating. MCL §141.1543(a)–(c). The Legislature has empowered Emergency Managers with broad authority and sweeping powers to "rectify the financial emergency and to assure the financial accountability of the local government and the local government's capacity to provide or cause to provided necessary governmental services essential to the public health, safety, and welfare." MCL §141.1549(2).

In April 2013, Governor Snyder authorized then-Flint Emergency Manager Ed Kurtz to contract with the newly-formed Karegnondi Water Authority (KWA) to supply the City with water beginning in mid-2016. *See* Am. Compl., ¶49, EM Appellants Appendix at 141a. When the contract was executed, state and local officials allegedly knew that the Flint River would be used as an interim water source and that previous studies had cautioned against its use. *Id.*, at ¶50-54, EM Appellants Appendix at 141a-42a.

In September 2013, Kurtz resigned as Emergency Manager and the Governor appointed Darnell Earley to replace him as the City's Emergency Manager. *Id.*, at ¶56, EM Appellants Appendix at 142a. On April 25, 2014 under the direction of Earley and with the approval of the Michigan Department of Environmental Quality ("MDEQ"), Flint switched its drinking water source from DWSD to the Flint River, nine (9) days after Flint's water quality supervisor advised MDEQ that the water plant was not ready to begin operations. *Id.*, at ¶57, EM Appellants Appendix at 142a. Unspecified State officials began receiving complaints regarding the water within a month. *Id.*, at ¶62, EM Appellants Appendix at 143a. By June 2014, Flint residents complained that the water was making them ill. *Id.*

Plaintiffs allege that by October 2014, Flint's public health emergency was a topic of significant discussion in the Governor's office. *Id.*, at ¶63, EM Appellants Appendix at 143a. That month, General Motors discontinued the use of Flint water at its Flint plant. *Id.*, at ¶66, EM Appellants Appendix at 144a. In addition, Plaintiffs also allege that unspecified "Flint officials" and MDDHS were made aware of Legionnaires cases resulting from the use of Flint River water. *Id.*, at ¶67-68, EM Appellants Appendix at 144a-45a.

In January 2015, Earley resigned as Emergency Manager and was replaced by Ambrose. *Id.*, at ¶70, EM Appellants Appendix at 145a. Later that month, Ambrose rejected an offer by DWSD to reconnect to DWSD. *Id.* at ¶74, EM Appellants Appendix at 146a. On February 17,

2015, Flint water users staged public demonstrations protesting the use of Flint River water. *Id.*, at ¶79, EM Appellants Appendix at 147a.

By March 2015, the Flint City Council had voted to cease using Flint River water. *Id.*, at ¶86, EM Appellants Appendix at 149a. Ambrose refused to reconnect with DWSD on both occasions, rejecting the City Council's vote. *Id.* at ¶79, 86, EM Appellants Appendix at 147a, 149a. In April 2015, Ambrose resigned as Emergency Manager – however, Flint itself remained in financial receivership and subject to the oversight and control of a board appointed by Governor Snyder. *See* April 29, 2015 Letter Appointing RTAB, EM Appellants' Appendix, at 288a.

Meanwhile, in February 2015, the United States Environmental Protection Agency had advised MDEQ that the Flint water supply was contaminated with iron and, potentially, lead. *Id.*, at ¶¶80-81, EM Appellants' Appendix, at 147a-48a. Through the remainder of 2015, other state officials allegedly continued to cover up the health emergency, discredit reports, and advise the public that the water was safe. *Id.*, at ¶¶82, EM Appellants' Appendix, at 148a (MDEQ official Steven Busch); ¶83, EM Appellants' Appendix, at 148a (Governor Snyder and unnamed "officials"); ¶89, EM Appellants' Appendix, at 150a (MDEQ officials Liane Shekter-Smith, Patrick Cook, Stephen Busch, and Michael Prysby); ¶¶93, 96, 98, 105-106, EM Appellants' Appendix, at 150a-53a (MDEQ official Brad Wurfel); ¶¶99-100, EM Appellants' Appendix, at 151a-52a (MDHHS Director Nick Lyon). On October 8, 2015, the Governor changed course and ordered Flint to reconnect to Detroit. *Id.*, at ¶109, EM Appellants' Appendix, at 154a.

B. PROCEDURAL HISTORY

Plaintiff-Appellees filed this action on January 21, 2016; no notice of claim was filed with the clerk of the Court of Claims. *See* Court of Claims Register of Actions ("CoC RoA"), EM Appellants Appendix, at 3a. On April 4, 2016, Governor Snyder, the State of Michigan, MDEQ, and the Michigan Department of Health and Human Services (MDHHS) filed a motion for

summary disposition, and on April 18, 2016, the former Emergency Managers filed their own motion for summary disposition. *Id.* On May 25, 2016, Plaintiff-Appellees filed the currently operative Amended Complaint. *Id.* In response, Plaintiffs filed an Amended Complaint alleging four claims arising under the State Constitution. *See* EM Appellants Appendix, at 129a.

The Amended Complaint alleged four counts: (Count I) violation of substantive due process – state created danger under the Michigan Constitution; (Count II) violation of substantive due process – bodily integrity under the Michigan Constitution; (Count III) denial of fair and just treatment in investigation under the Michigan Constitution; and (Count IV) unconstitutional taking or property. Am. Compl., at ¶128–54, EM Appellants Appendix, at 157a-63a.

On June 24, 2016, all defendants filed motions for summary disposition as to Plaintiff-Appellees' Amended Complaint. *See* CoC RoA, EM Appellants Appendix, at 16a. The motions for summary disposition were fully briefed, and on October 26, 2016, the Court of Claims entered an Opinion and Order granting summary disposition under MCR 2.116(C)(8) as to Counts I and III, and denying summary disposition under MCR 2.116(C)(8) as to Counts II and IV. *See* CoC Opinion and Order, at 50, EM Appellants Appendix, at 65a. The Court also denied summary disposition under MCR 2.116(C)(7). *See id.*

All parties appealed some aspects of the October 26 Opinion and Order. *See* MCoA Docket, EM Appellants Appendix at 66a. The parties subsequently briefed the issues raised, which included all aspects of the trial court's order except the dismissal of Count III, which plaintiffs failed to raise. Oral argument was held on January 9, 2018, and on January 25, 2018, in a decision noted for publication, the Court of Appeals affirmed the Court of Claims. *See* MCoA Opinion and Order, EM Appellants Appendix, at 78a. The State and former Emergency Manager defendants timely filed applications for leave to appeal with this Court. This Court granted those applications for leave on May 22, 2019.

III. ANALYSIS

This Court granted leave to appeal on seven issues:

> (1) when the plaintiffs' cause of action accrued, see *Henry v Dow Chemical Co*, 501 Mich 965 (2018), and *Frank v Linkner*, 500 Mich 133 (2017);
>
> (2) whether the Court of Appeals erred in holding that the fraudulent concealment exception in MCL 600.5855 applies to the statutory notice period in MCL 600.6431(3);
>
> (3) whether the Court of Appeals erred in holding that under the Court of Claims Act, MCL 600.6401 et seq., there is a "harsh and unreasonable consequences" exception to the notice requirement of MCL 600.6431(3) when a constitutional tort is alleged, compare *McCahan v Brennan*, 492 Mich 730 (2012), and *Rusha v Dep't of Corrections*, 307 Mich App 300 (2014);
>
> (4) if there is such an exception, whether it is met by the facts alleged in the plaintiffs' amended complaint;
>
> (5) whether the Court of Appeals erred in recognizing a constitutional tort for violation of bodily integrity under Const 1963, art 1, § 17, and, if not, whether the plaintiffs properly alleged such a violation, and whether a damages remedy is available for such a violation, see *Smith v Dep't of Public Health*, 428 Mich 540 (1987); *Jones v Powell*, 462 Mich 329 (2000);
>
> (6) for purposes of the plaintiffs' inverse condemnation claim, whether the plaintiffs have alleged direct action by defendants against the plaintiffs' property, and a special or unique injury, see *Peterman v Dep't of Natural Resources*, 446 Mich 177, 190 (1994); *Spiek v Dep't of Transp*, 456 Mich 331, 348 (1998); and
>
> (7) for purposes of the plaintiffs' inverse condemnation claim, the manner in which the class of similarly situated persons should be defined.

Darnell Earley and Gerald Ambrose, named here in only in their official capacities as former Emergency Managers for the City of Flint, will address each issue in turn.

A. STANDARD OF REVIEW

A trial court's denial of a motion for summary disposition is reviewed *de novo*. *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 202; 731 NW2d 41 (2007). Questions of statutory

interpretation are also reviewed *de novo*. *Rowland*, 477 Mich at 202. *De novo* review thus applies to all issues addressed in this brief.

The primary goal in statutory interpretation is to give effect to the intent of the Legislature. *Id.* When the language is unambiguous, words are given their plain meaning and the statute is applied as written. *Id.* Statutory interpretation must give effect "to every phrase, clause, and word in the statute, and no word should be treated as surplusage or rendered nugatory." *Gardner v Dep't of Treasury*, 498 Mich 1, 6 (2015).

B. ISSUE 1: PLAINTIFFS' CAUSE OF ACTION ACCRUED WHEN THE WRONG UNDERLYING THE CAUSE OF ACTION OCCURRED, AND NOT WHEN THEIR DAMAGES BECAME EVIDENT

Under this Court's precedent, statutory notice requirements must be enforced as written. *Rowland*, 477 Mich at 219 ("The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written"). This includes Legislative decisions permitting suit against the government only after timely and sufficient notice. *Id.* at 212 ("[C]ommon sense counsels that inasmuch as the Legislature is not even required to provide a defective highway exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits"). Judicially-created savings constructions that reduce the obligation to comply with statutory notice requirements are prohibited. *McCahan v Brennan*, 492 Mich 730, 746-47, 822 NW2d 747, 756 (2012).

Here, the Court of Appeals acknowledged that a person claiming property damage or personal injuries must file their claim or a notice of claim "within 6 months following the happening of the event giving rise to the cause of action." MCL §600.6431(3). The Court of Appeals also acknowledged that "no judicially created savings construction is permitted to avoid a clear statutory mandate" and that ""[c]ourts may not engraft an actual prejudice requirement or otherwise reduce the obligation to comply fully with the statutory notice requirements." *McCahan*,

492 Mich at 733. Despite acknowledging the existence of these clear and unequivocal rules, the Court of Appeals recognized a judicially-created exception to MCL §600.6431(3)'s statutory notice requirement that ultimately reduces the obligation of a plaintiff to fully comply with that requirement.

1. The Court of Appeals relied on abrogated case law to deny summary disposition to incorrectly focus on "when damages occurred" instead of "when the wrong was done."

The Court of Appeals erroneously held that denial of summary disposition was appropriate. Specifically, the Court of Appeals ruled that the MCL §600.6431 notice requirement was satisfied because Plaintiffs had alleged damages, such as "economic damages in the form of lost property value" that the Court of Appeals determined would not have occurred until the Flint Water Crisis became public in October 2015. *See* MCoA Opinion and Order, at 9; EM Appellants Appendix at 85a. The Court of Appeals also ruled that "it [was] not clear on what date Plaintiffs suffered actionable personal injuries." *Id.* While these findings may be presumed to be factually correct at this stage of the case, they are also ultimately irrelevant.

The Court of Appeals decision relied upon *Henry v Dow Chemical*, 319 Mich App 704 (2017). *See* MCoA Opinion and Order, at 9; EM Appellants Appendix at 85a. However, *Henry* was reversed by this Court in early 2018. *See Henry v Dow Chem Co*, 501 Mich 965, 905 NW2d 601 (2018). Instead, this Court adopted Judge Gadola's dissent in *Henry*. *Id.* A comparison of that dissent and the majority opinion illustrates error of the Court of Appeals.

In *Henry*, downstream property owners claimed that they had "suffered loss of the free use and enjoyment of their property as well as damages in the form of decreased property value, as a result of dioxin contamination discovered in the flood plain soil." *Id.* at 709. One issue addressed in *Henry* was whether the plaintiffs' claims were barred by the statute of limitations. There, the majority rejected the defendants' argument that the plaintiffs' claims had accrued when the public

was first made aware of the presence of dioxins in 1984, and instead determined that plaintiffs' claims did not accrue until a 2002 report was published by MDEQ and property values were noticeably affected. *Id.* at 715-32. Specifically, the Court of Appeals noted that:

> Plaintiffs' damages, including loss of the use and enjoyment of their property and depreciation of their property values, arose from the harm created when dioxins in their soil reached potentially toxic levels, but the damages did not exist in any tangible form until the MDEQ published its 2002 notice. As the circuit court aptly noted, "[p]rior to this time, Plaintiffs were free to use and enjoy their property without worry or restriction, and to sell their property without loss of value."

Id.

Judge Gadola's dissent in *Henry* rejected the majority's separation of "harm" and "damages" into discrete elements, and instead noted that "the publication of the MDEQ bulletin is not the 'wrong' on which the claim is based . . . The MDEQ bulletin, at most, marks the discovery by plaintiffs of the extent of the harm and the level of damages.'" *Id.* at 735-36 (Gadola, J., dissenting). Both this Court and Judge Gadola's dissent relied on *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 387 (2007).

Trentadue involved a wrongful death suit arising out of a tragic rape and murder in November of 1986. *Id.* at 382. 16 years after the victim's death, DNA evidence established the identity of the perpetrator, who was convicted and sentenced to life imprisonment. *Id.* at 383. The victim's estate brought a wrongful death suit against the perpetrators' parents, employer, and clients on what was essentially a theory of negligent hiring and monitoring. *Id.* Defendants, however, claimed that the action was barred by the three-year statute of limitations on wrongful-death claims. *Id.* at 383-84. While the lower courts had ruled against the defendants in that case by applying the common-law discovery rule, this Court reversed and held that the common-law discovery rule was invalid. *Id.* at 390-91.

To reach this conclusion, the *Trentadue* Court examined the statutory text and noted that MCL §600.5805(10) specifies that "the claim accrues 'at the time the wrong upon which the claim is based was done . . . .'" *Id.* at 388. This Court ultimately concluded that because the statute set forth clearly defined limitations periods, times of accrual, and tolling, the common-law discovery rule was no long valid in Michigan. *Id.* at 390-91. It thus ruled in favor of the defendants in that case. *Id.* at 392-93.

Together, Judge Gadola's dissent in *Henry* and *Trentadue* explains that a claim accrues upon the occurrence of the wrong, not upon manifestation of "damages", even if the full scope of the damages resulting from that harm are not evident, and even if the identity of the perpetrator is unknown. Instead, the relevant question in determining when a claim accrues is when the wrong itself occurred, and not when the damages became evident. Identifying the wrong, instead of specifying the damages, is thus the main consideration.

The distinction between the "occurrence of the wrong" and "the manifestation of the damages," and its relevance to the accrual of claims, is further illustrated by this Court's decision in *Frank v Linkner*, 500 Mich 133, 894 NW2d 574 (2017). In that case, the plaintiffs had argued that their claims di not accrue until "they first incurred a calculable financial injury." *Id.* at 152. This Court rejected that argument, noting that "plaintiffs' argument conflates monetary damages with harm." *Id.* This Court also criticized the Court of Appeals by noting that it had "erred by focusing on the availability of monetary damages, rather than on when plaintiffs had incurred 'harm.'" *Id.* at 153.

This Court also looked to the statutory text itself, noting that the relevant section in that case did not distinguish between claims for money damages and claims for other relief. *Id.* at 153-54. It thus concluded that the correct interpretation of that statute was that the Legislature had not intended to create separate accrual dates for claims of monetary damages. That analysis applies

with equal force here, where MCL §600.5827 and MCL §600.6431(3) do not speak in terms of a claim for monetary damages, but simply address the accrual of a claim generally.

Ultimately, by failing to distinguish between the "occurrence of the wrong" and the "manifestation of damages," the Court of Appeals has created a judicial exception to plain language of MCL §600.6431(3). Such action by the Court of Appeals is simply not in accord with this Court's rejection of judicially-created savings constructions.

For example, in *McCahan v Brennan*, this Court rejected a judicially-created "actual prejudice" requirement that excused non-compliance with a notice statute. *McCahan,* 492 Mich at 746-47. In that case, the lower courts had allowed claims to proceed, despite a failure to satisfy the exact same statutory notice requirement at issue here: MCL §600.6431(3). *Id.* at 744-45. *McCahan* makes it explicitly clear that the correct application of MCL §600.6431(3) requires ***full*** compliance with the requirements of that statute – or in the Court's own words: "Courts may not engraft an actual prejudice requirement **or otherwise reduce the obligation to comply fully with statutory notice requirements.** Filing notice outside the statutorily required notice period does not constitute compliance with the statute." *Id.* at 746-47 (emphasis added).

Similarly, in *Garg v Macomb County Community Mental Health Services*, this Court rejected the common-law "continuing violations doctrine," where a plaintiff could recover for injuries outside of a limitations period "when they are susceptible to being characterized as 'continuing violations.'" *Garg v Macomb County Cmty Mental Health Servs*, 472 Mich 263, 282 (2005). Instead, this Court recognized that the Legislature's policy decisions, as reflected in the plain language of the statutory text, were incompatible with judicially-created savings constructions. *Id.* at 283-84. As this Court noted, "[w]hether or not the 'continuing violations' exception of *Sumner* constitutes a useful improvement in the law, there is no basis for this Court to construct such an amendment." *Id.* at 285.

In all three cases – *McCahan, Trentadue*, and *Garg* – this Court has consistently recognized that judicially-crafted savings constructions which excuse clear and unambiguous statutory requirements are simply not permitted under Michigan law. This principle establishes that, absent a statutory or constitutional conflict, the judiciary should respect the policy determinations of the Legislature. The Legislature, as the branch of government most accountable to the citizenry through elections, is best positioned to make those determinations.

Here, the Court of Appeals repeated its error from *Henry*, and artificially distinguished the *harm* suffered – alleged exposure to contaminated water – with the damages resulting from that harm – such as lost property value. In other words, the Court of Appeals is effectively seeking to resurrect the discovery rule that this Court rejected in *Trentadue.* As a result, the Court of Appeals failed to give effect to the plain language of MCL §600.6431, which unambiguously requires that claimants file their claim or notice of claim "within 6 months following the happening of the event giving rise to the cause of action." MCL §600.6431. The Court of Appeals also failed to give effect to the provisions of MCL §600.5827, which provides that "[t]he claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done ***regardless of the time when damage results***." MCL §600.5827 (*emphasis added*).

2. Plaintiffs' amended complaint plainly alleges plaintiffs suffered wrongs over six months prior to the filing of this lawsuit, and therefore their claims are barred by their failure to provide the requisite statutory notice

What the Court of Appeals failed to do here was to review the allegations in Plaintiffs' complaint to determine, based on those allegations, what harm Plaintiffs had allegedly suffered and when that harm had occurred. Had it done so, it would have determined Plaintiffs' alleged harms that occurred well over six months prior to the filing of this case in the Court of Claims.

For example, Plaintiffs alleged that:

> "Beginning in June 2013 and continuing through April 25, 2014, the State created a dangerous public health crisis for the users of Flint tap water when it and Kurtz and Earley ordered and set in motion the use of highly corrosive and toxic Flint River water knowing that the WTP was not ready."

Am. Compl., at ¶59, EM Appellants Appendix at 143a. Here, plaintiffs allege the occurrence of some action by the former Emergency Managers for the City of Flint that, by its own plain language, occurred no later than April 25, 2014, almost **20 months** before the commencement of this action.

Similarly, Plaintiffs also allege that:

> "In June 2014, citizen complaints about contaminated water continued without the State doing anything to address these complaints. Many Flint water users reported that the water was making them ill."

Id., at ¶62, EM Appellants Appendix at 143a. The allegation here is even more obvious. Public reports of illnesses caused by the water can be fairly attributed to the plaintiffs, who style themselves as representatives for a purported class that essentially includes the entire population of the City of Flint. These reports would have occurred 18 months before the filing of this lawsuit.

Plaintiffs' own words establish the public and well-known nature of the issues with Flint's water supply:

> "On October 13, 2014, the General Motors Corporation announced that it would no longer use Flint River water in its Flint plant. Despite this clear evidence of serious and significant danger, none of the Defendants took any action to alter the course of the health crisis."

Id., at ¶66, EM Appellants Appendix at 144a. Again, plaintiffs allege that the corrosive nature of the water being used was publicly known. Simply put, if Defendants are supposed to have recognized this as "clear evidence of a serious and significant danger," the Plaintiffs should also have recognized this. This event occurred 14 months prior to the initiation of this litigation.

Plaintiffs also include the allegation that:

> "In January 2015, Flint home owner, LeeAnn Walters, called the EPA regarding water issues that she was experiencing at her Flint home. She informed the EPA that she and her family members were becoming physically ill from exposure to the Flint River water coming from her tap."

Id., at ¶75, EM Appellants Appendix at 146a. This allegation, occurring a year prior to the beginning of this action, further illustrates how the harms claimed by Plaintiffs were known to have occurred well over six months prior to the filing of the original complaint in this action.

Indeed, one of the named Plaintiffs, Melissa Mays, was a plaintiff in another case, captioned *Coalition for Clean Water v City of Flint*, Genesee County Circuit Court Case No. 15-10190, filed on June 5, 2015, more than six months prior to the date the instant case was filed. *See* Complaint, CCW v CoF, EM Appellants Appendix, at 290a; *see also* Am. Compl., CCW v CoF, EM Appellants' Appendix, at 335a. That case arose out of the same basic factual situation at issue here: the use, by the City of Flint, of the Flint River as a municipal water source. And in that case, the *Coalition* plaintiffs alleged that they "have suffered severe health problems that have been directly connected to the unhealthy, contaminated River water." Complaint, CCW v CoF, at ¶41, EM Appellants Appendix at 296a-97a. *Coalition for Clean Water* thus provides additional examples of how the harms alleged here both existed and were evident over six months prior to the filing of this case.

Plaintiffs have failed to plead when these harms occurred. A plaintiff bears the burden of pleading in avoidance of governmental immunity. *Hannay v DOT*, 497 Mich 45, 58, 860 NW2d 67, 75 (2014). While MCL §600.6431 does not itself grant immunity to a state actor, a potential plaintiff must satisfy this notice requirement to plead in avoidance of governmental immunity. *Fairly v Dep't of Corrections*, 497 Mich 290, 297 (2015). Thus, a plaintiff must plead satisfaction of the notice requirement, which requires that they plausibly allege that they either brought suit or

provided the requisite notice within 6 months of when their claim accrued. *See* MCL §600.6431(3).

As previously shown, Plaintiffs' claim accrued when "the wrong upon which the claim is based was done regardless of the time when the damage results." *See, e.g.*, *Henry, 501 Mich 965* (*citing Trentadue v Buckler Automatic Lawn Sprinkler Co*, 79 Mich 378, 387, 738 NW2d 664 (2007)); *Frank*, 500 Mich at 152-54. Whether a question of fact exists regarding when their damages occurred is thus irrelevant. Plaintiffs do not plausibly allege that *the wrong* on which their claims are based occurred within six months of their filing suit, but only allege that the damages allegedly became apparent to them within six months of when they filed suit.

The Court of Appeals erred by accepting this argument because, in doing so, it judicially relieved Plaintiffs of the obligation to strictly comply with the MCL §600.6431(3) notice requirement. Here, Plaintiffs have not complied with the MCL §600.6431(3) notice requirement, because they failed to file either their claim or a notice of claim within 6 months of the accrual of their claim. In essence, the lower courts have resurrected the discovery rule rejected by this Court in *Trentadue*. However, the reasons underlying *Trentadue* remain valid today – deference to the policy decisions of the Legislature as reflected in the clearly expressed statutory language. Reversal of the lower courts on this issue is thus warranted.

C. ISSUE 2: APPLYING FRAUDULENT CONCEALMENT TOLLING, PURSUANT TO MCL §600.5855, TO THE STATUTORY NOTICE PERIOD IN MCL §600.6431(3), IS CONTRARY TO THE POLICY DECISIONS OF THE LEGISLATURE

Here, the Court of Appeals went even farther than the Court of Claims did, by holding that the fraudulent concealment tolling exception in MCL §600.5855 applied to the notice requirement of MCL §600.6431. This error by the Court of Appeals represents both an incorrect interpretation of the statutory text and a failure to recognize or respect the different purposes of statutes of

limitations and pre-suit notice requirements. Reversal of the Court of Appeals is needed to correct these errors.

MCL §600.5855 reads as follows:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

MCL §600.5855. By its own terms, it allows a plaintiff to bring an action despite the expiration of a "period of limitations." The obvious follow-up question is this: is the statutory notice requirement of MCL §600.6431(3) a "period of limitations" such that it is properly subject to MCL §600.5855.

It is not.

A comparison of the purposes underlying statutes of limitation with the purposes underlying notice requirements identifies fundamental differences that make the application of fraudulent concealment tolling to MCL §600.6431 questionable at best. Specifically, this Court has identified that:

> "Statutes of limitations are intended to 'compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend'; 'to relieve a court system from dealing with 'stale' claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured'; and to protect 'potential defendants from protracted fear of litigation.'"

Bigelow v Walraven, 392 Mich 566, 576 (1974). All those reasons apply only to litigation, and two of those rationales are intended to protect defendants from untimely claims.

In contrast, this Court has found that statutory notice requirements serve distinctly different purposes. For example, in analyzing the more restrictive notice requirement under MCL §691.1404, this Court identified that such notice provisions afford a governmental agency time to:

(1) investigate a claim when the information is freshest,

(2) determine possible liability,

(3) create adequate reserves,

(4) reduce uncertainty of the extent of future demands, and

(5) force a claimant to make an early choice on how to proceed.

Rowland, 477 Mich at 212. The recognized purposes of such notice requirements are thus not limited to litigation itself. Instead, they extend beyond the boundaries of the litigation process, and implicate important public policy considerations, such as the allocation of public funds, strategic planning of public entities, and encouraging corrective actions by public entities at the earliest possible stage.

Clearly, the purposes underlying statutes of limitations differ from the purposes which underlie notice requirements. Applying fraudulent concealment tolling to statutes of limitations prevents defendants, the intended beneficiaries of statutes of limitations generally, from gaining an advantage in ligation as a result of their fraudulent acts. However, applying fraudulent concealment tolling to notice requirements works against the non-litigation purposes of such notice requirements and frustrates those purposes.

For example, excusing a failure to comply with statutory notice requirements denies governmental agencies the chance to create adequate reserves and increases the uncertainty within that agency as to the extent of future demands. Perhaps most importantly, it prevents a governmental agency from investigating a claim when information about that claim is freshest.

Obstructing early investigation of claims not only prevents collection of fresh information, but can also impede quick and speedy responses to a claim and any corrective actions that could be taken

In addition to the difference in purpose between statutes of limitation and statutory notice provisions, principles of statutory interpretation also support the conclusion that fraudulent concealment tolling does not apply to the statutory notice requirement of MCL §600.6431(3). In *Menard Inc v Department of Treasury*, 302 Mich App 467 (2013), this Court held as follows:

> "Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). The courts may not read into the statute a requirement that the Legislature has seen fit to omit. *In re Hurd-Marvin Drain*, 331 Mich 504, 509; 50 NW2d 143 (1951); *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 560; 808 NW2d 456 (2010). "When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose." *Mich Basic Prop Ins Ass'n*, 288 Mich App at 560 (quotation marks and citation omitted).

Id. at 471-72. In other words, where a statute addresses a subject in one section but omits it in another, *Menard Inc* forbids courts from substituting their policy determinations for those of the Legislature, even where it is done "to effect the statute's purpose." *Id.* Instead, the inclusion or exclusion of a subject represents a policy decision of the Legislature to which courts must defer.

Here, MCL §600.6431(3) is contained within the Court of Claims Act. *See* MCL §600.6401 *et seq.* The Legislature included in the Court of Claims Act a specific reference applying the fraudulent concealment exception to the application of statute of limitations under the Court of Claims Act. *See, e.g.*, MCL §600.6452 ("Except as modified by this section, the provisions of RJA chapter 58, relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section"); MCL §600.5855 (creating a statutory fraudulent concealment exception to statutes of limitations as part of Chapter 58 of the RJA). No similar

reference to RJA chapter 58, statutes of limitation or fraudulent concealment is made in the notice provisions in MCL §600.6431. Moreover, Section 6452 of the Court of Claims Act, which incorporates the provisions of Chapter 58 (including, specifically, the fraudulent concealment tolling provision) limits the application of those provisions "to the limitation prescribed **in this section**." MCL §600.6452(2) (emphasis added). Not "in this statute" or "in this Act".

This explicit inclusion of a reference to fraudulent concealment tolling in regards to statutes of limitation, and the lack of such a reference in regards to the statutory notice provision, implies that the absence of any similar reference in MCL §600.6431 was both intentional and deliberate. This distinction has been recognized by the Court of Appeals in other cases. There is no legal basis for applying RJA chapter 58 to both notice requirements and statutes of limitations under the Court of Claims Act, as the Court of Appeals has recognized in other decisions. *See Zelek v State*, No 305191, 2012 Mich App LEXIS 1993, at *4 (Ct App Oct 16, 2012) ("The Court of Claims notice provision has no effect on the limitation period and is not subject to the tolling provisions of MCL 600.5855"); *Brewer v Cent Mich Univ Bd of Trs*, No. 312374, 2013 Mich App LEXIS 1923, at *4 (Ct App Nov 21, 2013) ("plaintiff's arguments are premised on exceptions to the statute of limitations . . . [y]et, the notice requirement of MCL 600.6431(3) is not a statute of limitations, a savings provision, or a tolling provision").

Both the principles of statutory construction and a comparison of the purposes underlying statutes of limitation and notice requirements indicate that the Legislature did not intend to apply fraudulent concealment tolling to MCL §600.6431(3)'s notice requirement. The Court of Appeals ignored the briefing on this analysis and instead substituted its judgment for that of the Legislature, an action that this Court has consistently cautioned against. Reversal of the lower courts and on this issue is thus warranted in order to instruct the lower courts about the importance of complying with Legislatively-imposed requirements.

D. ISSUE 3: THE "HARSH AND UNREASONABLE CONSEQUENCES" EXCEPTION TO MCL §600.6431(3)'S NOTICE REQUIREMENT RELIES ON ABROGATED LAW AND REPRESENTS JUDICIAL USURPATION OF THE POLICY DECISIONS OF THE LEGISLATURE

The Court of Appeals also erred by holding that the "harsh and unreasonable consequences" doctrine (1) exists and (2) applies. That doctrine is discussed in *Rusha v Department of Corrections*, a 2014 case where the Michigan Court of Appeals recognized an "exception enforcement lies" where ''it can be demonstrated that [statutes of limitation] are so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right.'" *Rusha v Dep't of Corr*, 307 Mich App 300, 310 (2014). On the surface, *Rusha* appears to recognize the existence of that exception. However, on closer examination, *Rusha*, and by extension the "harsh and unreasonable consequence" doctrine, relies on abrogated and overruled case law, and thus cannot be relied upon.

Specifically, *Rusha* relied on a 1983 case from the Michigan Court of Appeals, *Curtin v Department of State Highways*, 127 Mich App 160, 163 (1983). The central holding in *Curtin* was supported by reference to *Reich v State Highway Department*, a 1972 case holding that a 60-day statute of limitations was arbitrary and violated equal protection principles. However, as even the Court of Appeals acknowledged, (*see* Opinion, at 11 n 8) *Reich*, and by extension, *Curtin*, was abrogated by this Court in *Rowland v Washtenaw County Road Commission*. The validity of *Rusha's* "harsh and unreasonable consequences doctrine" is thus seriously in doubt.

The Court of Appeals attempted to minimize this shortcoming, but did so without citing to a single controlling case from this court that would allow for a judicially-created exception to an express legislative directive, such as that contained in MCL §600.6431(3).

The Court of Appeals also noted, as if it supported *Rusha's* judicially created exception, that this Court had denied leave to appeal in that case. *See* MCoA Opinion and Order, at 12 n8, EM Appellants Appendix at 88a (*citing Rusha v Dep't of Corrections*, 498 Mich 860 (2015).

However, while *Rusha* recognized the existence of the "harsh and unreasonable consequences" doctrine, it did not actually invoke that exception in that case. *Rusha*, 498 Mich at 312-13. Leave to appeal on that issue was thus unnecessary because the its existence would not have helped the *Rusha* plaintiff avoid dismissal.

Where review by this Court was unnecessary in *Rusha* because the Court of Appeals did not apply the "harsh and unreasonable consequences" doctrine, here, in contrast, the Court of Appeals did so and thus correction by this Court is necessary. The judicially created "harsh and unreasonable consequences" doctrine conflicts with this Court's direction that statutes of limitations and notice requirements, enacted by the Legislature, are to be strictly enforced. *See, e.g.*, *McCahan*, 492 Mich at 746-47 ("Courts may not . . . otherwise reduce the obligation to comply fully with statutory notice requirements. Filing notice outside the statutorily required notice period does not constitute compliance with the statute."); *Trentadue*, 479 Mich at 391 ("we conclude that courts may not employ an extrastatutory discovery rule to toll accrual"); *Rowland*, 477 Mich at 219 ("The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written.").

In addition, application of the purported "harsh and unreasonable consequences" exception to constitutional tort claims under the Michigan constitution does not require a different result. Governmental immunity does not apply to bar constitutional tort claims. *See Smith v State*, 428 Mich 540, 544, 410 NW2d 749, 751 (1987) ("Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action"). However, the Legislature's inability to grant the State immunity from constitutional torts does not similarly prevent the Legislature from establishing procedural restrictions on how suits can be brought.

This Court has, in fact, held the exact opposite. This Court has long recognized the power of the Legislature to supplement constitutional provisions that are self-executing. *See Hamilton v Sec'y of State*, 227 Mich 111, 125, 198 NW 843, 848 (1924). More recently, in *Taxpayers Allied for Constitutional Taxation v Wayne County*, this court rejected the argument that the Legislature could not impose a 1-year statute of limitations on claims. *Taxpayers Allied for Constitutional Taxation v Wayne Cty*, 450 Mich 119, 126, 537 NW2d 596, 600 (1995). In fact, *Taxpayers Allied* did not challenge the validity of a ***90-day*** statute of limitations. *Id.* at 124 (noting that MCL §205.27a(6) requires that "a claim for refund based upon the validity of a tax law based on the laws or constitution of the United States or the state constitution of 1963 shall not be paid unless the claim is filed within 90 days after the date set for filing a return."). Here, where a claimant is only required to give notice under MCL §600.6431, and not to bring the full claim itself, the provisions clearly supplement the constitutional provision in question.

Rusha's recognition of the "harsh and unreasonable consequence exception was thus in error, because it relied on outdated and abrogated case law. Instead, it represents the kind of judicial overreach that this Court has consistently warned against. Nor is a different conclusion warranted simply because the plaintiffs have alleged a constitutional tort. No authority establishes that a six-month notice requirement presents an undue burden on plaintiffs' access to the courts regarding constitutional tort claims.

Had the Legislature wished to create such an exception, it could easily have done so. It did not, and this Court should respect that policy judgment of the Legislature, even if some would deem that decision unwise.

E. ISSUE 4: EVEN IF A "HARSH AND UNREASONABLE CONSEQUENCES" EXCEPTION EXISTS, THAT EXCEPTION IS INAPPLICABLE BECAUSE PLAINTIFFS HAD AMPLE KNOWLEDGE OF THE EXISTENCE OF THEIR CLAIMS AND HAD EVEN BROUGHT A PRIOR SUIT

Finally, the fact that, as noted above, Plaintiff Mays filed a lawsuit more than 6 months earlier than the present lawsuit makes it clear that, even if the "harsh and unreasonable consequences" doctrine exists, it is not applicable here. *Rusha* recognized a "harsh and unreasonable consequences" exception when a limitation "effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right." *See Rusha*, 307 Mich App at 310. Most notably, the application of the exception, as formulated in *Rusha*, is *objective.*

The "harsh and unreasonable consequences" doctrine does not look at the specific situation of an individual plaintiff, but instead examines whether the limitation is one that would generally prevent plaintiffs from accessing the courts. *Id.* Applying that analysis to MCL §600.6431(3)'s 6-month notice requirement, the limitation is not one that prevents plaintiffs generally from bringing suit. Numerous plaintiffs successfully bring claims in compliance with that statute, by filing either their claim or their notice of claim within the requisite six months. However, even if this situation here is analyzed subjectively, application of the harsh and unreasonable consequences exception remains unwarranted.

As set forth in *Rusha,* the core of the harsh and unreasonable consequences exception lies in preventing a notice provision from divesting plaintiffs of their opportunity to access the court. As previously cited, Plaintiffs' amended complaint itself sets forth numerous allegations which should have reasonably informed them of the existence of their claim. *See supra* Subsection III.B.2, at 12 (*citing* Am. Compl. at ¶59, EM Appellants Appendix at 143a (alleging that the switch to the Flint River occurred on April 25, 2014); *id.* at ¶62, EM Appellants Appendix at 143a (alleging widespread complaints and reports of illness in June 2014 resulting from the water); *id.* at ¶66, EM Appellants Appendix at 144a (noting an announcement by General Motors in October

2014 that it would no longer use Flint water at its manufacturing plant); *id.* at ¶75, EM Appellants Appendix at 146a (noting a January 2015 complaint by a Flint resident to the EPA regarding illness resulting from exposure to Flint River water). Not only are these allegations set forth in plaintiffs' amended complaint, but as previously discussed, one of the named plaintiffs also filed suit over six months before this action was brought. *See, e.g.*, Complaint, Coalition for Clean Water v City of Flint, EM Appellants Appendix, at 290a; Am. Compl., Coalition for Clean Water v City of Flint, EM Appellants Appendix, at 335a.

Judge Riordan, in his dissent, correctly concluded that Plaintiffs had clearly accrued before July 21, 2015, six months prior to the filing of this action. *See* MCOA Dissent, at 9-10, EM Appellants Appendix at 125a-126a. Relying only on Plaintiffs' allegations, as is appropriate at this stage of this litigation, he identified numerous facts "alleged by plaintiffs plainly support the conclusion that plaintiffs knew or should have known of their claims well before July 21, 2015." *Id.* at 9, EM Appellants Appendix at 125a. As Judge Riordan concluded:

> Thus, by the very latest possible date, July 6, 2015, plaintiffs knew or should have known that they and their property were being harmed by defendants' decision to use water from the Flint River. See *Cooke Contracting Co*, 55 Mich App at 338. They specifically acknowledged that they were aware of the possibility of such a claim by taking the affirmative step to file lawsuits in other courts. Therefore, their complaint filed on January 21, 2016 – more than six months after any reasonably possible, and actually occurring, accrual date – did not satisfy the strict requirements of the CCA's notice provision. MCL 600.6431(3). Consequently, all of plaintiffs' claims are barred and summary disposition should have been entered in favor of defendants in the Court of Claims. *McCahan*, 492 Mich App at 742.

Id. at 10, EM Appellants Appendix at 126a.

As a result, even assuming *arguendo* that the "harsh and unreasonable consequences" exception exists, Plaintiffs' own allegations and actions prevent its application here. Reversal of

the lower courts and remitter with instructions to enter summary disposition in favor of the Former Emergency Managers is thus warranted.

F. ISSUE 5: A CONSTITUTIONAL TORT FOR VIOLATION OF THE RIGHT TO BODILY INTEGRITY HAS NOT BEEN PROPERLY ALLEGED AGAINST THE FORMER EMERGENCY MANAGERS FOR THE CITY OF FLINT IN THEIR OFFICIAL CAPACITIES, NOR IS A DAMAGES REMEDY APPROPRIATE OR AVAILABLE

Article I, §17 of the Michigan Constitution states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Const Art I, §17. While Michigan Courts have never recognized a private action for violation of a right to bodily integrity under the state Constitution or defined the parameters of such a claim, the due process provisions of the Michigan Constitution are interpreted in a fashion that mirrors that of the federal Constitution. *People v Sierb*, 456 Mich 519, 523, 529 (1998). Since the filing of the Applications for Leave in this case, the Sixth Circuit has issued a published decision that recognizes such a right in the context of the Flint Water Crisis. *See Guertin v Michigan*, 912 F3d 907, 918-26 (6th Cir 2019) (recognizing a bodily integrity in the context of the Flint Water Crisis); *see also Guertin v Michigan*, 924 F3d 309 (6th Cir 2019) (denying petitions for rehearing en banc). While petitions for certiorari will soon be filed regarding the *Guertin* decision, the former Emergency Managers acknowledge that until and unless the Supreme Court of the United States grants certiorari in that case, the published decision of the Sixth Circuit is controlling.

However, just because a bodily integrity claim exists does not mean that the Plaintiffs here have alleged such a claim here, as to the former Emergency Managers in their official capacity, nor does it mean that that a damages remedy is appropriate here.

1. Plaintiffs have not alleged a bodily integrity claim as to the former Emergency Managers

A bodily integrity claim under the federal constitution – and by extension, the Michigan constitution – involves "the 'right to be free from . . . unjustified intrusion on personal security'

and 'encompass[ing] freedom from bodily restraint and punishment.'" *Guertin*, 912 F3d at 918. The central tenet recognized, as recognized in *Guertin*, balances "an individual's common-law right to informed consent with tenable state interests, regardless of the manner in which the government intrudes upon an individual's body." *Id.* at 919. In the context of the Flint Water Crisis, the Sixth Circuit held that "a government actor violates individuals' right to bodily integrity by knowingly and intentionally introducing life-threatening substances into individuals without their consent, especially when such substances have zero therapeutic benefit." *Id.* at 921 (internal citations omitted).

The Sixth Circuit also requires that the government's actor's actions must have "shocked the conscience." *Id.* at 922. An action shocks the conscience when it "infringes upon the 'decencies of civilized conduct,' is 'so brutal and so offensive to human dignity,' and interferes with rights 'implicit in the concept of ordered liberty.'" *Id.* at 923. Absent an intention to cause harm, an action can only shock the conscience if the "defendants acted with '[d]eliberate indifference in the constitutional sense.'" *Id.* at 926. *Guertin* identified three factors that were particularly relevant in making that determination: "the time for deliberation, the nature of the relationship between the government and the plaintiff, and whether a legitimate government purpose motivated the official's act." *Id.* at 924.

Most importantly, this analysis must be applied to each individual defendant. *Id.* at 926 ("The deliberate-indifference standard requires an assessment of each defendant's alleged actions individually"). Specifically, a court must focus "on each individual defendant's conduct, their 'subjective awareness of substantial risk of serious injury,' and whether their actions were made 'in furtherance of a countervailing governmental purpose that justified taking that risk.'" *Id.*

Here, the Court of Appeals erred by failing to identify any specific action or actions by either of the former Emergency Managers that constituted a conscience-shocking violation of the

right to bodily integrity. Instead, the lower courts looked only to the *collective* actions of various state officials and employees. This flawed approach overlooks one of the major points made by the Sixth Circuit in *Guertin* – that "culpability 'may or may not be shocking depending on the context,' for what may 'constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.'" *Id.* at 923.

As to former Emergency Managers Earley and Ambrose, plaintiffs allege only the following:

- Former EMs Ambrose and Earley were appointed by Governor Snyder (Am. Compl., ¶¶27, EM Appellants Appendix at 137a)
- Former EM Earley replaced EM Brown (Am. Compl., ¶56, EM Appellants Appendix at 142a).
- On April 25, 2014, Flint water users began receiving Flint River Water "under the direction" of former EM Earley and officials from the MDEQ (Am. Compl., ¶58, EM Appellants Appendix at 143a).
- On April 25, 2014, former EM Earley allegedly knew that the water treatment plant was not ready. (Am. Compl., ¶59, EM Appellants Appendix at 143a).
- On October 14, 2014, former EM Earley "maintan[ed] the water quality problems can be solved and that it would be cost-prohibitive to return to DWSD." (Am. Compl., ¶63 n 7, EM Appellants Appendix at 143a).
- Former EM Earley resigned in January 2015 and was replaced by Gerald Ambrose (Am. Compl., ¶70, EM Appellants Appendix at 145a).
- Former EM Ambrose rejected an offer to purchase water from DWSD. (Am. Compl., ¶74, EM Appellants Appendix at 146a).

- Former EM Ambrose refused to reconnect to DWSD on February 17, 2015 (Am. Compl., ¶79, EM Appellants Appendix at 147a).
- Former EM Ambrose refused to reconnect to DWSD again on March 25, 2015. (Am. Compl., ¶86, EM Appellants Appendix at 149a).

These allegations, even taken together, are insufficient to allege a violation of Plaintiffs' constitutional bodily integrity right that "shocks the conscience."

Examining the actions of former Emergency Manager Earley, plaintiffs allege that he took office, directed the use of the Flint River, in conjunction with experts from the MDEQ, allegedly knew that the water treatment plant was not ready, and later maintained that the water quality problems were solvable. These actions taken collectively, do not support a deliberate indifference claim as to former Emergency Manager Earley. They do not establish that he knew that the use of the Flint River would have the tragic results that occurred. At most these allegations establish only that former Emergency Manager Earley was aware that negative consequences *might* result, but also believed that any problems could be rectified while staying within the City's cost limitations.

The allegations against former Emergency Manager Ambrose are even sparser. Plaintiffs allege that he replaced former Emergency Manager Earley in January 2015, rejected an offer to purchase DWSD water, refused to reconnect to DWSD in the face of public protests, and refused to reconnect to DWSD despite a non-binding resolution of the Flint City Council requesting that he do so. Plaintiffs allege nothing of former Emergency Manager Ambrose's knowledge that could possibly support an inference of deliberate indifference.

The only way in which Plaintiff's claim can be salvaged is if the knowledge of other state employees and officials is imputed to former Emergency Manager Earley and former Emergency Manager Ambrose. But that is precisely what *Guertin* does not allow. Imputing knowledge does not comport with *Guertin's* direction to examine the "subjective awareness" of the "substantial

risk of serious injury." *Guertin*, 912 F3d at 926. It is, in fact, the exact opposite, attempting to hold each individual defendant responsible for what any state employee knew or did. This failure to consider each defendant individually is the key error made by the lower courts here and justifies reversal.

Furthermore, even though plaintiffs have named both former EM Earley and former EM Ambrose only in their official capacities, in which they "acted as the State of Michigan," Am. Compl. at ¶27, EM Appellants Appendix at 137a, this analysis does not change. Accepting as true that the Emergency Managers acted as the State of Michigan, former EM Earley and former EM Ambrose's individual actions as policymakers for the State of Michigan are still subject to review based on their own subjective knowledge. Those individual actions and subjective knowledge simply do not satisfy the analysis set forth in *Guertin* by the Sixth Circuit, and thus plaintiffs have failed to allege that either former EM Earley or former EM Ambrose committed any violation of plaintiffs' bodily integrity right under the Michigan constitution.

2. A damages remedy is inappropriate here because other remedies are not unavailable, and because other factors weigh against the judicial creation of a damages remedy

The Court of Appeals also erred by determining that a damages remedy was appropriate here at all. The Court of Appeals opinion identifies a purported five-factor test, citing to the Court of Claims decision below, Justice Boyle's concurrence in part in *Smith v State*, 428 Mich 540, 637-52 (1987) (Boyle, J., concurring in part), this court's decision in *Jones v Powell*, 462 Mich 329 (2000), and *Reid v Department of Corrections,* 239 Mich App 621 (2000). However, the five-factor test identified by the Court of Appeals is not set forth in the cases cited.

Instead, Justice Boyle set forth a *three*-part test to determine whether a damages remedy should be inferred. *Smith*, 428 Mich at 648-52. She identified the first step of this analysis as "establish[ing] the constitutional violation itself." *Id.* at 648. The second step "is to consider the

text, history, and previous interpretations of the specific provision for guidance on the propriety of a judicially inferred damage remedy. *Id.* at 650. Finally, Justice Boyle noted that "various other factors, dependent upon the specific facts and circumstances of a given case, may militate against a judicially inferred damage remedy for violation of a specific constitutional provision." *Id.* at 651.

In addition to Justice Boyle's three-part test, this Court has also held that constitutional torts are only available as "a narrow remedy **against the state** on the basis of the unavailability of any other remedy." *Jones*, 462 Mich at 337 (emphasis added).

a. ***Other remedies are not unavailable to the Plaintiffs in this case and a damages remedy is therefore inappropriate***

Jones instructs that constitutional torts are only available "on the basis of the unavailability of any other remedy." *Id.* Here, there are a host of other available remedies upon which the lower courts failed to place appropriate weight. Multiple other lawsuits, arising out of these same facts and circumstances, are pending in multiple other courts. The lower courts failed to acknowledge this and thus erred.

The Court of Appeals erred by conflating the availability (or unavailability) of other remedies generally, with the availability (or unavailability) of specific forms of relief. For example, the Court of Appeals focused on the unavailability of monetary damages under 42 USC §1983 against the former emergency managers in their official capacities, and their immunity from tort liability under state law. MCOA Opinion and Order, at 29, EM Appellants Appendix at 105a. However, the unavailability of *monetary damages* does not necessarily also mean that *remedies* are unavailable.

Despite the Court of Appeals' disregard of the federal and Michigan Safe Drinking Water Acts, those acts are clearly implicated on the face of Plaintiffs' Complaint. Plaintiffs' claims. Although couched here in constitutional terms, these laws are unavoidably implicated in claims

asserting exposure to unsafe drinking water. *See, e.g.*, Am. Compl., at ¶9, EM Appellants Appendix at 135a ("State public officials made the decision to replace safe water with a toxic alternative. . ."); *see also* Am. Compl., ¶¶5, 8, 36, 53, 59, 64, 93, 104, 106, 113, 114, 117-18, 119, 142-43, 150, 154, EM Appellants Appendix at *ibid*.

Safe drinking water is the subject of a detailed and comprehensive statutory and regulatory scheme under the federal Safe Drinking Water Act, 42 USC §300f *et seq.*, and the Michigan Safe Drinking Water Act, MCL §325.1001 *et seq.* Numerous regulations have been promulgated under both the federal and Michigan Safe Drinking Water Acts that address the factual foundations of Plaintiff-Appellees' constitutional claims. Violations of those regulations have clearly defined remedies under those Acts.

Furthermore, all Plaintiff-Appellees' state constitutional claims arise out of alleged violations of the federal or Michigan Safe Drinking Water Acts or regulations promulgated under those Acts. For example, the EPA has promulgated regulations under the federal SDWA regarding:

- Maximum contaminant levels, 40 CFR 141.11 *et seq*.;
- Monitoring and analytical requirements, 40 CFR 141.21 *et seq*.;
- Reporting and recordkeeping, 40 CFR 141.31 *et seq*.;
- National Revised Primary Drinking Water Regulations, 40 CFR 141.60 *et seq*.;
- Filtration and disinfection, 40 CFR 141.70 *et seq*.;
- Control of lead and copper, 40 CFR 141.80 *et seq*.; and
- Public notification of drinking water violations, 40 CFR 141.201 *et seq*.

Similarly, the MDEQ has promulgated rules under the MSDWA regarding:

- Public notification and education requirements, Mich. Admin. Code R. 325.10401 *et seq*.;

- Treatment techniques for lead and copper, Mich. Admin. Code R. 325.10604f.;
- Filtration, disinfection, and enhanced treatments, Mich. Admin. Code. R. 325.10611 *et seq*.;
- Coliform sampling, collection, analysis, and monitoring, Mich. Admin. Code R. 325.10704 *et seq*.;
- Monitoring requirements for lead in tap water, Mich. Admin. Code R. 325.10710a;
- Monitoring requirements for supplies exceeding lead action levels, Mich. Admin. Code R. 325.10710b;
- Reporting requirements for lead corrosion control, Mich. Admin. Code R. 325.10710d;
- Vigilance of threats or hazards, Mich. Admin. Code R. 325.10735;
- Regulating treatment systems and pumping facilities, Mich. Admin. Code R. 325.11001 *et seq*.; and
- Regulating distribution systems, Mich. Admin. Code R. 325.11101 *et seq*.

Under the federal Safe Drinking Water Act, the Environmental Protection Agency is granted broad authority to take actions it deems necessary to protect public water supplies. *See* 42 USC §300i. A citizen-suit provision allows private citizens to bring civil actions in order to remedy violations of the federal Safe Drinking Water Act or the regulations promulgated under that Act. *See* 42 USC 300j-8. The Michigan Safe Drinking Water Act, while lacking a citizen-suit provision, provides for both criminal and civil enforcement actions by the Attorney General. *See* MCL §325.1021; MCL §325.1022.[1] Both Acts therefore provide a remedy for violations of those Acts or regulations promulgated under those Acts.

[1] Plaintiffs even acknowledge this authority vested in the Attorney General by the statute, and the exercise of this authority, in their own allegations. *See* Am. Compl. at ¶114, EM Appellants Appendix at 155a ("On April 20, 2016, Attorney General Bill Schuette filed … charges for violation of the Michigan Safe Water Drinking (sic) Act.").

The Court of Appeals thus erred when found that there were no available remedies. Such remedies are clearly available, even if the specific remedy of damages is not. The *Jones* court directed that *available* alternative remedies bar constitutional tort claims. Thus, the remedies available under the SDWA and MSDWA should bar Plaintiffs from bringing such claims. The Court of Appeals failure to recognize these available remedies and their import is another error warranting leave to appeal and reversal.

b. ***A damages remedy is also inappropriate here because "other factors" militate against the creation of a judicially imposed damages remedy in this situation***

Justice Boyle's analysis in *Smith*, approved by this Court in *Jones*, provides additional reasons why a damages remedy is inappropriate here. *See Jones*, 462 Mich at 336 (*referring to Smith*, 428 Mich at 638 (Boyle, J., concurring in part)). As discussed above, Justice Boyle set forth a three-part test to determine whether to infer a damages remedy for a constitutional tort:

(1) establish the constitutional violations;

(2) consider the text, history, and previous interpretations of the provision to determine if a judicially inferred damages remedy is appropriate,; and

(3) consider other factors that may militate against a judicially inferred damages remedy.

Smith, 428 Mich at 648-52 (Boyle, J., concurring in part). As also discussed above, Plaintiffs failed to allege that either Earley or Ambrose violated the substantive due process bodily integrity right. *See supra* Subsection III.F.1 at 25. However, even if the underlying constitutional violation and the general appropriateness of a judicially-inferred damages remedy for that underlying constitutional violation is assumed *arguendo*, other factors militate also against a judicially inferred damages remedy.

Jones incorporated guidance from *Bivens v Six Unknown Named Federal Narcotics Bureau Agents*, 403 US 388 (1971),[2] where the Supreme Court of the United States held that the relevant question was "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." *Jones*, 462 Mich at 336 (*citing Bivens*, 403 US at 407). *Jones* also noted that "where a statute provides a remedy, the stark picture of a constitutional provision violated without remedy is not presented." *Id.* at 336-37. Looking again to *Bivens*, the *Jones* Court instructed that that "the existence of a legislative scheme may constitute 'special factors counselling hesitation,' militating against the creation of a judicially inferred damages remedy." *Id.* at 337 (*citing Bivens*, 403 U.S. at 396). Such a scheme, as previously shown, exists here. *See supra* Subsection III.F.2.a, at 30.

Justice Boyle also identified two situations in which *Bivens* actions were barred, and one in which it was not. *Smith*, 428 Mich at 647-48. Specifically, Justice Boyle noted that while *Bivens* actions are not barred by the federal tort claims remedy, *id.* at 647 (*citing Carlson v Green*, 446 US 14 (1980)), such actions were barred by comprehensive federal civil service statutes, which expressed clear public policy decisions regarding federal employment, and the unique requirements of military life and Congress's constitutional authority over the military. *Id.* at 647-48 (*citing Bush v Lucas*, 462 US 367 (1983) and *Chappel v Wallace*, 462 U.S. 296, 304 (1983)). Examining these decisions provides additional insight into why a damages remedy is inappropriate here.

In *Carlson*, the Supreme Court of the United States, in analyzing whether the Federal Tort Claims Act (FTCA) barred a *Bivens* action, concluded that: (1) judicially crafted remedies against

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[2] *Bivens* recognized that a private remedy was sometimes available for violations of the federal constitution.

the defendants were not constitutionally inappropriate, (2) qualified immunity was available to minimize the burden on the government defendants, and (3) congressional comments to the 1974 amendments to the FTCA made it clear that Congress viewed the FTCA and *Bivens* actions as parallel and complementary. *Carlson*, 446 US at 19-20. In addition, the *Carlson* Court also noted that a *Bivens* action, (4) has a greater deterrent effect because it was recoverable against individuals, (5) allows for punitive damages, (6) allows for a jury trial, and (7) allows for uniformity not possible under the FTCA. *Id.* at 20-23.

In contrast, *Bush* and *Chappel* show how the existence of a carefully constructed legislative scheme weighs against the availability of a damages remedy. The *Bush* Court noted that "[t]he question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an ***elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue***." *Bush*, 462 US at 388 (emphasis added). Similarly, in *Chappel* the Supreme Court of the United States determined that "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." *Chappell*, 462 US at 304. *Chappel* also stands for the proposition that a *Bivens*-style damages remedy can be inappropriate *despite* the lack of an available damages remedy. *Id.*

Examining *Carlson, Bush,* and *Chappel* in concert, *Bivens*-style damages remedies will be inappropriate where there is a comprehensive remedial scheme that would be jeopardized by the addition of a judicial remedy, or if special factors exist that weigh against judicial interference. The Court of Appeals erred by failing to conduct this analysis. Had it done so, it would have recognized that the federal and state SDWAs constitute a comprehensive remedial scheme that

would be jeopardized by the creation of a judicially-created damages remedy. The lack of a private damages remedy under those statutes represents a deliberate policy choice by the legislature and by Congress. By recognizing a judicially-inferred damages remedy, the Court of Appeals failed to give that policy determination the proper deference.

Applying the factors used to justify a damages remedy in *Carlson* to the situation in this case also fails justify a judicially-inferred damages remedy. While judicially-crafted remedies would not be constitutionally inappropriate here, qualified immunity is *not* available as a defense and thus there is no comparable means for defendants to defend against frivolous claims. The deterrent effect of any damages remedy will be low, because a constitutional tort is not recoverable against individual officials who are responsible for making policies, but only against the State itself. In fact, individual state and municipal officials cannot be held personally liable for Michigan constitutional torts, as set forth in *Jones*. 462 Mich at 337. [3]

Furthermore, punitive damages are not available under Michigan law, nor are jury trials allowed in the Court of Claims. In addition, there are no questions of uniformity with other jurisdictions that would be addressed by the availability of a judicially-created damages remedy.

In *Jones* and *Smith*, this Court used *Bush, Chappel*, and *Carlson* to identify two different tests to analyze whether a damages remedy for a constitutional tort is warranted. Under either test, a damages remedy for constitutional torts is inappropriate here, and the lower courts erred by

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[3] "*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy. Those concerns are inapplicable in actions against a municipality or an individual defendant. Unlike states and state officials sued in an official capacity, municipalities are not protected by the Eleventh Amendment. *Lake Country Estates, supra* at 400-401, 99 S.Ct. 1171. A plaintiff may sue a municipality in federal or state court under 42 U.S.C. § 1983 to redress a violation of a federal constitutional right. *Monell, supra* at 690, n. 54, 98 S.Ct. 2018 and accompanying text. Further, a plaintiff may bring an action against an individual defendant under § 1983 and common-law tort theories." *Jones*, 462 Mich at 337.

determining otherwise. The lower courts also erred by failing to give appropriate weight to the existence of other remedies, despite this Court's instructions to the contrary. There has never been a case in which this Court has held that a constitutional tort for damages was appropriate, and this case should not be the first.

G. ISSUE 6: WHILE PLAINTIFFS HAVE ALLEGED THAT THE ACTIONS OF THE FORMER EMERGENCY MANAGERS WERE AIMED AT THEM, THEY HAVE NOT ALLEGED A SPECIAL OR UNIQUE INJURY

In order to establish a *de facto* taking — necessary to support Plaintiff-Appellees' claim here — there must be action by the government, directly aimed toward the plaintiffs' property, that has the effect of limiting the use of the property or causing a decline in property value. *Blue Harvest, Inc v DOT*, 288 Mich App 267, 277 (2010). When considering whether a *de facto* taking has occurred, the Court "must consider 'the form, intensity, and the deliberateness of the government actions' in the aggregate." *Dorman v. Twp. of Clinton*, 269 Mich. App. 638, 645 (2006). In *Peterman v Department of Natural Resources,* this Court held that the building of a jetty was a direct action directed at a plaintiff's land, because it was the proximate cause of the destruction of plaintiffs' beachfront property as it "it undoubtedly set into motion the destructive forces that caused the erosion and eventual destruction of the property." *Peterman v Department of Natural Resources*, 446 Mich 177, 191, 521 NW2d 499, 507 (1994).

This Court, in *Peterman*, also found it relevant that:

> Defendant was forewarned that the construction of the jetties could very well result in the washing away of plaintiffs' property, and the evidence reveals that the destruction of plaintiffs' property was the natural and direct result of the defendant's construction of the boat launch. The effect of defendant's actions were no less destructive than bulldozing the property into the bay. Jarvis, supra at 325 (finding that "consequential" damages were compensable because they were "as clearly the direct, natural and necessary result of the acts complained of, as would be the piling of logs or the erection of a house up on the same land"). Defendant, therefore, may not hide behind the shield of causation in the instant case.

Id. "Proximate cause" has been defined by this Court as follows:

> Proximate cause, also known as legal causation, is a legal term of art with a long pedigree in our caselaw. Proximate cause is an essential element of a negligence claim. It "involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." Proximate cause is distinct from cause in fact, also known as factual causation, which "requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." Courts must not conflate these two concepts.

Ray v Swager, 501 Mich 52, 63, 903 NW2d 366, 371 (2017).

At this stage of these proceedings, the former Emergency Managers, in their official capacity, acknowledge that Plaintiffs have made enough allegations that proximate cause is likely satisfied. However, that does not end the analysis, because under Michigan law, a legalized nuisance occurs when government action "affects all in its vicinity in common." *Spiek v DOT*, 456 Mich 331, 345 (1998) (emphasis added). In such situations, "[t]he right to just compensation, in the context of an inverse condemnation suit for diminution in value caused by the alleged harmful affects (sic) to property abutting a public highway, exists only where the land owner can allege a unique or special injury, that is, an injury ***that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated***." *Id.* at 348 (emphasis added).

In *Spiek*, this Court further explained that "[w]here harm is shared in common by many members of the public, the appropriate remedy lies with the legislative branch and the regulatory bodies created thereby, which participate extensively in the regulation of vibrations, pollution, noise, etc., associated with the operation of motor vehicles on public highways." *Id.* at 349. This Court thus made it clear that the public nuisance exception to inverse condemnation claims is, in essence, judicial deferral to the "legislative branch and the regulatory bodies created thereby" which balance numerous public policy considerations in the regulation and direction of such activities which affect the general public. Although *Spiek* addresses the application of the legalized

nuisance doctrine to public highways, it is equally applicable here, where a public water distribution system serving a major municipality is implicated.

Here, Plaintiffs have failed to allege that they suffered a unique or special injury. They allege only that their injury was "unique or special because this group of Plaintiffs had water service lines and plumbing susceptible to damage by corrosive waters and which were rendered unsafe even after the corrosive water was discontinued." Am. Compl., at ¶154, EM Appellants Appendix at 163a. However, at the same time, they allege that they request certification on behalf of a proposed damages class of "all individual and entities . . . who owned property within the City of Flint and experienced injuries and damages to their person or property." *Id.* at ¶119, EM Appellants Appendix at 156a.

As a result, even assuming *arguendo* that Plaintiffs have alleged actions by the former Emergency Managers directed at them, they have not alleged that they have suffered a unique or special injury. The lower courts erred by failing to recognize this, and this Court should reverse on that issue as well.

H. ISSUE 7: ANY MEANINGFUL DEFINITION OF A CLASS OF "SIMILARLY-SITUATED" PERSONS MUST INCLUDE CONSIDERATIONS OF JURISDICTION, AND THE PRACTICAL REALITY OF WHETHER INJURIES ARE UNIQUE AND SPECIAL IN KIND

A plaintiff claiming inverse condemnation must also allege that their property was directly affected in a manner distinct from that of **other similarly situated persons**. *Id*. at 346 (emphasis added). Michigan law regularly confronts situations requiring a determination of whether persons are similarly situated. For example, in the context of discrimination cases, courts utilize the *McDonnell Douglas* test and its requirement that a plaintiff must establish that he or she was treated differently than another who is similarly situated in "all of the relevant aspects." *Town v Mich Bell Tel Co*, 455 Mich 688, 699-700, 568 NW2d 64, 70 (1997). When applied to an employment situation, this similarity must result in the compared situations being "nearly identical." *Id.* at 700;

see also Hecht v Nat'l Heritage Acads, Inc, 499 Mich 586, 608, 886 NW2d 135, 147 (2016) ("for this type of 'similarly situated' evidence alone to give rise to such an inference, however, our cases have held that the 'comparable' employees must be 'nearly identical' to the plaintiff in all relevant respects").

Determining whether parties are similarly situated is also relevant in an equal protection context. For example, this court has found that two entities were not similarly situated when one entity requested a variance to operate a day care, and another entity requested a variance to operate a primary school, that the two entities were not similarly situated. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 321-23, 783 NW2d 695, 699-700 (2010). Similarly, property taxpayers in Michigan have a right to be taxed the same as similarly situated properties, as those parties are classified by law. *Midland Cogeneration Venture Ltd P'ship v Naftaly*, 489 Mich 83, 93, 803 NW2d 674, 681 (2011).

The common thread running through these cases is this: at minimum, the parties will be similarly situated when they are alike in all relevant respects. What factors are relevant will need to be determined by the context in which the claim is made. In the employment context, relevant factors will include almost everything. However, in the taxation context, the relevant factor – the classification of properties – are limited to the statutory definitions underlying those classifications.

One relevant factor that was not considered by the lower courts here is the jurisdiction of the former Emergency Managers. Former Emergency Managers Earley and Ambrose were empowered only to act for and in the place and stead of the City of Flint. *See* MCL §141.1549(2). They had no authority or ability to act statewide. A comparison with the whole state is thus irrelevant, because EMs had no authority or ability to give any orders outside of their jurisdiction.

Indeed, almost all persons residing within the boundaries of the City of Flint were affected, to a greater or lesser degree, by the switch to the Flint River.

Plaintiffs also allege that "[t]he number of class members is sufficiently numerous to make class action status the most practical method for Plaintiffs to secure redress," *id.* at ¶121, EM Appellants Appendix at 156a, and that "[t]he violations of law and resulting harms alleged by the named Plaintiffs are typical of the legal violations and harms suffered by all Class members." *Id.* at ¶123, EM Appellants Appendix at 156a. On its face, a special or unique injury seems incompatible with class allegations such as these. At minimum, those class allegations highlight and provide further justification for applying the public nuisance exception to this case.

Plaintiffs themselves allege the root cause of the issues here was largely regulatory in nature. For example, the Plaintiffs' allege that "[f]or at least a year prior thereto, the State knew that using the Flint River water was dangerous and could cause serious public health issues." Am. Compl., at ¶60, EM Appellants Appendix at 143a; *see also* ¶69, EM Appellants Appendix at 145a (alleging MDHHS failure to act); ¶73, EM Appellants Appendix at 146a (alleging State failure to take action to correct harm). Had the proper regulatory measures by state agencies such as the MDEQ been taken, it is difficult to conceive of how this situation could have occurred. This Flint Water Crisis did not occur despite or in circumvention of regulation – it occurred due to a failure of regulation. It is impossible to conclude in this context that properties or citizens were targeted by government action that would result in inverse condemnation.

Under any of the standards referred to here, no one Flint water customer can establish that he or she is not similarly situated to any other Flint water customer. No such customer was directly affected by the change to water source in a unique and special manner, as is required to establish an inverse condemnation claim.

Instead, Plaintiffs' own allegations establish that the harm here was allegedly suffered by many members of the public. Their own allegations establish that Plaintiffs were similarly situated with all water customers of the City of Flint, in that they resided within the City of Flint's jurisdiction, were legally classified the same by the City of Flint's laws, and were all thus subjected to the authority of the former Emergency Managers for the City of Flint. The Court of Appeals erred by comparing the putative class pled here with the entire state of Michigan. The entire state was not within the jurisdiction of the former Emergency Managers and the entire state was not switching water sources under the regulatory oversight and control of the State of Michigan.

As *Spiek* notes, where, as is the case here, "harm is shared in common by many members of the public, the appropriate remedy lies with the legislative branch and the regulatory bodies created thereby." *Spiek*, 456 Mich at 349. To a greater or lesser degree, the harms here are alleged to have been suffered by many members of the general public that make up the City of Flint and who were within the jurisdiction of former Emergency Managers Earley and Ambrose. The situation here was a regulatory failure that is more properly addressed by the Legislature and the regulatory bodies, not the courts. Application of the public nuisance exception here thus furthers the public policy of deferring to the policy determinations of the Legislature.

CONCLUSION AND RELIEF REQUESTED

Plaintiffs may not obtain a legal remedy in the Court of Claims against the former Emergency Managers in their official capacity. They have failed to satisfy the requirements of MCL §600.6431(3) by failing to file either a claim or a notice of their claim within 6 months of the event giving rise to their claim. They have failed to properly allege a bodily integrity claim under the Michigan Constitution where a damages remedy would be appropriate. And they have failed to properly allege an inverse condemnation claim.

The Plaintiffs' allegations of harm created by the Flint Water Crisis inspire outrage, sympathy and cries for remedial action. But compelling facts do not alone give rise to any legal remedy against either Darnell Earley or Gerald Ambrose, named here in only in their official capacity as former Emergency Managers of the City of Flint. Plaintiffs must still satisfy the legal requirements of their claims, which they have failed to do as a matter of law. The former Emergency Managers respectfully request that this Court reverse the lower courts and find in their favor as to all issues on which leave to appeal has been granted.

Respectfully submitted,

Dated: August 7, 2019

/s/ William Y. Kim
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PROOF OF SERVICE

The undersigned certifies that on August 7, 2019, I directed that a copy of the City of Flint's Application for Leave to Appeal to be served upon the attorneys of record in the above cause by filing them with the TrueFiling system, which will serve copies on all attorneys of record who have appeared below.

Respectfully submitted,

Dated: August 7, 2019

/s/ William Y. Kim
William Y. Kim (P76411)