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

ORAL ARGUMENT REQUESTED

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Dated: January 10, 2020

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I. INTRODUCTION

Plaintiffs have not refuted the multiple and independent reasons why this Court should reverse the Court of Appeals and why this case should ultimately be dismissed. For the reasons set forth herein and in their initial briefing, former Emergency Managers Darnell Earley and Gerald Ambrose, named here in their official capacities as Emergency Managers for the City of Flint, respectfully request that this Court reverse and remand with instructions to enter summary disposition on their behalf.

II. ANALYSIS

A. PLAINTIFFS DID NOT TIMELY SATISFY THE REQUIREMENTS OF MCL §600.6431(3)

This Court asked the parties to address when Plaintiffs' cause of action accrued. Pursuant to the controlling statute, Plaintiffs had to file either their claim or their notice of claim "within 6 months following the happening of the event giving rise to the cause of action." MCL §600.6431(3). Plaintiffs' Response acknowledges that their causes of action must have accrued after July 15, 2015 to avoid being barred by their failure to satisfy MCL §600.6431(3). *See* Plaintiffs' Omni. Resp. Br., p 55. Yet they fail to identify a single action, by the former Emergency Managers for the City of Flint, which occurred after July 15, 2015. Nor can they plausibly due so, because no Emergency Manager remained in office after April of 2015. *See* EM Appellants' Appendix at 145a, 288a.

Plaintiffs nonetheless argue that questions of fact preclude a finding that their claims accrued prior to July 15, 2015. They also argue that their inverse condemnation claims did not accrue until after public health advisories were issued in the fall of 2015, and that their accrual is somehow delayed because they had water service lines and plumbing rendered unsafe even after the City switched back to Lake Huron water from DWSD in October 2015. *See* Plaintiffs' Omni. Resp. Br., p 56. These arguments are without legal merit – instead, Plaintiffs' seek to reinstate the

continuing violation doctrine, which no longer exists under Michigan law. *Garg v Macomb County Cmty Mental Health Servs*, 472 Mich 263, 282 (2005).

Plaintiffs' reliance on the "stabilization doctrine" as recognized in *Hart v City of Detroit*, 416 Mich 488 (1982), is also misplaced, for much the same reason. *Hart* applied the reasoning the Supreme Court of the United States in *United States v Dickinson*, 331 US 745 (1947), and allowed for tolling of a statute of limitations until "the consequences of a condemnor's actions have stabilized." *Hart*, 416 Mich at 504. However, the "stabilization doctrine" from *Hart's* 1982 decision directly conflicts with *Garg*'s 2005 rejection of the continuing violation doctrine, because it permits extension of a statute of limitations for reasons not expressly permitted by the statute.[1] Furthermore, this Court has rejected a blind reliance on federal case law and noted that "the persuasiveness of federal precedent can only be considered after the statutory differences between Michigan and federal law have been fully assessed." *Garg*, 472 Mich at 283.

Hart plainly did not examine the statutory language of MCL §600.6431(3), nor did Plaintiffs do so here. That language, strictly construed, does not permit the application of the continuing violation doctrine. That doctrine is incompatible with this Court's more recent holding in *Garg*, and further illustrates the untimeliness of Plaintiff's claims here.

Finally, Plaintiffs rely on *Bauserman v Unemployment Ins Agency*, 503 Mich 169 (2019), and *Frank v Linkner*, 500 Mich 133, 147 (2017), but neither case supports Plaintiffs' argument

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[1] "Whatever the merits of the policy crafted by *Sumner*, it bears little relationship to the actual language of the relevant statute of limitations, M.C.L. § 600.5805, and M.C.L. § 600.5827. Fundamental canons of statutory interpretation require us to discern and give effect to the Legislature's intent as expressed by the language of its statutes. If such language is unambiguous, as most such language is, 'we presume that the Legislature intended the meaning clearly expressed-no further judicial construction is required or permitted, and the statute must be enforced as written.'" *Garg*, 472 Mich at 281 (internal citations omitted).

that the accrual of their claims occurred after July 15, 2015. In *Bauserman*, this court determined that a seizure of property occurred when the state Unemployment Agency seized federal and state income tax refunds, and not simply when the state provided notice that it would do so. *Bauserman*, 503 Mich at 192-93. *Frank v Linkner* involved a limited liability company member-oppression claim under MCL 450.4515. *Frank*, 500 Mich at 152-53.

Neither situation provides guidance in the factual context of this case. The sole remaining claims alleged here are inverse condemnation and violation of substantive due process bodily integrity. Plaintiffs' own factual allegations establish, beyond any reasonable dispute, that those claims arose prior to Plaintiffs' acknowledged July 15, 2015 deadline, because the injuries alleged – a non-consensual invasion of their bodily integrity and an interference with their property rights – occurred prior to that date. As a result, under the plain language of MCL §600.6431(3), Plaintiffs' claims are untimely because Plaintiffs failed timely satisfy that statute and this suit is therefore barred. Reversal of the Court of Appeals on those grounds is warranted.

B. APPLYING FRAUDULENT CONCEALMENT TOLLING TO THE REQUIREMENTS OF MCL §600.6431 REQUIRES THAT THE JUDICIARY SUPERSEDE THE LEGISLATIVE INTENT EXPRESSED BY UNAMBIGUOUS STATUTORY LANGUAGE

Another issue this Court asked the parties to address is whether the fraudulent concealment tolling provision of MCL §600.5855 applies to the statutory notice provision set forth in MCL §600.6431(3). Plaintiffs' Brief did not address the arguments raised by the former Emergency Managers, which highlighted the distinctions this Court has drawn between the purposes of statutes of limitations and statutory notice requirements. *See* EM Defendants Br., at 17-19. Instead, Plaintiffs simply ignored the non-litigation reasons behind statutory notice requirements and treated them as statutes of limitations. *Cf. Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 212 (2007) (identifying reasons for statutory notice requirements irrelevant to the litigation process); *with Bigelow v Walraven*, 392 Mich 566, 576 (1974) (explaining how statutes of

limitation preserve the integrity of the litigation process). Plaintiffs' failure to understand the differences between the two renders much of their arguments specious.

In a further attempt to overcome the statutory deficiencies in their position, Plaintiffs argue that "harmonization" justifies judicial recognition of exceptions not contained in the statutory text. However, harmonization in statutory interpretation does not allow courts to interpret statutory language in a manner that contradicts the plain statutory language. Instead, harmonization is an application of the principle that, "***[w]hen possible***, we strive to avoid constructions that would render any part of the Legislature's work nugatory." *People v Seewald*, 499 Mich. 111, 123 (2016) (emphasis added). This principle is self-limited by its own terms to apply only "when possible." Plaintiffs' citation to *Nowell v. Titan Ins Co*, 466 Mich 478, 484 (2002) also supports this principle when it states that, "[i]n such a case of…conflict, between sections of a statute, it is our duty to, **if reasonably possible**…harmonize them." (emphasis added).

Here, harmonization is only possible by acknowledging the plain statutory language that the notice provision does not cite to or incorporate MCL §600.5855, and therefore the intent of the legislature was not to incorporate such tolling into MCL 600.6431(3). Indeed, MCL 600.6452(2) clearly states "RJA chapter 58…shall also be applicable **to the limitation period prescribed in this section.**" MCL §600.6452 (2) (emphasis added.) There are two cues in this language directing the court to the conclusion urged here. First, it applies RJA ch. 58 only to the "limitation period" and not the notice period. Second, it limits its applicability to "this section", not this chapter or statute. This Court would have to read those sections out of the law and construe them in manner inconsistent with their plain meaning to conclude that Plaintiffs' arguments are correct.

Ultimately, Plaintiffs argue that this Court should disregard the clear and unambiguous statutory language of MCL §600.5855 – and the Legislative public policy considerations addressed therein – to create an exception that does not exist within the statute itself. Plaintiffs' position is

nothing less than an appeal for the courts to substitute their judgment for that of the Legislature, an overreach that this Court has consistently rejected. As this Court recently held:

> [A] court is not free to rewrite a statute because the end result may be subjectively unpalatable, and that "the object of judicial statutory construction is not to determine whether there are valid alternative policy choices that the Legislature may or should have chosen, but to determine from the text of the statute the policy choice the Legislature actually made."

People v. Harris, 499 Mich. 332, 352 n.47 (2016).

The intent of the Legislature, as set forth in the unambiguous statutory text, is thus not susceptible to alternative interpretations, and the Court of Appeals erred by applying fraudulent concealment tolling here. A court simply cannot rewrite the statute to incorporate fraudulent concealment tolling to the notice provision of MCL §600.6431(3) without impermissibly substituting its judgment for that of the Legislature. Accordingly, this Court should reverse the decision of the lower courts which impermissibly re-wrote MCL §600.6431(3) to incorporate fraudulent concealment tolling.

C. THE HARSH AND UNREASONABLE CONSEQUENCES EXCEPTION DOES NOT EXIST, AND EVEN IF IT DID, IT SHOULD NOT APPLY HERE

Plaintiffs again seek to have the courts substitute their policy judgments for those of the Legislature by recognizing, without a shred of binding authority, a "harsh and unreasonable consequences" exception to the clearly worded and unambiguous statutory notice requirement in MCL §600.6431(3). Their response posits various hypothetical situations under which the six-month notice requirement in MCL §600.6431would have prevented unspecified plaintiffs from bringing their claims here. This argument is without merit for three reasons

First, Plaintiffs have not cited any controlling authority establishing the "harsh and unreasonable consequences" exception, nor do they show how *Rusha v Department of Corrections*, 307 Mich. App. 300, 310 (2014), relied on below by the Court of Appeals, did not

itself rely on abrogated and discredited case law. Instead, they once again argue that courts should substitute their judgment for that of the Legislature. As discussed above, this is not permitted under Michigan law.

Second, assuming *arguendo* that a "harsh and unreasonable consequences" exception exists, it applies – according to *Rusha*– where "'it can be demonstrated that [statutes of limitations] 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) (*citing Curtin v Department of State Highways*, 127 Mich App 160, 163 (1983)) (emphasis added). Neither *Rusha* nor *Curtin* involved more than a single plaintiff. *See, e.g.*, *Rusha*, 307 Mich App at 301-02; *Curtin*, 127 Mich App at 161 (referring to the Plaintiff's estate in the plural). The application of the "harsh and unreasonable consequences" doctrine – which Plaintiffs' urge this Court to adopt – is thus not a *subjective* analysis based on the facts and circumstances particular to this case, but is rather an *objective* analysis based on whether plaintiffs generally are divested of access to the courts. In other words, if the "harsh and unreasonable consequences" exception exists, its analysis is objective, and *Rusha* holds that the exception applies only where *no* reasonable plaintiff could be expected to bring a claim of that type.

Finally, even if the harsh and unreasonable consequences exception is applied *subjectively*, Plaintiffs have failed to allege or argue how that exception should be applied to *them*. Instead they argue only that it *could* apply to a hypothetical and unspecified plaintiff. This cannot be sufficient, or else the harsh and unreasonable consequences exception would almost *always* apply. Any lawyer can conjure up a speculative hypothetical demonstrating harsh and unreasonable consequences, and the notice requirements set forth by the legislature would become meaningless.

For these reasons, reversal of the Court of Appeals, as to both the existence and the application of the so-called "harsh and unreasonable consequences" exception, is warranted.

D. USING THE ANALYSIS SET FORTH IN *SMITH* AND *JONES*, PLAINTIFFS HAVE FAILED TO SHOW HOW A DAMAGES REMEDY IS APPROPRIATE HERE

Despite the clear language of this Court's holding in *Jones v Powell*, 462 Mich. 329, 337 (2000), recognizing a damages remedy against the State of Michigan only "on the basis of the unavailability of any other remedy," Plaintiffs and the Court of Appeals argue that the damages remedy must be available from the State itself for *Jones* to apply. This argument rests on two flawed premises: (1) that the damages remedies available to them must be limited to recovery from the State of Michigan itself, and (2) the recovery from other potential defendants is immaterial. These premises are flawed because they violate a fundamental and longstanding principle of Michigan law: that so-called "double recovery" for an injury is not permitted. *See, e.g., Greer v. Advantage Health*, 305 Mich App 192, 203-04 (2014) ("When there is a recovery 'for an injury identical in nature, time and place, that recovery must be deducted from [the plaintiffs'] other award'"); *Grace v. Grace*, 253 Mich. App. 357, 368-69, (2002) ("Generally, under Michigan law, only one recovery is allowed for an injury").

Plaintiffs cannot plausibly argue or allege that the injuries that they allegedly suffered as a result of the State's policies and practices are somehow substantively separate and distinct from the injuries that they claim were caused by other defendants, including individual capacity claims against the defendants named here, which they are currently actively litigating in other forums. Indeed, Plaintiffs continue to pursue remedies for those injuries against other defendants in multiple forums and courts. *See, e.g.*, State Defendants App Vol 1, at 128a-206a; State Defendants App Vol 3, at 586a-689a; State Defendants App Vol 4, at 690a-784a. The Court of Appeals thus erred by restricting its examination to whether another damages remedy was available against the State of Michigan itself, despite the lack of any such restriction in *Jones* itself.

Furthermore, Plaintiffs' arguments against the applicability of *Chappel v Wallace*, 462 US 296 (1983), and *Bush v Lucas*, 462 US 367 (1983), are without merit. They argue that because a

damages remedy is unavailable under the federal and state Safe Drinking Water Acts, that those statutes cannot be comprehensive remedial statutes. *See* Pl Brief, at 41 n 52. However, *Chappel* instructs that a damages remedy can still be inappropriate *despite* the lack of an available damages remedy. *Chappel*, 462 US at 304.

Thus, the absence of an available damages remedy does not, on its own, establish that a damages remedy here is appropriate here. In a similar vein, Plaintiffs do not address how Justice Boyle, when recognizing the theoretical existence of a damages remedy against the State for a constitutional tort in *Smith v State*, 428 Mich 540, 618-19 (1987), relied on the analysis set forth in *Carlson v Green*, 446 US 14 (1980). As previously argued, and as ignored by Plaintiffs, that analysis shows that a damages remedy is inappropriate here. *See* EM Appellants Br., at 36.

E. INVERSE CONDEMNATION CLAIMS REMAIN INAPPROPRIATE HERE

The EM Defendants adopt by reference the arguments made by State Defendants regarding the "similarly situated" and "special or unique injury" factors. Specifically, since "all persons similarly situated to Plaintiffs (persons with metal service lines, plumbing, or both) will experience some degree of corrosion . . . Plaintiffs have alleged an injury that is only different 'in degree' from others with metal pipes, not an injury different 'in kind.'" State Appellants Br., at 50 (citing *Spiek v Michigan Dep't of Transp*, 456 Mich 331, 345 (1998)). As a result, should this Court allow an inverse condemnation claim based on the facts as alleged here to proceed, courts will necessarily be required to determine not whether *exposing* property owners to corrosive water constitutes inverse condemnation, but instead what *degree of exposure* to corrosion constitutes inverse condemnation. When confronted with facts demonstrating differences in degree rather than kind of injury alleged, courts decline to find that a claim of inverse condemnation is stated. *Id.*

In addition, as further argued by both the State and the former EMs, "the requirement that a person demonstrate an injury distinct from that experienced by similarly situated persons is

meant to keep a 'harm . . . shared in common by many members of the public' out of the 'judicial realm,' because "the appropriate remedy [in that situation] lies with the legislative branch and the regulatory bodies." State Appellants Br., at 50 (*citing Spiek*, 456 Mich at 349); *see also* EM Appellants Br., at 42. As applied to the former Emergency Managers, this point is particularly relevant as not only were the alleged harms shared by many members of the public, they were shared by *all* property owners within the EM's jurisdiction.

Finally, Plaintiffs' argument that defining the class of similarly situated persons is premature is meritless. They confuse the concepts of defining a class for class-action certification purposes and the definition of a class of similarly situated persons for inverse condemnation purposes. Despite the similarity in nomenclature, the two are not the same.

Defining a class in the class certification context is a necessary step to determine whether an action should proceed as a class action. Thus the class definition need not be finalized until the question of class certification is decided. In contrast, defining a class of similarly situated persons in an inverse condemnation context is a necessary step to determining whether a plaintiff has alleged a claim at all. Furthermore, a class definition may be revised as litigation progresses, which can affect whether a class is certified. In contrast, the failure to allege an injury that is different in kind, and not just degree, from all persons similarly situated bars an inverse condemnation claim in its entirety. In other words, the two analyses are legally unrelated and the standards to be applied to one should not apply to the other. Plaintiffs' argument that it is premature to identify the similarly situated plaintiffs is a fig leaf, a last second half-court shot at the basket. It is a legally barren effort avoid dismissal for having failed to state a claim on which relief could be granted.

Reversal of the Court of Appeals as to Plaintiffs' inverse condemnation claim is thus warranted.

CONCLUSION AND RELIEF REQUESTED

Despite Plaintiffs' heartfelt and emotional appeals, this case is not the appropriate vehicle for them to seek a legal remedy. Their failure to satisfy the requirements of MCL §600.6431(3) bars their claim, and they have failed to show how any judicially created exception to those requirements is permitted under Michigan law. Furthermore, their arguments fail to show how a damages remedy for an alleged constitutional violation is appropriate here under the controlling case law, and likewise fail to establish necessary elements of their inverse condemnation claim. For any or all of these reasons, the former Emergency Managers respectfully request that this court reverse the Court of Appeals and remand with instructions to enter summary disposition for the former Emergency Managers in their official capacity.

Respectfully submitted,

Dated: January 10, 2020

/s/ William Y. Kim _____
William Y. Kim (P76411)
For Defendant-Appellants, Former Emergency Managers Darnell Earley and Gerald Ambrose, in their official capacities

PROOF OF SERVICE

The undersigned certifies that on December 27, 2019, I served the foregoing Reply Brief upon the attorneys of record in this case by filing it with the MIFiling system, which will serve copies on all attorneys of record who have appeared.

Respectfully submitted,

Dated: January 10, 2020

/s/ William Y. Kim _____
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