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John Nevin, Communications Director
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FOR IMMEDIATE RELEASE

Michigan Supreme Court Announces March 4-5, 2020
Oral Arguments Schedule

LANSING, MI, February 19, 2020 —The Michigan Supreme Court announced that oral arguments in eight cases will be heard on March 4-5, 2020. The Court will convene to hear the cases beginning at 9:30 a.m. in the Supreme Court courtroom, located on the sixth floor of the Hall of Justice. The schedule of arguments is posted on the Supreme Court's oral arguments homepage.

The Court broadcasts its oral arguments and other hearings live on the Internet. Watch the stream only while the Court is in session and on the bench. Streaming will begin shortly before the hearings start; audio will be muted until justices take the bench. Follow the Court on Twitter to receive regular updates as cases are heard. Please contact the Office of Public Information at 517-373-0129 or SeaksL@courts.mi.gov for permission to film or photograph during the hearing. See the link to Request and Notice for Film and Electronic Media Coverage of Court Proceedings. The request must be submitted three days in advance of the hearing.

These brief accounts may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, issues, procedural history, and significance of these cases. For further details about the cases, please contact the attorneys.

Wednesday, March 4, 2020
Morning Session - 9:30 a.m.

No. 6 159063 (30-minute arguments per side)
PEOPLE OF THE STATE OF MICHIGAN, Brian Thiede
Plaintiff-Appellee,

v (Appeal from Ct of Appeals)
(Mecosta – Janes, E.)

KEITH ERIC WOOD, David Kallman
Defendant-Appellant.

On a day in November 2015 when the only case on the docket of the Mecosta District Court was a jury trial in a criminal matter, defendant stood on the sidewalk in front of the courthouse and passed out "jury nullification" leaflets to prospective jurors. He was arrested and charged with felony obstruction of justice and misdemeanor jury tampering. The obstruction of justice charge was dismissed. Defendant attempted to seek interlocutory appellate review of the remaining jury tampering charge, but the circuit court, the Court of Appeals, and the Supreme Court denied his

applications for leave to appeal. After a jury trial in district court, defendant was convicted of jury tampering. He appealed and the circuit court affirmed. The Court of Appeals affirmed in a split published opinion, rejecting defendant's arguments based on statutory construction (meaning of "juror"), the First Amendment, and due process. The dissent concluded that the jury tampering statute did not apply to defendant's conduct because no trial had been conducted in the case for which the prospective jurors in question were called. The Supreme Court has granted defendant's application for leave to appeal.

MOAA 158259

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, — Meredith Beidler

v (Appeal from Ct of Appeals) (Allegan – Cronin, K.)

ANTHONY RAY MCFARLANE, JR., Defendant-Appellant. — C. Michael Villar

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Before her birth, the victim suffered a stroke in utero that was not immediately detected. When she was 9-weeks-old, she began to cry in a pained, high-pitched tone and eventually convulsed into seizures. Doctors did not find any external injuries, but they did observe retinal hemorrhaging and bilateral subdural hematomas—classic signs of head trauma. The victim will likely suffer lifelong effects. Defendant, the victim's father, was charged with one count each of first-degree child abuse and second-degree child abuse (failure to seek medical treatment). At trial, the victim's sister testified that defendant had hurt her and that she had seen him shake the victim. Neighbors also testified that they often heard defendant yelling and that he made some implicitly incriminating statements after the victim's hospitalization. The prosecution's medical expert examined the victim and diagnosed her as having suffered "abusive head trauma" and "definite pediatric physical abuse." Defense counsel did not object to the expert's terminology in describing the victim's diagnosis, but counsel presented three medical experts who identified the victim's prenatal stroke as the cause of her symptoms. The jury convicted defendant of first-degree child abuse, but found him not guilty of second-degree child abuse. In a published opinion, the Court of Appeals held that the trial court plainly erred by allowing the prosecution's medical expert to use terminology suggesting that whoever inflicted the injuries on the victim did so with a culpable state of mind, but it affirmed after determining that this error did not affect the outcome of defendant's trial. The Supreme Court has ordered oral argument on defendant's application for leave to appeal to address: (1) whether the prosecution's medical expert invaded the province of the jury by using phrases like "abusive head trauma" and "definite pediatric physical abuse" to label her diagnosis; and (2) if so, whether defendant has satisfied the plain error standard set forth in *People v Carines*, 460 Mich 750, 763 (1999).

No. 2 157335-7, 157420-2 (30-minute arguments per side)

157335-7

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, RHONDA KELSO, and ALL OTHERS SIMILARLY SITUATED, — Deborah Labelle, Julie Hurwitz

Plaintiffs-Appellees,

v (Appeal from Ct of Appeals)
(Ct of Claims – Boonstra, M.)

GOVERNOR OF MICHIGAN, STATE OF MICHIGAN, DEPARTMENT OF ENVIRONMENTAL QUALITY, and DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants-Appellants,
and
DARNELL EARLEY and JERRY AMBROSE,
Defendants-Appellees,
and
CITY OF FLINT,
Not Participating.

Nathan Gambill
Charles Cavanagh

In these Flint water cases, plaintiffs filed a class action complaint in the Court of Claims alleging four Counts of constitutional torts: (1) Const 1963, art 1, § 17, substantive due process—state created danger; (2) Const 1963, art 1, § 17, substantive due process—violation of bodily integrity; (3) Const 1963, art 1, § 17, substantive due process—denial of fair and just treatment in investigation; and (4) Const 1963, art 10, § 2, inverse condemnation. The complaint alleges wrongdoing committed by two groups of defendants. The first set of defendants includes former Governor Rick Snyder, the Michigan Department of Environmental Quality, and the Michigan Department of Health and Human Services (state defendants). The second set includes former Flint Emergency Managers Darnell Earley and Jerry Ambrose (EM defendants). The state and EM defendants separately moved for summary disposition on all four Counts, arguing that plaintiffs failed to satisfy the statutory notice requirements of the Court of Claims Act, MCL 600.6431, failed to allege facts to establish a constitutional violation, and otherwise failed to allege facts to establish the elements of their claims. The Court of Claims granted summary disposition to all defendants on plaintiffs' Counts 1 and 3, but denied summary disposition on Counts 2 and 4. The state defendants appealed; the EM defendants and plaintiffs filed claims of cross-appeal. In a split published opinion, the Court of Appeals affirmed. Among other things, the majority held that in cases alleging constitutional torts there is a "harsh and unreasonable consequences" exception to the notice requirements of MCL 600.6431. It further held that there was a substantive due process claim for violation of bodily integrity. The dissent stated that, because plaintiffs failed to comply with the notice provision in MCL 600.6431(3), he would have reversed and remanded for entry of summary disposition in favor of all defendants. The state defendants filed an application for leave to appeal (Docket Nos. 157335-7), as did the EM defendants (Docket Nos. 157340-2). The Supreme Court has granted leave to address: (1) when 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 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 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 plaintiffs have alleged direct action by defendants against 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 plaintiffs' inverse condemnation claim, the manner in which the class of similarly situated persons should be defined.

157340-2

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, RHONDA KELSO, and ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellees,

v (Appeal from Ct of Appeals)
(Ct of Claims – Boonstra, M.)

GOVERNOR OF MICHIGAN, STATE OF MICHIGAN, DEPARTMENT OF ENVIRONMENTAL QUALITY, and DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants-Appellees,
and
DARNELL EARLEY and JERRY AMBROSE,
Defendants-Appellants,
and
CITY OF FLINT,
Not Participating

In these Flint water cases, plaintiffs filed a class action complaint in the Court of Claims alleging four Counts of constitutional torts: (1) Const 1963, art 1, § 17, substantive due process—state created danger; (2) Const 1963, art 1, § 17, substantive due process—violation of bodily integrity; (3) Const 1963, art 1, § 17, substantive due process—denial of fair and just treatment in investigation; and (4) Const 1963, art 10, § 2, inverse condemnation. The complaint alleges wrongdoing committed by two groups of defendants. The first set of defendants includes former Governor Rick Snyder, the Michigan Department of Environmental Quality, and the Michigan Department of Health and Human Services (state defendants). The second set includes former Flint Emergency Managers Darnell Earley and Jerry Ambrose (EM defendants). The state and EM defendants separately moved for summary disposition on all four Counts, arguing that plaintiffs failed to satisfy the statutory notice requirements of the Court of Claims Act, MCL 600.6431, failed to allege facts to establish a constitutional violation, and otherwise failed to allege facts to establish the elements of their claims. The Court of Claims granted summary disposition to all defendants on plaintiffs' Counts 1 and 3, but denied summary disposition on Counts 2 and 4. The state defendants appealed; the EM defendants and plaintiffs filed claims of cross-appeal. In a split published opinion, the Court of Appeals affirmed. Among other things,

the majority held that in cases alleging constitutional torts there is a "harsh and unreasonable consequences" exception to the notice requirements of MCL 600.6431. It further held that there was a substantive due process claim for violation of bodily integrity. The dissent stated that, because plaintiffs failed to comply with the notice provision in MCL 600.6431(3), he would have reversed and remanded for entry of summary disposition in favor of all defendants. The state defendants filed an application for leave to appeal (Docket Nos. 157335-7), as did the EM defendants (Docket Nos. 157340-2). The Supreme Court has granted leave to address: (1) when 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 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 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 plaintiffs have alleged direct action by defendants against 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 plaintiffs' inverse condemnation claim, the manner in which the class of similarly situated persons should be defined.

Afternoon Session
t/b/d

No. 1 154773 (20-minute arguments per side)
PEOPLE OF THE STATE OF MICHIGAN, Emil Semaan
Plaintiff-Appellee,

v (Appeal from Ct of Appeals)
(Macomb – Druzinski, D.)

IHAB MASALMANI, Erin Van Campen
Defendant-Appellant.

In 2009, the 17-year-old defendant kidnapped a man outside a fast food restaurant, took his car, shot him in the head, and dumped the body in a house that he tried to burn down. Over the next two days, defendant committed a robbery and another carjacking. Initially sentenced to mandatory life without parole for first-degree murder, a result upheld on direct appeal, he was resentenced under MCL 769.25, again to a term of life without parole. The Court of Appeals affirmed, finding no abuse of sentencing discretion. The Supreme Court has granted defendant's application for leave to appeal, limited to whether, in exercising its discretion to impose a sentence of life without parole (LWOP), the trial court properly considered the factors listed in *Miller v Alabama*, 567 US 460 (2012), as potentially mitigating circumstances. MCL 769.25(6). See *People v Skinner*, 502 Mich 89 (2018). In particular, the Court will address: (1) which party,

if any, bears the burden of proof of showing that a *Miller* factor does or does not suggest a LWOP sentence; (2) whether the sentencing court gave proper consideration to the defendant's "chronological age and its hallmark features," *Miller*, 567 US at 477-478, by focusing on his proximity to the bright line age of 18 rather than his individual characteristics; and (3) whether the court properly considered the defendant's family and home environment, which the court characterized as "terrible," and the lack of available treatment programs in the Department of Corrections as weighing against his potential for rehabilitation.

No. 7 159619 (20-minute arguments per side)
PEOPLE OF THE STATE OF MICHIGAN, Emil Semaan
Plaintiff-Appellee,

v (Appeal from Ct of Appeals)
(Macomb – Faunce, J.)

BRAD STEPHEN HAYNIE, Cecilia Quirindongo Baunsoe
Defendant-Appellant.

In 2015, defendant suffered from a psychotic episode and physically attacked his mother, causing serious injury. Defendant has a long history of mental illness and suffers from brain damage. He was charged with assault with intent to commit murder (AWIM). At trial, expert witnesses unanimously agreed that defendant was legally insane at the time of the crime. The jury found defendant guilty but mentally ill of the lesser included offense of assault with intent to do great bodily harm. The Court of Appeals affirmed in a split published opinion. The majority held that the trial court had properly denied the defense request for a jury instruction on assault and battery and that the verdict was not against the great weight of the evidence. The dissent opined that assault and battery is a necessarily included lesser offense of AWIM and that a rational view of the evidence in the case supported such an instruction. The Supreme Court has granted defendant's application for leave to appeal to address: (1) whether assault and battery is a necessarily included offense of AWIM; and (2) if so, whether a rational view of the evidence in this case could support a conviction for assault and battery.

Thursday, March 5, 2020
Morning Session – 9:30 a.m.

No. 3 157812 (20-minute arguments per side)
PEOPLE OF THE STATE OF MICHIGAN, Amy Somers
Plaintiff-Appellee,

v (Appeal from Ct of Appeals)
(Wayne – Roberson, D.)

ARTHUR LAROME JEMISON, Kristin LaVoy
Defendant-Appellant.

In 2016, defendant was convicted of first-degree criminal sexual conduct for a rape and robbery committed in 1996. The victim was unable to identify her attacker. In 2015, the rape kit that had been prepared immediately after the assault was finally tested, and the DNA from the kit matched defendant. Several DNA experts testified at trial, one of them, over defendant's

objection, by two-way interactive video. The Court of Appeals affirmed defendant's conviction in an unpublished opinion. One judge concurred separately. The Supreme Court has granted defendant's application for leave to appeal to address whether permitting an expert witness to testify by two-way interactive video, over defendant's objection, denied defendant his constitutional right to confront witnesses and, if so, whether this error was harmless.

No. 4 158240 (20-minute arguments per side)
SUSAN BISIO, Richard Bisio
Plaintiff-Appellant,

v (Appeal from Ct of Appeals)
(Oakland – Bowman, L.)

THE CITY OF THE VILLAGE OF CLARKSTON, Julie O'Connor
Defendant-Appellee.

Plaintiff, an attorney, submitted a request to defendant city under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., requesting, among other things, documents relating to a real estate development project and the cleanup of a vacant property. The city provided plaintiff with most of the records she requested, but it declined to provide certain items in the files of the city attorney, declaring that he was not a "public body" for purposes of the FOIA. Plaintiff filed this lawsuit. The parties filed cross motions for summary disposition. The trial court granted the city's motion, ruling that the contested records were not "public records" because the city did not use or retain them in the performance of an official function. Consequently, the trial court denied plaintiff's cross motion for summary disposition as moot. The Court of Appeals affirmed in an unpublished opinion, relying on *Hoffman v Bay City School Dist*, 137 Mich App 333 (1984), and *Breighner v Mich High Sch Athletic Ass'n*, 471 Mich 217 (2004), to reject plaintiff's argument that the agent-principal doctrine should apply to the determination of a public record under the FOIA. The Supreme Court has granted plaintiff's application for leave to appeal to address: (1) whether the Court of Appeals erred in holding that the contested documents were not within the definition of "public record" in § 2(i) of the FOIA; and (2) whether the city attorney, who was appointed under the city charter, was an agent of the city such that his correspondence with third parties, which was never shared with the city or in the city's possession, were public records subject to the FOIA, see *Breighner* and *Hoffman*.

MOAA 159093
SAMUEL JEROME, Christopher Desmond
Plaintiff-Appellant,

v (Appeal from Ct of Appeals)
(Oakland – Langford-Morris, D)

MICHAEL CRUM and CITY OF BERKLEY, Mary Massaron
Defendant-Appellant.

Plaintiff was accused of criminal sexual conduct by his step-daughter and bound over to face the charges, but a mistrial was declared mid-trial when it was discovered that defendant Michael Crum, the officer in charge of the investigation, had failed to disclose a videotaped interview

with the complainant. The prosecutor ultimately decided not to re-try plaintiff. Plaintiff sued Crum and his employer, the City of Berkley, in federal court, alleging various federal and state law claims. The federal court declined to exercise supplemental jurisdiction over the state claims (false arrest, malicious prosecution, false imprisonment, and gross negligence) and eventually granted summary judgment to defendants on the federal claims (false arrest/imprisonment, malicious prosecution, denial of due process, and failure to adequately train officers), concluding that the existence of probable cause to arrest and charge plaintiff defeated the false imprisonment and malicious prosecution claims, and that Crum was entitled to qualified immunity because he did not act with reckless disregard for the truth. Meanwhile, plaintiff sued defendants for the state law claims in circuit court, but that court granted defendants' motion for summary disposition on the ground of collateral estoppel because of the federal judgment. The Court of Appeals affirmed in an unpublished opinion, over one judge's dissent regarding the gross negligence claim. The Supreme Court has ordered oral argument on plaintiff's application for leave to appeal to address whether the circuit court erred in granting summary disposition to defendants on the ground of collateral estoppel.

-MSC-