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STATE OF MICHIGAN
IN THE SUPREME COURT

TOWNSHIP OF FRASER,
Plaintiff/Appellant,

v.

HARVEY HANEY and
RUTH ANN HANEY,
Defendants/Appellee
_____/

Supreme Court Case No.: 160991
Court of Appeals Case No.: 337842
Circuit Court Case No.: 16-3272-CH

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HANEY APPELLEE-DEFENDANTS' ANSWER TO
FRASER TOWNSHIP'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER STATEMENT OF JURISDICTION

Appellees agree that this Court has jurisdiction to consider and reject Appellant Fraser Township's *Application for Leave to Appeal* pursuant MCR 7.303(B)(1).

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COUNTER STATEMENT OF QUESTION(S) PRESENTED

I. Did the Court of Appeals fail to obey this Court's command to resolve and correctly explain the legal consistency of *Baker* and this case?

Haney Appellees say: No

II. Should this Court grant Fraser Township's sparse and underdeveloped second Application for Leave to Appeal?

Haney Appellees say: No

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ANSWER

This *Application* should be denied. On December 20, 2018, the Court of Appeals issued a decision (which it later published on January 17, 2019) which modestly held that local governments are bound by the statute of limitations just like everyone else. *Twp of Fraser v Haney*, 327 Mich App 1; 932 NW2d 239 (2018) (hereinafter *Fraser I*"). It also explained that using the statute of limitations as a defense was not barred when it was tried to the trial court, without any objection by the Township, in the trial court. *Id.* at 244 (township "did not object until after this appeal was filed to defendants' failure to allege a statute-of-limitations defense in their responsive pleading"). The Court of Appeals applied the plain language of MCR 2.118(C)(1) to allow for an amendment to make the paperwork in the court record match the implied consensual issues of the parties.

The Township appealed by application to this Court and, in lieu of granting leave, this Court vacated the Court of Appeals' decision and remanded to answer "whether the published opinion in this case is consistent with the published opinion in *Baker v Marshall*, 323 Mich App 590; 919 NW2d 407 (2018)." *Twp of Fraser v Haney*, __ Mich __; 933 NW2d 42 (2019). Supplemental briefing was undertaken and the Court of Appeals obediently reaffirmed its prior published decision. *Twp of Fraser v Haney (On Remand)*, __ Mich App __; __NW2d __; 2020 Mich. App. LEXIS 2650 (2020) (hereinafter "*Fraser II*"). In a correct and thorough analysis, the Court of Appeals concluded that its original opinion "is consistent with th[e] Court [of Appeals'] opinion in *Baker*." It explained that—

> In *Baker*, when the issue of the plaintiff's fraud was raised in the motion for summary disposition, the plaintiff argued that the fraud defense was waived because it had not been pled as an affirmative defense as required by MCR 2.111(F). In the present case, when defendants moved for summary disposition on the basis of the statute of limitations, plaintiff did not argue that defendants had waived the statute-of-limitations defense. It was only after defendants filed their appeal that plaintiff claimed that defendants had waived the statute-of-limitations

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> defense because the defense was not raised in defendants' responsive pleading. *Fraser [I]*, 327 Mich App at 6-7. Because of this distinction, we conclude that our published opinion in this case is consistent with *Baker*.

Id. Why? It is because MCR 2.118(C)(1) directs us so. MCR 2.111(F)(3) provides that "affirmative defenses must be stated in a party's responsive pleading, either as originally filed *or as amended in accordance with MCR 2.118.*" (emphasis added). In turn, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, *they are treated as if they had been raised by the pleadings*." MCR 2.118(C)(1) (emphasis again added). The Court of Appeals, following the Haney's supplemental arguments, confirmed how *Baker* and *Fraser I* are consistent—

> In *Baker*, because the plaintiff argued when she responded to the motion for summary disposition that the fraud defense had been waived, the plaintiff did not expressly or impliedly consent to try the fraud issue. In contrast, in our case, because plaintiff [Township] responded to the merits of [the Haney] defendants' claim that its request for injunctive relief was barred by the six-year limitations period of MCL 600.5813, without claiming that defendants had waived the statute-of-limitations defense, plaintiff impliedly tried the statute-of-limitations defense

Fraser II, *supra*, at *3.

In response, the Township has again filed an application for leave to this Court. The Township did not challenge the analysis or decision of Court of Appeals' remand decision or even meaningfully argues that *Baker* and *Fraser I* are inconsistent. Instead, the Township, rather bizarrely, simply re-raises the same issue seemingly already rejected by this Court in the prior application. The *Application* should be again denied.

RESPONSE TO THE APPLICATION

As an initial manner, the Haney Appellees object to the alleged facts presented by the Township in its *Application*. Most are simply untrue or incomplete. The reason why it thinks it can get away with the same is because the Township failed to obey MCR 7.305(A)(1)(d) which requires a concise statement of the material proceedings and facts

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conforming to MCR 7.212(C)(6). That cited rule, MCR 7.212(C)(6), requires "specific page references to the transcript, the pleadings, or other document or paper filed with the trial court" containing the claimed fact. The Township's *Application* cites none. So, here are the pertinent facts.

COUNTER STATEMENT OF FACTS

The Haney Defendants have operated a piggery since 2006. **Opposition to MSJ/Counter Motion, Exhibit J, ¶5.** This is undisputed.[1] The piggery operation of the Haneys is a professional one. An animal health expert confirmed that hogs are healthy and free of disease, and are provided adequate housing, shelter, food, and water. **Opposition to MSJ/Counter Motion, Exhibit G**. Manure is correctly and properly managed. ***Id.*** Moreover, the Haneys were following "a strict Bio-Security protocol in the husbandry practices." ***Id.***

Prior to raising hogs, Defendants operated a state-licensed cervidae (deer) farm. Deer farming require a state license (see MCL 287.951 et seq); pigs and hogs do not. There was never an allegation that the deer operation was unsafe. Merely as a result of a legal *zoning* issue, the State refused to renew the Haneys' license and a settlement agreement was ultimately reached with the State to end the deer-raising operation.

In 2016, Fraser Township filed a new lawsuit claiming this existence of the piggery—in and of itself—has continuously constituted a zoning violation for existing in an alleged prohibited zoning district (C-3) since its inception in rural Bay County. **Compl**.

---

[1] This sworn fact is consistent with Fraser Township's own filed admissions that the piggery has existed "for the last five years *plus*." **Opposition to MSJ/Counter Motion, Exhibit K, p. 2, ¶11**; see also **Opposition to MSJ/Counter Motion, Exhibit K, p. 5, ¶5** ("the residential neighbors have had to endure *over five years* of horrible stench from the Haney property").

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The Township moved for summary disposition (and thereafter the undersigned counsel took over the case) claiming the prior suit by the State acted as an automatic win for the Township based on the doctrine of res judicata. In response, the Haneys opposed the motion on merits and also on the grounds that the statute of limitations and the *Right to Farm Act* bars both summary disposition and the suit as a whole. Defendants offered the affidavit of Harvey Haney confirming the operation of a piggery since 2006. **Opposition to MSJ/Counter Motion, Exhibit J.** In light of the affidavit, Defendants also sought summary relief pursuant to MCR 2.116(I)(2). In response, the Township did not seek to amend its motion or otherwise offered any evidence to contradict Haney's affidavit. It also did not object to the affirmative defenses being raised and instead formally and fully engaged the trial court in argument against its argument's merits.

Accepting the Haney affidavit as uncontested,[2] the trial court denied summary disposition to everyone by concluding, in relevant part, that local township zoning cases are really *in rem* proceedings and thusly outside the statute of limitations coverage. The Haneys sought and were granted an interlocutory appeal. *Twp of Fraser v Haney*, unpublished order of the Court of Appeals, issued Sept 18, 2017 (Docket No. 337842). In briefing in the first appeal, the Township took two unusual positions. First, it claimed, for the first-time, waiver of the affirmative defense. Second, it falsely asserted (again without citation to the court record) that it knew nothing of the piggery until 2016. See **Township**

[2] With a sworn affidavit in the court file from the Defendants as the moving parties, the Township (as the non-moving party), in turn, needed to show a disputed question of fact in the trial court, else the court may rule as a matter of law. See *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). Because the Township offered nothing in the trial court to counter the affidavit's facts, there was no factual dispute facing the trial court (or now this Court). When "there is no factual dispute, whether a plaintiff's claim is barred under the applicable statute of limitations is a matter *of law* for the court to determine." *Kincaid v Cardwell*, 300 Mich App 513, 523; 834 NW2d 122 (2013).

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COA Appellee Br, p. 2-3. That was blatantly false. In the lower court, Haneys' counsel notified the appellate court of the same pursuant to MRPC 3.3(b)[3] and presented the letter the Township now attaches to its *Application* as Exhibit A.

On December 20, 2018, the Court of Appeals issued a decision (which it later ordered published on January 17, 2019) which held that local governments are bound by the statute of limitations just like everyone else and rejected the remaining arguments made by the Township, including the suggestion of waiver. *Fraser I,* 327 Mich App at 1. The Township appealed by application to this Court arguing that the statute of limitations does not bar the current action. This Court did not adopt the Township's argument. Instead and in lieu of granting leave, this Court vacated the Court of Appeals' decision and remanded to narrowly answer "whether the published opinion in this case is consistent with the published opinion in *Baker…" Twp of Fraser*; 933 NW2d at 42. The Court of Appeals dutifully obeyed. After care analysis, it reaffirmed its prior ruling. *Fraser II, supra*.

Now, the Township has filed an application for leave to challenge the Court of Appeals' decision which narrowly resolved the question of the consistency of *Baker* and this case. However, the Township did not challenge <u>*that*</u> legal conclusion but essentially remade the same arguments raised in the prior and resolved application. Here, the Township challenges the issue of whether zoning is subject to the statute of limitations.[4]

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[3] An attorney is under an obligation to disclose to the tribunal when he "knows that [a] person… is engaging, or has engaged in… fraudulent conduct related to an adjudicative proceeding involving the client…." MRPC 3.3(b). When such happens, "the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." *Id.*

[4] The Township also implies that there is a question of fact of when it was aware of the existence of the piggery. The Haney affidavit provides it was in 2006. The Township suggests it was 2009 by the letter it attaches to the *Application* as Exhibit A. The Court of Appeals rejected that underlying premise. See *Fraser I*, 327 Mich App at 11 ("the accrual of plaintiff's claim is also not subject to tolling simply because

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COUNTER ARGUMENT

The arguments of the Township in its *Application* are visibly sparse, grossly underdeveloped, and a poor fit for this Court's review. The Township seems merely to proclaim there is no prior case law about applying the statute of limitations. However, the Legislature has clearly decreed that "[a]ll other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." MCL 600.5813. The Township has not identified any other statute or precedent supporting its assertions. 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.

The Township's arguments for leave to appeal are essentially twofold. First, it claims the Court of Appeals' original decision "has made a new law with no analysis or foundational history." **App for Lv, p. 6.** Second, it also claims that leave is needed due to a direct conflict between this case and *Charter Twp of Lyon v Petty*.[5] Both are actually meritless. ***Id.***

As to the claim that there lacks a foundation or basis in law to conclude that the statute of limitations applies to local governments, this Court need only look to the well-outlined reasoning of now two Court of Appeals' decisions. The Haney Appellees defer to and adopt the same as its response to the Township's erroneous assertion.

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plaintiff may have been unaware that defendants were keeping pigs on the subject property in violation of plaintiff's ordinance" citing *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 391-392, 738 NW2d 664 (2007)). But even if we assume arguendo the Township is right with 2009, it would still be barred by the six years statute of limitation by having brought the suit in 2016.

[5] 317 Mich App 482; 896 NW2d 477 (2016), vacated by, in part, and leave denied by, in part, 500 Mich 1010; 896 NW2d 11 (2017).

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As to *Petty*, it is simply not applicable. In *Petty*, two families had their primary residences and the sites of their family-owned business operations on property zoned residential agricultural on Belladonna Road in Lyon Township. The township brought an action to cease their business operations in their current locations. The property owners never raised the statute of limitations as an affirmative defense. Ultimately, the Court of Appeals concluded the property owners failed to meet their required legal element of prejudice under the affirmative defense of laches.

Here, the Haneys took a different approach by challenging on statute of limitations grounds which is different from the doctrine of laches. See *Lothian v Detroit*, 414 Mich 160, 165; 324 NW2d 9 (1982). Delay alone for the prescribed period is a conclusive bar to suit under the statute of limitations while laches requires proof of prejudice. See *Citizens Ins Co of America v Buck*, 216 Mich App 217, 228; 548 NW2d 680 (1996). It is unclear why the property owners in *Petty* tried laches instead of the statute of limitations. But because the owners did not raise the statute of limitations either directly or impliedly (as they could have under MCR 2.111(F)(3) or MCR 2.118(C)(1)), the defense was waived and need not been addressed by the Court of Appeals on appeal. In short, there is no conflict between *Petty* and *Fraser I*. The argument fails and does not warrant this Court's review. See MCR 7.305(B)(5)(b).

Finally, the Township antidotally argues that the Township's zoning challenge should be allowed to proceed because it was brought by a government seeking to end a "new violation" occurring each day. Neither proposition holds any weight.

First, this Court has "completely and retroactively abrogated the common-law continuing wrongs doctrine in the jurisprudence of Michigan, including in nuisance...

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cases." E.g. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 288; 769 NW2d 234 (2009). Second, the applicable statute of limitations provides that "*all* other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." MCL 600.5813. Courts must apply the law as written. "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). A legislatively-granted right belongs to the Haney Defendant to the bar to an action when litigants sue too late which is based upon the plain application of the statute of limitations. E.g. *Henry v Dow Chemical Co*, 501 Mich 965; 905 NW2d 601 (2018); see also *Trentadue,* 479 Mich at 378.[6] Township governments are not exempted. Nor should they be absent legislative amendment.[7] *Trentadue,* 479 Mich at 407 ("[s]tatutes lose their meaning if an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity."). As it stands, governments are regularly subject to the statute of limitations law and the Township prevents no judicial error regarding the interpretation of the statute of limitations enacted by the Legislature. This township is no different than

[6] Statutes of limitations are procedural devices intended to promote judicial economy and protect the rights of defendants by precluding litigation of stale claims, *Attorney General v Harkins*, 257 Mich App 564, 569; 669 NW2d 296 (2003), and has been described by this Court as a "perfectly righteous" meritorious affirmative defense, *Bigelow v Walraven*, 392 Mich 566, 570; 221 NW2d 328 (1974). A statutory limitations period represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action. *Lothian*, 414 Mich at 165. Statutes of limitations bar a claimant from filing suit after the statutory period has expired. *Id.* at 167.

[7] As a matter of policy, maybe it ought to be. But that decision lies with the Legislature, not this Court, to rewrite or amend the statute on public policy grounds. *Cady v Detroit*, 289 Mich 499, 509; 286 NW 805 (1939) ("Courts cannot substitute their opinions for that of the legislative body on questions of policy"). Arguments that a statute is "unwise or results in bad policy should be addressed to the Legislature." *People v Kirby*, 440 Mich 485, 493-494; 487 NW2d 404 (1992). Exceptions have been made for other specific circumstances. See MCL 600.5821 If such is a good policy idea, the Township should ask the branch of government who writes the law, i.e. the Legislature, to make an addition to Section 5821 for townships.

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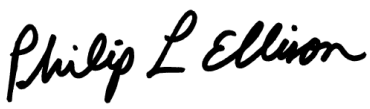
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countless other governments who are legally excluded from bringing clearly time-barred claims. *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 383; 760 NW2d 856 (2008); *Harkins,* 257 Mich App at 569; *City of Fraser v Almeda Univ*, 314 Mich App 79, 100-101; 886 NW2d 730 (2016); *Detroit Bd of Edu v Celotex Corp*, 196 Mich App 694; 493 NW2d 513 (1992); *City of Midland v Helger Constr Co, Inc*, 157 Mich App 736; 403 NW2d 218 (1987); *City of Marysville v Pate, Hirn & Bogue, Inc*, 196 Mich App 32, 37; 492 NW2d 481 (1992) (as to contract claim); *City of Ann Arbor v AFSCME*, 284 Mich App 126; 771 NW2d 843 (2009). There is simply no need for this Court to step into this case.

CONCLUSION AND RELIEF REQUESTED

When an *Application* is filed for this Court to accept a case, it must meet certain criteria to warrant review. MCR 7.305(B). The Township's *Application* fails to meet (or even discuss) those benchmarks. As presented, the Township's *Application for Leave to Appeal* should and must be denied.

RESPECTFULLY SUBMITTED:



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