STATE OF MICHIGAN
IN THE SUPREME COURT

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

v

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-Appellants,

and

CITY OF FLINT,
Not Participating.

Supreme Court Nos.: 157335, 157340-42

Court of Appeals Nos.: 335555, 335725, 335726

Court of Claims No.: 16-000017-MM

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PLAINTIFFS-APPELLEES' CORRECTED OMNIBUS ANSWER TO STATE DEFENDANTS' AND FORMER EMERGENCY MANAGERS EARLEY AND AMBROSE'S APPLICATIONS FOR LEAVE TO APPEAL

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The decision of the Court of Appeals upholding the Court of Claims' decision is reported at *Mays v Governor*, —Mich App—; —NW2d—; 2018 WL 559726 (Jan. 25, 2018), amended by order of the Court of Appeals, entered January 26, 2018 (Docket Nos. 335555, 335725, and 335726) (**Exhibit 1)** (hereafter, "COA Opinion"). The decision of the Court of Claims is not reported, *Mays v Governor*, and was issued October 26, 2016 (Case No. 16-000017-MM) (**Exhibit 2**) (hereafter, "COC Opinion"). Plaintiffs-Appellees ("Plaintiffs") submit this omnibus answer in opposition to the State Defendants'[1] and Emergency Managers'[2] applications for leave to appeal filed on March 8, 2018 (hereafter, "Application(s)"). Both Applications[3] seek leave to appeal the decision of the Court of Appeals issued on January 25, 2018.

STATEMENT OF JURISDICTION

The Michigan Supreme Court has discretionary jurisdiction to review by appeal a case after decision by the Court of Appeals. MCR 7.303(B)(1).

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[1] "State Defendants" means Defendants-Appellants Governor Snyder, the State of Michigan, the Department of Environmental Quality, and the Department of Health and Human Services.

[2] "Emergency Managers" means Defendants-Appellants former Flint Emergency Managers Darnell Earley and Gerald Ambrose. State Defendants together with Emergency Managers will be referred to herein collectively as "Defendants-Appellants" or "Defendants." For purposes of this omnibus answer, the State Defendants' application for leave to appeal will be referred to as "State Def App" and the Emergency Managers' application for leave to appeal will be referred to as "EM Def App."

[3] Emergency Managers also filed an answer on April 5, 2018 in response to the State Defendants' Application requesting that this Court deny the State Defendants' request to appeal the portion of the Court of Appeals' decision relating to whether Emergency Managers fall within the scope of the term "state officers" as defined by the Court of Claims Act, MCL §600.6401 *et seq*. Plaintiffs here concur with their request to deny leave to appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals correctly conclude that material fact questions exist with regard to whether Plaintiffs complied with the notice requirements of MCL 600.6431?

   Plaintiffs-Appellees' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

   Defendants-Appellants' answer: No.

2. Did the Court of Appeals correctly conclude that the fraudulent concealment tolling provision found in MCL 600.5855 is applicable and was adequately pleaded?

   Plaintiffs-Appellees' answer: Yes.

   Trial court's answer: No.

   Court of Appeals' answer: Yes.

   Defendants-Appellants' answer: No.

3. Did the Court of Appeals correctly conclude that a "harsh and unreasonable" exception to MCL 600.6431 exists under the circumstances pleaded in this case?

   Plaintiffs-Appellees' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

   Defendants-Appellants' answer: No.

4. Did the Court of Appeals correctly conclude that the Court of Claims had jurisdiction over claims brought against Emergency Managers?

   Plaintiffs-Appellees' answer: Yes.

   Emergency Manager-Appellants' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

State Defendants-Appellants' answer: No.

5. Did the Court of Appeals correctly conclude that a damages claim against state defendants under Michigan's due process clause is proper here because plaintiffs have properly pleaded that the state violated plaintiffs' fundamental right to bodily integrity by virtue of custom or policy, and this case is otherwise an appropriate one for which to impose a damage remedy?

   Plaintiffs-Appellees' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

   Defendants-Appellants' answer: No.

6. Did the Court of Appeals correctly conclude that Plaintiffs properly pleaded a viable claim for inverse condemnation?

   Plaintiffs-Appellees' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

   Defendants-Appellants' answer: No.

.

INTRODUCTION

"The victims are real people, families who have been lied to by government officials and been treated as expendable."

– Attorney General Bill Schuette[4]

"[T]he state Department of Environmental Quality assured us that Flint's water was safe. It wasn't."

– Governor Rick Snyder[5]

"The [DEQ officials'] statements were not false (let alone knowingly false)…"

– (State Def App, p 42)

Two of the above statements are true. The third one is not. DEQ officials *did* make false statements assuring the citizens of Flint that their water was safe, when it wasn't. And although the Governor and Attorney General have candidly acknowledged this fact, the Application submitted by State Defendants to this Court fails abysmally to do so.

This class action asserts that Defendants poisoned large segments of Flint while they falsely assured these people that the water was "safe to drink". This entire web of deception came crashing down in October of 2015, only three months before this lawsuit was filed.

Despite knowing the serious risks of providing toxic water, Plaintiffs allege that Defendants concealed the public health threat, ignored the citizens who raised genuine concern for families' well-being, falsely assured people that the water was fine, refused to switch the source for Flint's water, and deliberately continued to poison the public while recklessly disregarding the

[4] "Schuette Charges Six More in Flint Water Crisis" Attorney General Press Release, *available at* https://www.michigan.gov/ag/0,4534,7-359-82917_78314-390055--,00.html

[5] Governor Rick Snyder's Opening Statement before US House of Representatives Committee on Oversight and Government Reform at p 1, dated March 17, 2016, *available at* https://www.scribd.com/document/305080702/Governor-Snyder Testimony#fullscreen&from_embed ; *see also* Plaintiffs' First Amended Class Action Complaint ("Amended Complaint" or "Am. Compl."), ¶¶ 115-6 attached as **Exhibit 3**.

consequences. Although State Defendants attempt to deflect blame for the crisis in their Application, the Flint Water Advisory Task Force, Commissioned by the Office of Governor Rick Snyder in the aftermath of the disaster found as follows:

> MDEQ caused this crisis to happen. Moreover, when confronted with evidence of its failures, MDEQ responded publicly through formal communications with a degree of belligerence that has no place in government.[6]

Flint finally switched back to its original supply (the Detroit Water and Sewerage Department or "DWSD") on October 16, 2015. (Am. Compl., ¶ 110).

The State Defendants assert that they did not knowingly make false statements, and consequently, their behavior did not "shock the conscience" for purposes of establishing the elements of a constitutional bodily integrity claim. (State Def App, p 42). In contrast, Attorney General Schuette stated: "Some people failed to act, others minimized harm done and arrogantly chose to ignore data, ***some intentionally altered figures . . . and covered up significant health risks.***" (emphasis added). The result, Schuette ("A.G.") said, "was water was poisoned." He stated that this criminal concealment occurred "through on or about August 2015" – well within six months prior to the filing of Plaintiffs' Complaint in January 2016. (*See* Criminal Indictments, attached as **Exhibit 4**).[7]

Specifically, the A.G. alleged that willfully and knowingly:

- state employee Adam Rosenthal manipulated test results for a state mandated lead and copper report and falsely reported that the level of lead in Flint water was below the federal action level, 15 parts per billion. The A.G.'s criminal complaint further alleges that Rosenthal intentionally removed, altered, concealed, destroyed or otherwise tampered with evidence in Lead and Copper Report and Consumer

[6] Task Force Final Report, Exh. A to Am. Compl., p 29.

[7] Plaintiffs' Amended Complaint makes reference to criminal charges filed by the Attorney General on April 20, 2016. (Am. Compl., ¶114). However, because most of the Attorney General's criminal charges were not filed until after the filing of Plaintiffs' Amended Complaint, Plaintiffs requested the lower courts to take judicial notice of the later filed charges pursuant to MRE 201(e) and no party objected.

Notice of Lead Results dated February 27, 2015, July 28, 2015 and August 20, 2015. (Exhibit 4 at 1).

- state employee Liane Shekter-Smith misled public health officials and others as to the presence of lead in the drinking water "through on or about August 2015." (Exhibit 4 at 3).
- state employee Patrick Cook interpreted the Michigan Safe Drinking Water Act ("MSDWA") contrary to the requirements of the Lead and Copper Rule contained therein "through on or about August 2015." (Exhibit 4 at 4).
- state employee Nancy Peeler misled employees of the Department of Health and Human Services regarding reports of the increase in blood levels of children in Genesee County, in violation of her duty to promote and protect the health of County of Genesee citizens "through on or about August 2015." (Exhibit 4 at 5).
- state employee Robert Lawrence Scott misled employees of the Department of Health and Human Services regarding reports of the increase in blood levels of children in Genesee County, in violation of his duty to promote and protect the health of County of Genesee citizens "through on or about August 2015." (Exhibit 4 at 6).
- state employee Corinne Miller instructed employees of the Department of Health and Human Services to ignore valid reports of the increase in blood lead levels of children in Genesee County, in violation of her duty to promote and protect the health of County of Genesee citizens "through on or about August 2015." (Exhibit 4 at 7).

Defendants present two equally untenable defenses to the claims presented in the Amended Complaint, arguing first that they did not lie to the people of Flint or otherwise engage in behavior that violated citizens' constitutional rights to bodily integrity; or alternatively, that the people of Flint should have known that they were being lied to sooner, and, thus, given notice of their intent to sue the State sooner.

Clearly, these are not defenses that affirm the faith of the citizenry in its government.

The first defense is premised on sheer falsehood (as per the public pronouncements of the Governor, the Governor's Task Force, and in the criminal charges filed by the A.G.) and merits the opportunity to be so exposed in discovery. In disposing of the argument below, in a thorough and scholarly 50-page opinion, the Honorable Mark Boonstra held as follows:

> The Court also concludes that plaintiffs have pleaded sufficient facts, if proven, that the actions taken by the state actors were so arbitrary, in a constitutional sense, as to shock the conscience. Plaintiffs allege that it was state actors who made the decision to switch to the Flint River as the source of drinking water, after a period of deliberation, despite knowledge of the danger posed by the water, without a state-conducted scientific assessment of the suitability of using water from the Flint River as drinking water and with knowledge of the inadequacies of Flint's water treatment plant. They also allege that various state actors intentionally concealed data and made false statements in an attempt to downplay the health dangers posed by using Flint's water treatment plant. They also allege that various state actors intentionally concealed data and made false statements in an attempt to downplay the health dangers posed by using Flint's tap water, despite possessing scientific data and actual knowledge that the water supply reaching the taps of Flint water users was contaminated with Legionella bacteria and dangerously high levels of toxic lead, both of which were poisoning those drinking the tap water. Such conduct on the part of state actors, and especially the allegedly intentional poisoning of the water users of Flint, if true, may be fairly characterized as being so outrageous as to be "truly conscience shocking." (COC Opinion, p 28).

The Court of Appeals affirmed. Indeed, four separate courts[8] – the Michigan Court of Claims, the Michigan Court of Appeals, the United States District Court for the Eastern District of Michigan, and the United States Court of Appeals for the Sixth Circuit – have all reviewed some variant of the allegations pleaded in the Amended Complaint that is the subject of these Applications and all four have come to the same conclusion: Plaintiffs' allegations present actionable claims (under either the Michigan or US Constitution) which, if proven, establish: 1) a substantive due process deprivation of Plaintiffs' rights to bodily integrity; and 2) an inverse condemnation of property without due process. A fifth court, the United States Supreme Court, has denied several cert. petitions[9] and this Court should rule likewise.

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[8] *See* Exhibit 2, COC Opinion dated October 26, 2016; Exhibit 1, COA Opinion dated January 25, 2018; *Guertin v Michigan*, No 16-CV-12412, 2017 WL 2418007 (ED Mich June 5, 2017); and *Boler v Earley*, 865 F3d 391 (CA 6, 2017).

[9] *See Wright v Mays*, 138 S Ct 1281 (2018); *Wyant v Mays*, 138 S Ct 1285 (2018); and *City of Flint v Boler*, 138 S Ct 1294 (2018).

The second defense posed by State Defendants is predicated on pure cynicism. The State is literally arguing that state actors may commit fraud (indeed, the Attorney General *has* charged state actors with *criminal* falsification) and then use any delay attributable to that fraud as a basis to avoid liability via the Court of Claims six-month notice of suit provision. Make no mistake: if Defendants had accurately reported the existence of Legionella and lead contamination sooner, Plaintiffs would have acted sooner. Judge Boonstra rejected Defendants' position, finding that "affirmative acts of concealment and obfuscation," if proven by Plaintiffs, would rise to the level of a functional abrogation of constitutional rights if Defendants were "permitted to further become a vehicle for manipulating the date on which the notice period began to run, only to then reward those acts by dismissing the claims of ordinary citizens who possessed less information about the events than did the state actors themselves." (COC Opinion, p 11).

The Court of Appeals not only agreed with Judge Boonstra, but it also found that "[i]f plaintiffs can prove, as they alleged, that defendants actively concealed the information necessary to support plaintiffs' cause of action so that plaintiffs could not, or should not, have known of the existence of the cause of action until a date less than six months prior to the date of their complaint fraudulent concealment exception will fully apply and plaintiffs should be permitted to proceed regardless of when their claim actually accrued." (COA Opinion, p 17).

The Amended Complaint, the sufficiency of which is challenged by the Defendants in these Applications, was filed in 2016. The Defendants all filed motions for summary disposition in lieu of a responsive pleading. When Court of Claims Judge Boonstra issued his thoughtful and thorough order that is the subject of this appeal, it was based upon a "record" of an Amended Complaint and the papers submitted by the parties. No answer had been filed. No discovery had been taken. Given this posture, this Court should deny the Applications.

The Court of Appeals identified questions of fact that should allow discovery to proceed:

> [t]he Court of Claims did not err when it denied defendants' motion for summary disposition of plaintiffs' constitutional injury to bodily integrity and inverse condemnation claims. Questions of fact remain that, if resolved in plaintiffs' favor, could establish each of these claims and plaintiffs' compliance with, or relief from, the statutory notice requirements of the CCA. Further, for the reasons described, the Court of Claims did not err when it allowed plaintiffs to proceed with their claims against the Governor, Earley, Ambrose, and all other defendants in the Court of Claims . . . (COA Opinion, p 40).

Developments that have occurred *since* the Amended Complaint was filed have removed any doubt about the gravity of the Defendants' conduct, and raise substantial issues that deserve exploration and full discovery before this Court reviews any disposition of this case. Consider the following:

- The State Defendants claim that "Flint lead sampling figures …showed that Flint's lead level had not risen above the federal action level." (State Def App, p 42). Yet, nowhere in the State's brief do they disclose that the "sampling figures" upon which they rely for this statement were the subject of criminal falsification charges brought by the Michigan Attorney General.[10] Given the context of State Defendants' assertion, this omission is misleading and deserves factual development.

- The State Defendants claim that "only a small percentage of people had an elevated blood levels (sic)…" (State Def App, p 42). But qualified academicians have noted that the data relied upon for this assertion are statistically biased and "watered down by an additional 50% of addresses that weren't in the city and weren't using Flint water."[11] In other words, in order to conclude that only a "small percentage" of Flint residents had elevated blood levels, a large number of the people counted by the State in calculating this percentage were non-Flint residents who didn't drink Flint water. Yet even today, State officials use these biased numbers to downplay the tragedy of Flint and provide misleading comparisons with blood lead levels in

[10] *See*, Michigan Attorney General Bill Schuette Press Release: "Charges allege that in 2015, Rosenthal willfully participated in the manipulation of lead testing results and falsely reported that the 90th percentile of the results for lead water testing was below the federal action level. Eventually, a July 28, 2015 report was altered to exclude some high lead tests and Rosenthal forwarded the altered report on. Previously charged MDEQ employees Busch and Prsyby were also allegedly involved." Press release *available at*: https://www.michigan.gov/ag/0,4534,7-359-82917_78314-390055--,00.html.

[11] *See*, "How ZIP codes nearly masked the lead problem in Flint," by MSU Professor Casey Sadler, *available at* https://theconversation.com/how-zip-codes-nearly-masked-the-lead-problem-in-flint-65626.

other Michigan communities. This issue too deserves factual development.

- At last count, the A.G. has now charged fifteen state and local governmental employees with 51 criminal counts associated with the events surrounding the Flint Water crisis.[12]

These facts deserve exploration *before* this Court weighs in on the constitutional and statutory arguments presented in Defendants' Applications. When the Attorney General himself is criminally prosecuting state actors associated with generating the water quality data, measuring the levels of lead in children's blood, probing the outbreaks of Legionella and otherwise making the representations about whether water is safe, don't the citizens similarly deserve the opportunity to at least conduct discovery on these same questions?

Rather than basing its decision on an inadequate factual record, the deficiencies of which are omnipresent in Defendants' Applications, the parties would be better served by denying the applications, exploring the facts alleged in discovery and addressing the issues presented by Defendants with the benefit of a full factual record.

STATEMENT OF FACTS AND PROCEEDINGS[13]

Plaintiffs have set forth in their First Amended Complaint detailed allegations regarding Defendants' deliberate decision to supply Flint water users with toxic water from the Flint River, which resulted in devastating injuries to people and property. Moreover, in deliberate indifference to the bodily integrity, physical health and safety of Flint's citizenry, Defendants increased the risk of bodily injury by falsely claiming that Flint's water was safe when they knew that it was not.

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[12] *See* Mich.gov Attorney General's Flint Water Investigation website: https://www.michigan.gov/ag/0,4534,7-359-82917_78314---,00.html

[13] State Defendants have included an extensive statement of facts many of which were not presented below. (State Def App, pp 2-18). Moreover, State Defendants include references to Plaintiffs' initial complaint which was superseded by the Amended Complaint. MCR 2.118(A)(4). Plaintiffs will not respond to each factual misstatement made in Defendants' presentation, but note that discovery has not been conducted on any material question of fact.

Defendants' catastrophic decisions led to what is known world-wide as the "Flint Water Crisis."

A. Defendants Approved the Use of the Flint River as an Interim Source of Drinking Water Knowing That It Was Unfit for Human Consumption.

From 1964 to 2014, Flint water users received their water from Lake Huron via the DWSD. During this 50 year period, the Flint water users enjoyed safe, clean, fresh water in their homes, businesses, schools, hospitals and other places of public services. (Am. Compl., ¶ 38). Motivated principally by the political pressure and efforts of Genesee County Drain Commissioner Jeffrey Wright ("Wright"), the predominantly white communities north of Detroit formed the Karegnondi Water Authority ("KWA") in 2009 to explore an alternative to the DWSD. (Am. Compl., ¶ 39).

From 2009 to April 2013, Wright intensely lobbied the Governor, Treasurer Andrew Dillon, and Flint's Emergency Managers, to financially commit the predominantly African American city of Flint to the project. In April 2013, Defendants Snyder and Dillon authorized the KWA proposal as an alternative to water provided by the DWSD. (Am. Compl., ¶ 49). The anticipated completion date for the KWA project was October 2016. (Am. Compl., ¶ 51).

Once the Governor approved the KWA project, state and local public officials were required to devise a plan ("Interim Plan" or "Interim Period") to deliver water to the KWA communities during construction. (Am. Compl., ¶ 51). The Interim Plan devised provided that the predominantly African American community of Flint would drink the contaminated Flint River water as its primary drinking source while the surrounding predominantly white communities would remain with the clean DWSD water. The Governor's own Task Force has described this decision to be a "case of environmental injustice."[14]

The Governor and Treasurer Dillon participated in the decision to permit the predominantly

[14] Task Force Final Report, Exh. A to Am. Compl., p 54.

white communities continue with DWSD water while switching the people of Flint to use the polluted Flint River to ensure the success of the favored KWA project. This option was attractive to Defendants because the money saved by using the "free river water" would be used by Flint's Emergency Manager for the necessary upgrades to the Flint Water Treatment Plant which had been dormant for 50 years. (Am. Compl., ¶ 48-54). The Governor and Dillon approved this option even though they knew that the use of the Flint River as a primary drinking source was rejected in 2011 as "dangerous and unsafe" and that it would likely remain unsafe during the Interim Period. (Am. Compl., ¶¶ 40-41, 52-53, 57-58). By the time the Interim Plan was to be implemented in April 2014, the Water Treatment Plant was not ready to cleanse the toxic Flint River water. (Am. Compl., ¶ 57, n.4). Indeed, Attorney General Schuette has since criminally charged MDEQ employee Stephen Busch with criminal misconduct in office "by authorizing a permit to the Flint Water Treatment Plant knowing that the [ ] Plant was deficient in its ability to provide clean and safe drinking water" for the citizens of Flint.[15]

B. Defendants' Switch to Flint River Water Led to a Series of E. Coli, Fecal Coliform and TTHM Events that Exceeded State and Federal Water Quality Standards. On Each Occasion, the Issue Was Reported to the Public, the Matter Reportedly "Fixed" and the Advisory Lifted.

After the switch to Flint River water, citizen complaints about contaminated water were rampant. Many Flint water users reported that the water was making them ill. (Am. Compl., ¶¶ 61-62, n. 6-7). Thus began a series of events where: 1) problems with Flint's water were reported to the public, 2) warnings were issued to not drink the water, and 3) the warnings were lifted as the problem was reportedly fixed.

As set forth in State Defendants' Application, in August 2014, elevated levels of fecal

[15] Exhibit 4 at 9, Criminal Indictment of Stephen Busch.

coliform and E. coli bacteria were detected in the water and the MDEQ issued a "boil water advisory" instructing Flint residents not to drink the water. (State Def App, p 6). The advisory warned that "microbes in these wastes can cause diarrhea, cramps, nausea, headaches, or other symptoms."[16] The notice advised that "We are increasing our chlorine levels and flushing the system. We will inform you when tests show no bacteria and you no longer need to boil your water. We anticipate resolving the problem within a few days." Per the instructions in the advisory, the issue was addressed and the advisory lifted on August 20. *Id.* A second E. coli exceedance occurred on September 5, 2014. *Id.* Again, the issue was addressed and the advisory lifted on September 9. *Id.*

The City's continued use of chlorine to address these intermittent bacteria exceedances led to a different problem: creation of a byproduct, total trihalomethane ("TTHM"). (Am. Compl., Exh. A, App V, p 7). On January 2, 2015, at MDEQ's instruction, Flint notified its residents that Flint had exceeded TTHM levels for the previous year. (Am. Compl,. Exh. A, App V, p 8). Flint hired an engineering firm, Veolia, to address the exceedances that had been experienced. On March 12, 2015, Veolia issued a report which concluded that Flint water met state and federal standards for TTHM control. (Am. Compl., Exh. A, App V, p 10).

All told, there were four separate water quality events in 2014 that exceeded state and federal water quality standards which were identified, reported to the public and for which Flint reportedly returned to compliance:

- The August 15, 2014 E. coli and Fecal Coliform bacteria exceedance. Returned to compliance reported on August 20;
- The September 5, 2014 E. coli bacteria exceedance. Return to compliance reported on September 9;
- The September 7, 2014 expanded area E. coli bacteria exceedance. Return to

[16] *See,* boil water advisory on Attorney General Bill Schuette's website, *available at* https://www.michigan.gov/documents/ag/Boil_Water_Warning_8.15.14_527087_7.pdf

compliance reported on September 9; and

- The 2014 TTHM exceedances, reported to the public on January 2, 2015. Compliance reported on March 12, 2015.

Throughout this time, residents complained that the water was making them ill. (Am. Compl., ¶¶62, 77). In each of these reported events, the public was given notice and informed when the exceedances of state and federal water quality standards had ended.

C. Defendants Failed to Timely Require Corrosion Control to Prevent Lead Contamination in Flint Water, Causing Massive Corrosion Throughout the System, And Then Concealed Elevated Lead Contamination in Water and Blood From the Citizens of Flint.

In stark contrast to the public reports that issued to Flint's citizenry for exceedances of water quality standards for E. coli and fecal coliform bacteria and TTHM, Defendants caused, were aware of , and *concealed*, elevated lead contamination in the water (and blood of children) from Flint until late September or October 2015. (Am. Compl., ¶¶ 64 n. 8, 81 n. 20, 83, 85-90).

1. State Defendants allowed untreated Flint River Water to corrode the entire Flint water distribution infrastructure in violation of the Lead and Copper Rule.

The federal SDWA's Lead and Copper Rule ("LCR") "requires public water systems to minimize lead and copper levels in drinking water by controlling corrosion in the distribution system, which is achieved by implementing corrosion control treatment (CCT)."[17] Prior to the switch to the Flint River, MDEQ was required to assure that the City use corrosion control to prevent lead from leaching out of the pipes in Flint. Detroit had treated the water with orthophosphate as a corrosion inhibitor before the switch, and it was reasonable to assume that the Flint River Water, ***which was more corrosive than the Detroit water,*** would require the same.

But MDEQ failed to require corrosion control for the more corrosive Flint River water and, instead, simply required two rounds of six month testing – reducing the City of Flint's residents to

[17] Task Force Final Report, Exh. A to Am. Compl., p 50.

the status of "guinea pigs" as the water they were drinking was ***monitored*** for safety – instead of being ***treated*** for safety. In its statement of facts, State Defendants state that the LCR "requires water suppliers to evaluate new water sources, such as the Flint River, for two consecutive, six-month periods to determine what types of treatment the supplier should implement for minimizing lead." (State Def App, p 6). The Governor's Task Force recognizes that it was incorrect to merely require monitoring for a year after the water switch. As the Task Force explained, "[a] critical element of that treatment – corrosion control, as required under EPA's Lead and Copper Rule (LCR) – ***was (incorrectly) determined by MDEQ not to be required immediately***; instead, Flint could complete two, six-month monitoring periods and MDEQ would then determine whether corrosion control was necessary." (Am. Compl., Exh. A, p 16).

2. *By 2015, MDEQ was aware – yet concealed from the public – widespread corrosion leading to elevated levels of lead in drinking water.*

By 2015, MDEQ officials became aware of widespread corrosion from the untreated water, leading to increased lead contamination. On January 21, 2015, State officials, recognizing the toxicity of the Flint River water, ordered drinking water coolers to be installed in State buildings operating in Flint. (Am. Compl. ¶ 71, n. 14). By January 29, 2015, State officials recognized (in an internal email) that the public health crisis was caused by the corrosion of the entire infrastructure of the Flint water system. (Am. Compl., ¶73). They fraudulently concealed the information from US EPA and the public in a manner that has since been criminally charged by the Michigan A.G.

In January 2015, Flint homeowner Ms. LeeAnne Walters informed EPA that she and her family members were becoming physically ill from exposure to Flint water. (Am. Compl., ¶75) Subsequent test results on February 25, 2015, revealed that lead levels in Ms. Walters[18] water were

[18] The mere fact that Ms. Walters' home exhibited elevated levels of lead does not mean that all homes in Flint exhibited such levels. Indeed, representatives of the state characterized Ms.

104 parts per billion, nearly seven times over the federal and state limit of 15 parts per billion. (Am. Compl., ¶80, fn.19 and Exh. B, p 9). Miguel Del Toral, an employee at US EPA, suspected that these high lead levels were caused by corrosion in the Flint system and asked MDEQ officials whether Flint was using phosphates as a corrosion control inhibitor. (Am. Compl., ¶81, fn.20).

On February 27, 2015, MDEQ's Stephen Busch falsely advised Del Toral that the City was using corrosion control, knowing that the statement was false. (Am. Compl., ¶82). Mr. Busch has since been criminally charged by the A.G. for making the false statement. The criminal complaint charges Busch with misconduct in office for "willingly and knowingly misleading federal regulatory officials in the [EPA], including but not limited to Miguel Del Toral."

On March 5, 2015, the Governor and officials in the Governor's office realized that they had a massive public health emergency, which probably included widespread lead poisoning on their hands, and began discussing distributing water filters to Flint water users. These public officials took no action to warn or otherwise protect Plaintiffs and the putative class, and continued to conceal the true nature, extent and severity of the public health crisis. (Am. Compl., ¶¶ 92-95, nn. 22-23).

On April 23, 2015, Del Toral again communicated with MDEQ, and asked whether Flint was using corrosion control treatment or "CCT". (Am. Compl., Exh. B, p11). The following day, MDEQ officials reversed themselves on Busch's earlier misrepresentation that corrosion control was in place and communicated back that ***no corrosion control was in place*** for the Flint system. *Id.* Del Toral shared with colleagues at EPA that it was "very concerning given the likelihood of lead service lines in the City."

Walters' elevated lead levels as an "isolated incident" and pointed to system-wide numbers which (fraudulently, as it turns out) demonstrated compliance with the federal 15 ppb threshold.

On June 24, 2015, Del Toral prepared an internal memorandum entitled "High Lead Levels in Flint Michigan-Interim Report". On the following day, Del Toral wrote an internal email with respect to the elevated lead in Flint water at EPA stating:

> I understand that this is not a comfortable situation, but the State is complicit in this and the public has a right to know what they are doing because it is their children that are being harmed.

(Am. Compl.,¶ 87). Del Toral further warned that the failure to inform Flint water users of the elevated lead levels was "bordering on criminal neglect." (Am. Compl.,¶ 88). Throughout this time period, as Governor Snyder's Task Force found, "EPA tried to convince MDEQ by persuasion and forthright referencing to the LCR that Flint needed to add CCT (as DWSD had been doing for decades). However, MDEQ was entrenched in its (incorrect) position that two, six-month monitoring periods are allowed before a decision on CCT is required." (Am. Compl., Exh. A, p 50). Ultimately, the A.G. charged Stephen Busch with a criminal violation of the MSDWA because he "did cease the utilization of optimal corrosion control treatment at the Flint Water Treatment Plant after the Plant switched to the Flint River as a water source and/or did refuse to mandate optimized corrosion control treatment at the Flint Water Treatment Plant. . . " *See* Exhibit 4 at 10.

On July 10, 2015, MDEQ official Brad Wurfel, in an effort to conceal the public health crisis, appeared on public radio stating that Flint water was safe and that it was not causing "any broad problem" with lead leaching into residential waters. Parents, worried about the lead poisoning of their children demanded answers from Wurfel. He told the concerned parents, "[l]et me start here—anyone who is concerned about lead in the drinking water can relax." Wurfel, at the time he made the statement, knew his statements were false and he deliberately misled the public about the seriousness of the crisis. (Am. Compl.,¶ 93).

a) MDEQ officials falsified water samples to conceal Flint's noncompliance with the regulatory threshold for lead.

At the same time MDEQ concealed its failure to implement corrosion control and then, after being caught in its deception, resisted implementation of corrosion control, it also falsified water quality samples to conceal the true levels of lead contamination in city water. This made the failure to implement corrosion control all the more insidious, because it concealed the resulting elevated lead levels caused by the lack of corrosion control from the public and forestalled public recognition of the emerging crisis.

State Defendants' Application states that the first six-month round of water sampling results were published on December 31, 2014, and showed a six parts per billion (ppb) level for lead, "indicat(ing) lead levels in Flint were below the 15-ppb action level." (State Def App, p 8). State Defendants' Application further states that by "July 27, 2015, the DEQ had concluded that Flint's second round of lead testing showed that lead levels had risen to 11 ppb, which was still below the federal action level of 15 ppb." (State Def App, p 12).

Both of the lead levels reported in State Defendants' Application (and submitted to this Court for their purported truth) are false. The Governor's Task Force stated:

> The first 6-month monitoring period results showed the 90th percentile to be 6 ppb, and the second 6-month monitoring period results showed the 90th percentile to be 11 ppb. Both of these outcomes fell beneath the lead action level of 15 ppb. ***Unfortunately, because the flawed sampling pool and sampling techniques, the extent of the lead problem was under-reported.***
>
> (Amend. Compl., Exh. A, p 51)(emphasis added).

Attorney General Schuette has since criminally charged MDEQ employee Adam Rosenthal with criminal misconduct in office "by willfully and knowingly participating in the manipulation of testing results for a state mandated lead and copper report; and falsely reporting to the City of Flint Water Treatment Plant that the 90th percentile of the results of water monitoring for lead was below the federal action level of 15 parts per billion. . ." Schuette has also criminally charged

MDEQ employee Liane Shekter-Smith with "willfully and knowingly misleading public health officials and others regarding the existence of lead in the drinking water of the City of Flint…" And Schuette criminally charged MDEQ employee Stephen Busch with tampering with evidence, manipulating the collection of water samples in violation of the MSDWA. Exhibit 4 at 1, 3, 9-10.

b) MDHHS officials concealed increased levels of blood in Flint children.

Even more insidious than MDEQ officials' falsification and concealment of elevated levels of lead in water was the concealment by MDHHS of an alarming increase of lead in the blood of Flint's children. By July 2015, Director Lyon knew of the elevated blood lead levels of Flint's children. (Am. Compl., ¶99-100). However, Lyon failed to order that any action be taken to warn the public or to remediate the public health crisis created by the actions and inactions of state and Flint employees and officials. His concealment of these dangers exacerbated the public health crisis underway. (Am. Compl., ¶¶ 99-101, n.25). Ultimately, Attorney General Schuette criminally charged three DHHS employees (Corinne Miller, Robert Scott and Nancy Peeler) with misleading or concealing increases in levels of lead in children's blood. *See* Exhibit 4 at 6-8.

c) Defendants' fraudulent concealment of elevated lead in water and blood was exposed in August through October of 2015.

In August 2015, Professor Marc Edwards of Virginia Tech, determined that there was serious lead contamination of the Flint water system and stated that the people of Flint faced a major public health emergency. (Am. Compl., ¶¶ 97). Whereas the MDEQ had misled the public and claimed that Flint's water levels tested at below the federal limit of 15 ppb, Edwards' more exhaustive sampling demonstrated that the actual level of lead in Flint water was at least 25 ppb, and more than 100 samples had lead over 5 ppb. (Am. Compl., Ex.A, p 51). Also in the summer of 2015, Dr. Mona Hanna-Attisha, using data available to her from Hurley Hospital, observed a similar spike in the percentage of Flint children with elevated blood lead levels from blood drawn

in the second and third quarter of 2014. She published her study in an effort to alert the community about the health risks associated with drinking Flint River water. (Am. Compl., ¶102).

Even after these findings became public, Bradley Wurfel, then Director of Communications for MDEQ, continued to promote the cover-up of the health crisis and attacked both Edwards and Hanna-Atisha, as well as EPA employee Miguel Del Toral. (Am. Compl., ¶¶ 97-8,102-107).

On October 8, 2015, the Governor recognized that he could no longer pretend that the water from the Flint River was safe or that water filters could be a long term solution to the State created emergency. He finally ordered Flint to re-connect with the Detroit water system. The re-connect took place on or about October 16, 2015. (Am. Compl., ¶¶ 108-109).

D. Similar to Their Concealment of Issues Associated With Lead Poisoning, State Defendants Also Concealed Deadly Exposure to Legionella.

Like the concealment of exposure to elevated lead levels, State Defendants were aware of, and concealed that, Flint water had caused a deadly outbreak of Legionella in 2014 and 2015. (Am. Compl., ¶¶65,67-9,72,76,84,99-101). On December 13, 2015, the Attorney General alleged that Robert Skidmore died of Legionella disease associated with Flint water and Mr. Skidmore is one of dozens of people who died or were seriously ill in a spike of Legionella disease coinciding with the introduction of Flint River water. The A.G. has charged MDHHS Director Nick Lyon with involuntary manslaughter for "allegedly participat[ing] in covering up the source of Genesee County's Legionnaires' Disease outbreak by repeatedly attempting to prevent an independent researcher from looking into the cause of the outbreak."[19] Also charged were Chief Medical Executive Eden Wells, MDEQ's Stephen Busch and Liane Shekter-Smith and Emergency

[19] *See*, Attorney General Press Release *available at* https://www.michigan.gov/ag/0,4534,7-359-82917_78314-423854--,00.html

Manager Darnell Early.

E. Defendants Exacerbated the Harm to the Public by Knowingly Permitting State Agencies to Conceal the True Threat to Public Health and Delaying Implementation of an Effective Remedial Plan – Events that Took Place Within Six Months of Plaintiffs Filing Their Original Complaint.

State Defendants made false and misleading statements to the public about the health crisis and neither the Governor's office nor Director Lyon's office nor the MDEQ took steps to correct the misinformation. Indeed, the Michigan Attorney General has criminally charged fifteen (15) (and counting) separate employees from the MDEQ and MDHHS, and gubernatorially appointed emergency managers and alleged a criminal concealment of the crisis. (Am. Comp., ¶ 114).[20] Many of the acts of concealment occurred within six months of the filing of the complaint in this case on July 15, 2016. (Am. Comp., ¶95-98, 102-7); *see also* Exhibit 4 at 1, 3, 4, 5 and 7 (criminal charges alleging criminal concealment through August 2015).

In addition to a spike of Legionella deaths and illnesses, other deleterious health effects have unfortunately become well documented in the years following the crisis. Published academic analysis of Flint in the aftermath of the water crisis have demonstrated a statistically significant increase in miscarriages and a reduction in fertility that coincides with the introduction of Flint River water in the city. Coinciding with the introduction of Flint River water, "fetal death rates in the city increased by 58%, fertility rates in Flint decreased by 12% and overall health at birth decreased (from scarring) compared to other Michigan cities."[21]

F. Proceedings Below.

[20] *See also*, https://www.michigan.gov/ag/0,4534,7-359-82917_78314---,00.html

[21] *See* joint publication by University of Kansas and West Virginia University, "The Effect of an increase in Lead in the Water System on Fertility and Birth Outcomes: The Case of Flint, Michigan," at 1, by professors Daniel S. Grossman and David J.G. Slusky, available at: http://www2.ku.edu/~kuwpaper/2017Papers/201703.pdf

Plaintiffs first commenced this action with the Court of Claims on January 15, 2016,[22] on behalf of themselves and the tens of thousands of Flint water users. Plaintiffs amended their Complaint on May 25, 2016, and Defendants filed their respective motions for summary disposition under MCR 2.116(C)(4), (C)(7), and (C)(8) on June 24, 2016.

On October 26, 2016, the Court of Claims issued a 50-page opinion, **Exhibit 2**, denying Defendants' motions regarding Plaintiffs' compliance with the notice requirement found in MCL 600.6431(3) and ruled that the substantive-due-process doctrine under the Due Process Clause of the Michigan Constitution gives rise to a tort claim for damages against both the state and individuals in their official capacities in avoidance of governmental immunity. The court also concluded that emergency managers are state officials within the jurisdiction of the Court of Claims. Finally, the court ruled that Plaintiffs had failed to state either a state-created danger claim or a fair-and-just-treatment-clause claim, but had adequately pleaded both a bodily integrity claim and an inverse condemnation claim.

Subsequent to the issuance of the COC Opinion in December of 2016, Attorney General Schuette brought criminal charges against additional employees, including Emergency Managers Darnell Earley and Gerald Ambrose. The criminal charges included a "misconduct in office" charge that alleged, *inter alia*, that the Emergency Managers intentionally misled the citizens of Flint by "falsely stating that the Flint Water Treatment Plant was equipped to produce safe water," "allowing the Flint Water Treatment Plant to produce water to the public despite knowledge that the plant was not ready for use," and "authorizing dissemination of information to the general public that was false and misleading in regards to the safety and portability of the Flint River

[22] The Court of Appeals' decision makes reference to Plaintiffs filing their initial complaint on January 21, 2016, (COA Opinion, p 8), when in fact Plaintiffs filed on January 15, 2016. *See* timestamp of January 15, 2016 located on page 1 of complaint, attached as **Exhibit 6**.

water…" (*See* Criminal Indictments, **Exhibit 4** at 15).

Between November 4, 2016 and February 15, 2017, State Defendants and Emergency Managers filed several applications for leave to appeal. The Court of Appeals granted those applications and consolidated them with State Defendants' appeal concerning the statutory notice provision and Plaintiffs' Constitutional claims. Plaintiffs responded to the applications for leave to appeal and subsequent briefs and oral argument was held on January 9, 2018. On January 25, 2018, in a decision noted for publication, the Court of Appeals affirmed the Court of Claims. Defendants filed their applications for leave to appeal on March 8, 2018 and Plaintiffs now respond.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT SUMMARY DISPOSITION WAS PREMATURE REGARDING PLAINTIFFS' COMPLIANCE WITH THE COURT OF CLAIMS' NOTICE PROVISION MCL 600.6431 [23]

In its denial of Defendants' request for summary disposition relating to notice,[24] the Court of Claims held that Defendants' request was "at best" premature for two separate and distinct reasons. First, relying on *Rusha v Dep't of Corrections*, 307 Mich App 300, 312 (2014), *lv den* 498 Mich 860 (2015), the court concluded that "at a minimum, . . . there are fact questions that if answered favorably to plaintiffs, would, under the established [harsh and unreasonable] exception recognized by existing caselaw, justify relieving [Plaintiffs] from the requirements of MCL 600.6431(3)" (COC Opinion, p 12) (quotation marks and citation omitted); and second, even if MCL 600.6431 applied without application of the harsh and unreasonable exception, "[s]ome

[23] MCL 600.6431(3) states that a 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."

[24] Defendants moved for summary disposition below pursuant to MCR 2.116(C)(4) and (C)(7), arguing that for each of Plaintiffs' claims, there is only a single actionable "event" which gave "rise to the cause of action" pursuant to MCL 600.6431(3).

injuries suffered by some [P]laintiffs or putative class members may thus be actionable, while other injuries experienced by those or other [P]laintiffs or putative class members may not be actionable, depending on the various factors giving rise to the cause of action." (COC Opinion, p 13) (emphasis added)[25].

The Court of Appeals agreed, holding that "at a minimum, summary disposition [ ] is premature. Plaintiffs have alleged personal injury and property damage sustained as a result of defendants' allegedly knowing and deliberate decision to supply plaintiffs with contaminated and unsafe drinking water. Although defendants assert that plaintiffs' causes of action could only have arisen on the date of the physical switch, our Legislature has not defined claim accrual so narrowly." (COA Opinion, p 8).[26] As an alternative basis for upholding Judge Boonstra's decision, the Court of Appeals also recognized Plaintiffs' argument that the fraudulent concealment tolling provision contained in MCL 600.5855 may be applied to toll the obligation to provide notice of suit under MCL 600. 6431 in order to rectify an internal conflict within the Court of Claims statute regarding the availability of fraudulent concealment tolling. (COA Opinion, pp 14-17).

For the reasons outlined below, this Court should deny Defendants' Applications.

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[25] In light of these circumstances and the court's review of the allegations in Plaintiffs' Amended Complaint, the Court of Claims rejected Defendants' argument that the six-month notice period set forth in MCL 600.6431(3) began to run on ***one*** particular day in either June of 2013, or on April 25, 2014, for ***all*** putative class members. As a result, the Court of Claims properly concluded that, *at a minimum*, material fact questions exist with regard to whether Plaintiffs complied with the notice requirement such that summary disposition would be premature. (COC Opinion, p 13).

[26] "Regardless of which date is selected,. . . [t]he Court is unpersuaded by defendants' arguments. Were the Court to accept defendants' position, it would have to find that [P]laintiffs' claims are barred because they should have filed suit (or notice) at a time when the state itself was stating that it lacked any reason to know that the water supply was contaminated." (COC Opinion, p 9).

A. Under Defendants' Unduly Narrow Construction of the Notice Requirements in MCL 600.6431, Plaintiffs' Amended Complaint and the Record Generate Material Fact Questions That Render Summary Disposition Inappropriate.

Even under the narrowest of readings, without application of either the harsh and unreasonable exception applied in *Rusha* or the tolling provided by fraudulent concealment under MCL 600.5855, Defendants' position that all members of the putative class – as a matter of law – must have filed their notice of suit within six months of April 25, 2014 (or by October 25, 2014) is patently erroneous. It ignores: 1. questions of fact concerning when Plaintiffs were injured, 2. multiple additional events (many of which occurred within six months of the filing of Plaintiffs Complaint) that also give rise to Plaintiffs' claims, and 3. established case law concerning when causes of action accrue.

1. *An event gives rise to the cause of action under MCL 600.6431 when a plaintiff is harmed, which is a question of fact.*

For purposes of determining when an "event" gives "rise to the cause of action", courts have analyzed the Court of Claims notice provision with reference to the accrual provisions in Michigan's Revised Judicature Act. MCLA 600.5827 provides: "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." "Accordingly, a cause of action for a tortious injury accrues when all the elements of the claim have occurred and can be alleged in a proper complaint." *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 512(2007).

"For purposes of MCL 600.5827, the term "wrong" refers to the date on which the plaintiff was harmed by the defendant's act, not the date on which the defendant acted negligently because that would permit a cause of action to be barred before any injury resulted." *Schaendorf, Id* (citing *Chase v Sabin*, 445 Mich 190, 195-196; 516 NW2d 60 (1994)) The Michigan Supreme Court has held that the term "wrong" as used in the statute "is done when the plaintiff is harmed rather than

when the defendant acted." *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 388 (2007). *See also, Henry v Dow*, 319 Mich App 704, 733(2017) *rev'd in part* 905 NW2d 601(Mich. 2018) (Gadola dissenting opinion[27]) (citing *Trentadue*).

It is impossible to conclude that each class member was harmed on April 25, 2014 – as proposed by Defendants. Defendants' position ignores, for example, that thousands of putative class members could not have been harmed or possess a claim as of April 25, 2014, because ***they were not yet born***. MDHHS' data demonstrates that there were 1,680 children born in the City of Flint in 2015 alone.[28] These children are among the most damaged members of the putative class as they would have been exposed *in utero* to elevated levels of lead, when their developing brains were most susceptible. Yet, Defendants' position is that – as a matter of law – the substantive due process claims for these 1,680 infants are barred if they did not file a notice of intent to sue by October 25, 2014 – ***when they were either fetuses or not yet conceived.*** Similarly, under Defendants' position, class members like Mr. Skidmore, who died of Legionella disease in December 2015, would have had to file their notice of intent to sue over a year ***in advance*** of their

[27] Contrary to Defendants' assertions, (State Def App, p 25; EM Dep App, pp 8-9), this Court's adoption of Judge Gadola's dissenting opinion in *Henry v Dow* is consistent with both the COC and COA decisions, as he acknowledges that the period of limitations began to run when plaintiffs were *harmed*, *i.e.*, "when the dioxin dumped into the river by defendant *reached* plaintiffs' properties or otherwise *reached a particular plaintiff*." *Henry*, 318 Mich App at 734-735 (emphasis added). As stated herein, there were several actionable tortious events, which occurred separately and affected *particular* plaintiffs at different times. State Defendants undermine their own position, and create a question of fact, when they assert that levels of lead in Flint water were ***below*** 15 ppb, the federal action level, through July 27, 2015. (State Def App, p12). If the Court were to accept the State Defendants' allegation as true, it means that Flint residents were ***first*** harmed by lead levels in excess of the federal limits in August 2015, when lead levels at or above 25 ppb were revealed by Marc Edwards – less than six months before the filing of this Complaint.

[28] *See* Kids Count Data Center, citing data from MDHHS, Division for Vital Records and Statistics, *available at* https://datacenter.kidscount.org/data/tables/1669-total-births?loc=24&loct=3#detailed/3/58,3675-3687,3689-3743/false/573,869,36,868,867/any/3545

death. The Court of Claims notice provision does not require this level of clairvoyance about compensable injuries that have yet to occur.

The notice statute requires that plaintiffs file either their notice, or the lawsuit itself, within six months of when their cause of action accrued. Accrual occurs when the plaintiff is harmed. And when each plaintiff is harmed is a question of fact. Defendants have no factual basis for proposing that Plaintiffs' *physical injury* claims accrued at the time of their proposed premature early accrual dates, and the time that such physical injury accrued is a question of fact.[29]

Similar questions of fact exist with respect to the accrual date of Plaintiffs' inverse condemnation claim. "An inverse or reverse condemnation suit is one instituted by a landowner whose property has been taken for public use without the commencement of condemnation proceedings." *Electro-T'ech, Inc v H F Campbell Co*, 433 Mich 57, 88-89 (1989) Generally, a plaintiff alleging a de facto taking or inverse condemnation must establish (1) that the government's actions were a substantial cause of the decline of the property's value, and (2) that the government abused its powers in affirmative actions directly aimed at the property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537 (2004). Even a fractional loss of the value or use of property by an act of government, which directly affects it, constitutes an appropriation. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 190 (1994).

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[29] State Defendants' argue that the Amended Complaint proposes a class definition beginning with exposure to Flint River water on April 24, 2014, and that consequently, the suit was untimely. (State Defendants' Appl. Pp 24-25). Defendants rely too heavily upon Plaintiffs initial proposed class definition, which is pleaded without the benefit of fact discovery. Class definitions typically evolve after class discovery. Subclasses may be proposed. And "modification of the class definition, or use of subclasses is generally preferred." *In re Whirlpool Corp Front-Loading Prod Litig*, 302 FRD 448 (2014); See also, *Henry v Dow*, 484 Mich 483, 507-9 (2009)(recognizing the ability to bifurcate class proceedings or decertify certain members of the class based upon "how other issues in the case develop…")

Although Michigan case law addressing when a cause of action for inverse condemnation accrues is scant, federal jurisprudence is instructive. In *United States* v *Dickinson*, 331 US 745, 749 (1947), the US Supreme Court addressed a situation where Congress, in 1935, authorized the construction of a dam on the Kanawha River in West Virginia that would raise the water level on the upstream portion of the river and thus "take" upstream private property by way of inundating it with water and imposing a navigational servitude thereon. Despite the clear consequences of building the dam, the federal government did not commence condemnation proceedings as to the upstream properties. When upstream landowners brought takings claims about eight years later, the government argued that those claims were barred by the applicable six-year statute of limitations, which the government argued began to run not later than the time at which the dam become fully operational.

The US Supreme Court rejected the government's formulation of the relevant limitations period. The Court explained that, when the full scope of the consequences of governmental action is uncertain, the statute of limitations for an inverse condemnation claim does not start to run until conditions have stabilized. *Dickinson* at 331 US 749. In Flint, conditions had not stabilized until, at the earliest, October of 2015. Plaintiffs allege that "Governor Snyder belatedly and publicly recognized that Flint residents were potentially exposed to unsafe levels of lead in October 2015. Once the crisis became public, the value and marketability of property within the City of Flint was immediately and significantly impaired. Lenders became hesitant to authorize loans for purchase of realty within the City and property values plummeted." (Am. Compl., ¶113) Defendants do not challenge the allegation that the government caused a substantial decline in property value (*Hinojosa*'s first element in a claim for inverse condemnation) until October of 2015 when property values and marketability declined. The Plaintiffs have similarly alleged damage to the

physical integrity of plumbing within the businesses and homes of Flint residents and that "plumbing, water heaters and service lines were rendered unsafe ***even after*** the corrosive water was discontinued." (Am. Compl., ¶150). Defendants cannot establish that, as a matter of law, these conditions had stabilized within six months of April 25, 2014. As such, Defendants' assertion that the notice and suit are untimely also contains material questions of fact. *Silverstein v Detroit,* 335 F Supp 1306 (ED Mich, 1971) (holding that, even though "taking" first started in 1957 when the plaintiffs lands were approved for condemnation, the plaintiffs' cause of action for inverse condemnation did not start to accrue until 1963, when the wrongs committed by the city had stabilized).

As to both their personal injury and property claims, the parties contest an issue of material fact which may not be settled by way of summary disposition.

2. *Defendants attempt to conflate* ***multiple*** *tortious events into* ***one single tortious event*** *is misguided.*

Defendants also attempt to transmogrify ***multiple events,*** as alleged in Plaintiffs' Amended Complaint and identified in the record, into a ***single event*** so as to immunize independently tortious conduct that occurred after April 25, 2014.[30] But the record establishes that there were separate

[30] If one were to accept Defendants' logic and apply the notice provision to the first of multiple tortious acts in which they engaged, then every tortious act in which they engaged that occurred more than six months after the first tortious act would be immunized, no matter how vile the conduct. The Court of Appeals rejected a similar argument in a statute of limitations context in *Dep't of Environmental Quality v Gomez*, unpublished opinion per curiam of the Court of Appeals, issued November 17, 2016 (Docket No. 328033) 2016WL 6809542 ("the fact that some of plaintiff's claims accrued outside the applicable limitation period does not time-bar all of the plaintiff's claims") (attached in **Exhibit 5**). The *Gomez* Court upheld the trial court's determination that *each* alleged violation was a *separate* claim with a *separate* time of accrual. Under the holding in *Gomez*, each day of poisoning of Flint's citizenry between April 25, 2014 and October 16, 2015 is a separate "event" for purpose of triggering the Court of Claims notice requirement.

incidents, and separate conduct, that were separately actionable.[31] For example, Defendants point to the E. coli and fecal coliform outbreaks that occurred in August and September of 2014, as well as the subsequent TTHM exceedances, to establish that Plaintiffs were aware of their cause of action and that their notice was untimely.[32] (State Def App, pp 6, 8-10). Yet the E. coli and TTHM outbreaks were over before much of the tortious conduct associated with lead and Legionella contamination even began. These were separately actionable events, occurring at separate times.

Judge Boonstra understood that discovery was appropriate to address this issue, holding:

Nevertheless, even if strict compliance with the notice requirements were

[31] Although they appear to abandon the argument in these Applications, Defendants attempted, in the lower courts, to avoid liability for subsequent acts and events by characterizing them as mere "continuing violations" of earlier actions. It strains credulity to suggest that falsification of lead samples in water in August of 2015 – an independently tortious act – is a mere "continuing violation" associated with an entirely independent E. coli contamination outbreak that occurred a year before. In doing so, Defendants attempt to impermissibly extend the holdings in *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263 (2005) and *Terlecki v Stewart*, 278 Mich App 644 (2008) to argue that the actions of state governmental actors that occurred within six months of the filing of the complaint were mere continuations of prior actions and somehow immunized the state actors from civil liability. But Michigan's rejection of the continuing violation doctrine as set forth in *Garg, Terlecki* and other cases extends nowhere near as far as Defendants contend. The Supreme Court in *Garg* (an employment action) took pains to link the accrual of a cause of action with "*each* adverse employment act…" that was alleged in Plaintiffs' complaint. *Id* at 282. And, although the court identified some claims as untimely due to the statute of limitations, it recognized that other events that had been pled within the applicable statute of limitations survived the continuing violation challenge. *Garg, id* at 286 "[P]laintiff's claims of retaliatory discrimination arising from acts occurring before June 21, 1992, are untimely and cannot be maintained. Without these untimely acts, plaintiff's claim is limited to acts occurring five to eleven years after she filed her grievance."

[32] Defendants also improperly make reference to an earlier action brought by the Coalition for Clean Water ("CCW"). (EM Def App, pp 10-11; State Def App, p 29). The CCW case was dismissed after representations were submitted by the City of Flint that the MDEQ had determined that "the City of Flint is in compliance with all applicable laws and regulations." As detailed in subsequent criminal charges brought by the Attorney General, the statement that the City of Flint was "in compliance with all applicable laws and regulations" was false. Indeed, on July 29, 2016, Attorney General Bill Schuette filed charges against MDEQ employees for criminally falsifying water quality reports upon which the City of Flint's "compliance" was ostensibly based. Plaintiffs' proposed a Supplemental Brief Regarding CCW Complaints Against the City of Flint, filed January 22, 2018 in *Mays v Snyder*, Michigan Court of Appeals No. 33555 at Docket No. 73 to address this issue. It was not allowed.

> required, the Court concludes that summary disposition would still be premature. Plaintiffs acknowledge that not every injury suffered by every user of Flint water is necessarily actionable, depending on when the actionable event(s) occurred, when each user suffered injury, and when the claim(s) of each accrued, relative to the filing of notice (or of the claim). Some injuries suffered by some plaintiffs or putative class members may thus be actionable, while other injuries experienced by those or other plaintiffs or putative class members may not be actionable, depending on the various factors giving rise to the cause of action. Under such circumstances, at a minimum, material fact questions exist with regard to whether (and which) plaintiffs complied with the notice requirement, and as to which claim(s), such that summary disposition on all counts of plaintiffs' first amended complaint, on that ground, would be inappropriate at this time. The record is simply insufficiently developed for this Court to determine, at this juncture, which claims of which plaintiffs or putative class members may not be viable as not timely filed within the six-month notice provision of MCL 600.6431(3).
> (COC Opinion, p 13).

*3. Plaintiffs allege **multiple** events within six months of the filing of their lawsuit.*

Even with the Defendants' unduly narrow reading of the accrual provision and the six-month notice provision, Plaintiffs have alleged ***multiple events*** involving affirmative conduct engaged in by State Defendants within six months of the filing of the complaint that increased the risk of danger to the Plaintiffs and satisfy the Defendants incorrect and narrow interpretation of accrual events as applied to the notice provision in MCL 600.6431(3).

First, and most obvious, between July 15, 2015 and October 8, 2015, the Defendants took no action to require the switch of Flint's drinking water source from the corrosive and toxic Flint River water back to the safe water provided by the Detroit water system in spite of their knowledge that the Flint River-sourced water was toxic. Even the Governor's Chief of Staff documented the deliberate indifference with which Defendants had ignored the public health of Flint's citizenry on July 22, 2015, noting that the critical health issues had been "blown off" by the State Defendants. (Am. Complaint, ¶95). Finally, on October 8, 2015, Governor Snyder ordered Flint to reconnect with the Detroit system. (Am. Complaint, ¶109). The switch occurred on October 16, 2015. (Am.

Complaint, ¶110). Thus, for three months, and even though State Defendants knew the water provided to the Flint citizenry was by that time toxic, Defendants authorized, and even promoted, its continued use in deliberate indifference towards the physical health and welfare of Flint's citizenry.

Second, as detailed, independent reports (from both a Virginia Tech academic expert, a Flint pediatrician and an EPA employee) emerged in late July and August of 2015 noting Flint's growing public health emergency and demonstrating: 1) that Flint's water was corrosive and toxic, and 2) that the levels of lead in Flint children's blood was increasing. (Am. Complaint, ¶ 97, 102, 107). In spite of these developments, State Defendants falsely denied the accuracy of these reports, belligerently discredited the sources, and provided false assurances to the citizenry of Flint that they could continue to drink Flint River-sourced water. (Am. Complaint, ¶¶ 94-107).

Third, the Attorney General himself has pled the existence of criminally actionable events of concealment by state actors of water and blood analyses "through on or about August 2015" in multiple criminal charges filed by the State on July 29, 2016. Each affirmative act of concealment in which Defendants engaged that caused Flint's citizenry to consume more unsafe water is a separately actionable "event" for purposes of applying MCL 600.6431. As Judge Boonstra opined, "(m)atters are further complicated by allegations of affirmative acts undertaken by a variety of state actors between April 25, 2014 and October of 2015, not only to conceal the fact that the tap water was contaminated and posed a threat to the health of all who drank it, but to obfuscate the occurrence of the very event ***or events*** that would trigger the running of the six-month notice period." (COC Opinion, p 11) (emphasis added).

For all of these reasons, questions of fact exist that make it inappropriate to dismiss Plaintiffs' claims on the basis of MCL 600.6431(3), as held by both Judge Boonstra and the

Michigan Court of Appeals.

B. The Court of Appeals Properly Applied the Fraudulent Concealment Tolling Provision Found in MCL 600.5855 as Authorized by the Legislature.

The trial court held that Plaintiffs' allegations were sufficient to overcome summary disposition relating to notice, even without applying fraudulent concealment tolling or the "harsh and unreasonable" exception in *Rusha*. The court did not, however, adopt Plaintiffs' argument that the fraudulent concealment tolling provision found in MCL 600.5855 is applicable to MCL 600.6431(3). (COC Opinion, pp 11-13).[33] The Court of Appeals disagreed and held that the fraudulent concealment tolling provision found in MCL 600.5855 is applicable here to toll the notice provision obligations in MCL 600.6431. MCL 600.5855 provides:

> 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.

This statutory section enables a plaintiff to toll the statute of limitations for a period of two years if a defendant engages in fraudulent concealment of the underlying claim. Plaintiffs allege that Defendants engaged in repeated affirmative actions of fraudulent concealment and exacerbated the public health crisis by intentionally deceiving the public into believing their drinking water from the Flint River was safe. (Am. Compl., ¶¶ 76, 79, 82-84, 93, 96, 98, 101, 103-07, 115-18).

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[33] The Court of Claims and Defendants cite two unpublished opinions, *Brewer v Central Michigan Univ Bd of Trustees*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2013 (Docket No. 31237) and *Zelek v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 16, 2012 (Docket No. 305191). However, neither of these decisions even mentions the fact that the Michigan Legislature expressly authorized application of the fraudulent concealment tolling provision, MCL 600.5822, to the limitations provision set forth at MCL 600.6452. Moreover, "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1).

Defendants contest application of fraudulent concealment to the notice provision based upon two flawed premises: 1. that the Legislature didn't authorize it, and 2. that the Plaintiffs haven't generated a material fact as to whether their claims were fraudulently concealed.[34]

1. *Statutory construction principles require that fraudulent concealment tolling be applied to the notice provision in order to enable the legislature's express application of fraudulent concealment tolling to statutes of limitation.*

The Michigan Legislature expressly imported the fraudulent concealment provision in MCL 600.5822 for application to the Michigan Court of Claims Act. Specifically, MCL 600.6452(2) states:

> 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.

By enacting this section, the Michigan Legislature expressly provides for the fraudulent concealment tolling provision in MCL 600.5855 to be applied (when warranted and appropriately pleaded) to the Court of Claims statute of limitation. No Defendant contests this.

The Court of Claims recognized that the Legislature imported fraudulent concealment tolling into the statute of limitation provisions of the Court of Claims Act, but failed to recognize that this importation also required that fraudulent concealment be applicable to the notice provision. (COC Opinion, p 12 n.4). The Court of Appeals held that the lower court erred by not recognizing the inherent conflict involved when the Legislature expressly imported fraudulent concealment tolling for limitations purposes – but not notice purposes. (COA Opinion, pp 14-17). As a matter of pure logic, ***it is impossible to apply fraudulent concealment tolling – as the***

[34] It would be difficult for Defendants to prevail in such an argument when the Attorney General himself has pleaded *criminal* concealment in parallel proceedings against several state employees (Am. Compl., ¶116) and the Governor has testified before the United States Congress that the facts giving rise to Plaintiffs' constitutional tort claims were purportedly concealed even from him. (Am. Compl., ¶115).

Legislature has expressly instructed **–** for statute of limitations purposes unless one ***also applies it*** to the notice provision.

Put differently, when factual allegations present fraudulent concealment as an available basis to toll a statute of limitations, the Legislature has expressly authorized its application. But under such circumstances, application of fraudulent concealment tolling to the notice provision ***is a condition precedent*** to application of fraudulent concealment tolling to a statute of limitation. If fraudulent concealment is not applied to toll the shorter notice requirement, it will ***never*** be available to toll the longer statute of limitations. The former is a necessary precondition to the latter. And by conceding that the Legislature intended to apply fraudulent concealment to the latter, Defendants' argument that fraudulent concealment is not available to toll application of the notice provision collapses under the weight of its own logical inconsistency.

Defendants argue that the court should nullify the Legislature's directive to apply fraudulent concealment tolling to the Court of Claims statute of limitation provision (MCL 600.6452) because the Legislature failed to also direct that the court should apply fraudulent concealment to the Court of Claims notice provision found in MCL 600.6431. But under Defendants' proposed interpretation of the interplay between MCL 600.6431, MCL 600.5822 and MCL 600.6452(2), the lack of availability of fraudulent concealment tolling for the notice statute will "trump" or nullify the availability of fraudulent concealment as authorized by the other two statutory provisions. No appellate court has reached this conclusion in a published opinion.

This Court has directed that "[i]n such a case of tension, or even conflict, between sections of a statute, it is our duty to, if reasonably possible, construe them both so as to give meaning to each–that is, to harmonize them." *Nowell v Titan Ins Co*, 466 Mich 478, 484 (2002). In honoring

the Legislature's instruction that fraudulent concealment tolling is to apply to the statute of limitations in the Court of Claims as authorized under MCL 600.6452(2), and in keeping with the Supreme Court's instruction in *Nowell* that potentially conflicting statutory sections should be read in harmony, the only way to rectify the conflict between application of the fraudulent concealment tolling provision to the Court of Claims statute of limitation is to also allow fraudulent concealment tolling of the notice provision contained in MCL 600.6431(3).

If a plaintiff's claim has been fraudulently concealed, preventing him or her from timely filing a claim within the three-year statute of limitations period, how can the plaintiff invoke the fraudulent concealment tolling protection expressly afforded by the Legislature if notice of the fraudulently concealed claim must first be filed a mere six months after the claim accrued? To reconcile the Legislature's decision to make fraudulent concealment tolling available for limitations purposes, one must also make it available for notice purposes. Otherwise, the Legislature's express application of fraudulent concealment tolling to the statute of limitations in the Court of Claims Act was a useless nullity. A plaintiff can hardly be expected to comply with the notice provision if the defendants fraudulently conceal underlying facts that would enable the filing of the notice. And if the plaintiff is unable to file the notice, the Legislature's express extension of fraudulent concealment tolling to the underlying statute of limitations is illusory.

2. The limited record in the proceedings below present a question of fact as to whether Defendants fraudulently concealed their cause of action.

Defendants also contend that the limited record presented below forecloses any question of fact on whether Plaintiffs' claims were fraudulently concealed. The Attorney General himself has pleaded criminal concealment of facts which, had they been disclosed, would surely have put an end sooner to the continued use of the Flint River as the drinking water source for

thousands of Flint citizens. For this reason alone, Defendants' position that there is no genuine issue of material fact is ludicrous.

At oral argument in the Court of Appeals, Defendants made reference to new pleadings from two different complaints (neither of which was presented to Judge Boonstra below), to ostensibly "prove" that the Plaintiffs possessed knowledge (or could have) of sufficient facts to plead their claims earlier. Reliance on these new materials for the first time in oral argument with no advance notice to opposing counsel was improper[35]. But even if they were appropriately presented to the trial court, they do not establish as a matter of law that Plaintiffs' claims concerning Legionella and lead poisoning were sufficiently knowable by the Plaintiffs to have been asserted earlier. At best, they demonstrate that Plaintiffs knew about the discrete issues associated with E. coli and fecal coliform bacteria, as well as TTHM. Given the public notices on these topics that had been issued earlier (see discussion *supra* at pp 10-11), this is hardly controversial. But use of the documents to suggest that because some Plaintiffs had known about publicly reported boil water advisories and TTHM exceedances means that they cannot bring suit on criminally concealed lead and Legionella poisoning that occurred in separate incidents is improper.

[35] If Defendants had raised this issue at the trial court, rather than "sandbagging" the materials for Court of Appeals oral argument, Plaintiffs would have had an opportunity to produce countervailing affidavits demonstrating that, for example, they had diligently monitored their own water for lead contamination and found none during the time that Defendants claim they should have filed suit. Such an affidavit could also have demonstrated that lead contamination arose in their homes *at a later point in time*. By waiting to present these issues ***for the first time*** in the Court of Appeals, Plaintiffs were deprived of the opportunity to present a record on these issues in the trial court.

C. The Court of Appeals Correctly Followed its Decision in *Rusha,* which held that the "Harsh and Unreasonable" Exception Prevents the Notice Provision from Unduly Impairing Substantive Constitutional Rights.

1. *Defendants' position that Constitutional torts are only permissible if the Legislature allows them exults the Legislature over the Constitution.*

Throughout their Applications, Defendants rely upon the flawed premise that only the Legislature may decide whether constitutional torts are actionable and, if the Legislature so chooses, it may provide blanket governmental immunity from governmental conduct that violates the Constitution. (State Def App, pp 1-2, 18-19, 23-27; EM App, pp 13, 15).

This is incorrect.

As noted in *Burdette v Michigan,* 166 Mich App 406, 408-409 (1988):

> Constitutional rights serve to restrict government conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional restrictions.

Defendants invoke the catchphrase "governmental immunity" in precisely the method warned against in *Burdette.* (State Def App, pp 1, 20, 26; EM Def App, p 3). Michigan's Constitution embodies a limited form of representative democracy based upon the consent of the governed. And when the state commits constitutional torts upon the homes, children and fetuses of its citizenry through actions that violate that consent by endangering bodily integrity with deliberate indifference, and taking property without just compensation, it is not a "judicial usurpation of legislative power" to recognize a remedy. (State Defendants' Br. at 23-24). Rather, it is a governmental usurpation of the powers and rights constitutionally reserved by the citizens themselves for government to act in a manner that outrageously threatens those citizens' bodily integrity and property in the first place. Although Defendants would have this Court ask: "has the Legislature graced the citizens with a remedy?" The constitutionally correct question, when confronted with a deprivation of constitutional rights is: "have the citizens graced government with

the power to engage in the offending conduct at issue?"

For these reasons, Michigan courts have long held that governmental immunity ***does not apply*** in the context of constitutional torts. "In a case involving an alleged unconstitutional act by the state government, neither sovereign nor statutory immunity should bar liability. The injury arises from violation of a constitutionally protected right by the government, a right engendered by 'the basic law which created and seeks to control that government.'" *Smith v Dep't of Public Health*, 428 Mich 540, 643-44 (1987), *aff'd sum nom Will v Michigan Dep't of State Police*, 491 US 58 (1989) (citation omitted).[36] With these constitutional precepts in mind, a court must take care in applying statutes that potentially impair constitutional rights in the same manner as though they were merely impairing legislatively conferred exceptions to governmental immunity. Such impairment of the latter, should not be cavalierly broadened, as Defendants urge, to unconstitutionally enable impairment of the former.

In *Rusha v Dep't of Corrections*, 307 Mich App 300, 312 (2014), *lv den* 498 Mich 860 (2015), the Michigan Court of Appeals identified that when notice provisions are applied in a harsh and unreasonable manner that effectively divests citizens of their constitutional rights, application of such a provision is improper.[37] Both the Court of Claims and the Court of Appeals have held that Plaintiffs have adequately pleaded a circumstance where application of the notice provision meets the "harsh and unreasonable" exception.

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[36] "The state's liability for a constitutional tort is not something that the state affirmatively grants in the form of a statute with which a plaintiff must comply. Rather, liability for a constitutional tort is simply inherent in the fact that the state is subject to the constitution as the preeminent law of the land." *Rodwell v Forrest*, unpublished opinion per curium of the Court of Appeals, issued May 25, 2010 (Docket no. 289038) 2010 WL 2076933 (attached in **Exhibit 5**).

[37] Plaintiffs did not waive application of *Rusha*'s harsh and unreasonable exception at oral argument. (State Def App, p 25). Plaintiffs cited *Rusha* for the proposition that the notice provision may not be wielded in a manner that creates "an effective divesture of the constitutional right." (1/9/18 Hr'g Tr, 25–26 *available at* State Def App, Exh. 3).

2. *Concealment of the lead poisoning of children and the spread of legionella so as to obstruct the invocation of a six-month notice statute meets the "harsh and unreasonable" exception in Rusha*.

After heavily relying upon *Rusha* in the Court of Claims,[38] Defendants now argue that the "harsh and unreasonable" exception discussed in *Rusha* – a decision the Michigan Supreme Court denied leave to appeal (*see Rusha*, 498 Mich 860 (2015)) – is inapplicable here.[39] (State Def App, pp 25-30). On the contrary, the Court of Appeals' application of *Rusha* does not conflict with *Trentadue, Rowland, McCahan,* and *Fairley* as Defendants posit. (State Def App, pp 18-30 at 24; EM.Def App, pp 6-13). Rather, *Trentadue*, pre-dates *Rusha* by seven years and, like *McCahan* and *Rowland*, did not involve constitutional torts claims.

Moreover, Defendants' reliance upon *Trentadue* is misplaced. *Trentadue* supports the Plaintiffs' position that the time of accrual of Plaintiffs' claim (for purposes of triggering the notice obligation) "is when the plaintiff is harmed rather than when the defendant acted." *Id* at 388. Additionally, one of the primary reasons that the *Trentadue* Court provided for abrogating the common law discovery rule was that a plaintiff could rely, instead, upon statutory fraudulent concealment tolling.[40] Yet, Defendants argue that fraudulent concealment does not apply to the

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[38] *See* 6/24/2016 State Defendants' Motion for Summary Disposition, at 10, 14, 16, and 17 (attached as **Exhibit 7**). In *Rusha*, the Michigan Court of Appeals reviewed application of the notice provision in MCL 600.6431 in the context of constitutional torts and stated that an exception to enforcement of the notice provision lies "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.'" 307 Mich App at 311, *Curtin v Dep't of State Hwys*, 127 Mich App 160, 163 (1983).

[39] State Defendants argue that the Court of Appeals' ruling conflicts with the Supreme Court's holdings in *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378 (2007); *Rowland v Washtenaw County Rd Comm*, 477 Mich 197 (2007); *McCahan v Brennan*, 492 Mich 730 (2012); and *Fairley v Dep't of Corrections*, 497 Mich 290 (2015). (State Def App, pp 18-32).

[40] *Trentadue*, *id* at 391, "Finally, MCL 600.5855 is a good indication that the Legislature intended the scheme to be comprehensive and exclusive. MCL 600.5855 provides for essentially unlimited tolling based on discovery when a claim is fraudulently concealed."

notice provision in direct contradiction to the *Trentadue* Court's rationale as to why the abrogation of the discovery rule was not overly harsh. Finally, *Trentadue* did not overrule the authority upon which *Rusha* relies, *Curtin v Dep't of State Hwys*, 127 Mich App 160, 163 (1983) or *Forest v Parmalee*, 402 Mich 348, 359 (1978). Neither *McCahan*[41], *Rowland*, nor *Trentadue* addressed constitutional torts alleging constitutional deprivations of bodily integrity or taking of property without just compensation. As the *Rusha* Court recognized, it would be harsh and unreasonable to divest Plaintiffs "of the access to the courts intended by the grant of the substantive right." *Rusha*, 307 Mich App at 311.

It is in this spirit that the court below[42] pointed out that Plaintiffs have "asserted only constitutional claims" and their suit was unique and unlike, for example, a suit brought to recover for personal injuries sustained in an automobile accident where "the event giving rise to the cause of action" was unambiguous – the accident itself. (COA Opinion, p 10). The injury arises from violation of a constitutionally protected right by the government, a right engendered by "'the basic law which created and seeks to control that government.'" *Smith v Dep't of Public Health*, 428

[41] *McCahan* arose from an automobile collision claim that could be maintained against the state only through the enactment of MCL 691.1405. Relying on *Rowland*, the Michigan Supreme Court held that the notice requirement of MCL 600.6431(3) was to be strictly construed and applied. The rationale for *McCahan* was that, "it being the sole province of the Legislature to determine whether and on what terms the state may be sued," the Legislature could permissibly condition a legislatively-created cause of action on compliance with a notice statute of that very Legislature. There is nothing new about the principle of *McCahan. Rowland* case, on which *McCahan* relied, was on the books when *Rusha* was decided and the *Rusha* Court even cited *Rowland*. *See Rusha*, 307 Mich App at 312-13.

[42] Relying upon *Rusha*, the Court of Claims also recognized that the present litigation was unlike any other suits cited by Defendants and that Defendants' proposed accrual dates could potentially divest plaintiffs of the ability to vindicate constitutional violations despite factual allegations that the cause of action was not readily apparent to Plaintiffs and concealed by Defendants' conduct. (COC Opinion, pp 10-11). As noted above, this was not the only basis for which the court denied summary disposition. The court also held that *if* strict compliance with the notice requirements were required, summary disposition would still be premature. (COC Opinion, p 13).

Mich 640, 643-44 (1987), *aff'd sum nom. Will v Michigan Dep't of State Police*, 491 US 58 (1989) (citation omitted). With these constitutional precepts in mind, a court must take care in applying statutes that potentially impair constitutional rights in the same manner as though they were merely impairing legislatively conferred exceptions to governmental immunity. And case law that enables impairment of the latter should not be cavalierly broadened, as Defendants urge, to unconstitutionally enable impairment of the former. For these reasons, Defendants' applications for leave to appeal must be denied.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE COURT OF CLAIMS HAS SUBJECT MATTER JURISDICTION OVER THE EM DEFENDANTS

In their Application, State Defendants argue that PA 436, rather than the Court of Claims Act ("CCA"), governs whether Emergency Managers ("EM(s)") are subject to the jurisdiction of the Court of Claims. (State Def App, pp 42-45). While the Court of Appeals correctly observed that it did not need to look past the CCA[43] to determine whether the lower court had jurisdiction over EMs, it still considered PA 436 and found that its ruling would be no different. (COA Opinion, pp 19-21).

The Court of Appeals agreed that EMs are in fact State officials under PA 436, as set forth in the detailed and accurate synopsis of the law by the Court of Claims identifying a myriad of statutory provisions and relying on *Kincaid v City of Flint*, 311 Mich App 76; 874 NW2d 193

[43] "The question is not, as state defendants contend, whether the Legislature in passing PA 436 intended to make [EMs] state officials. While PA 436 and its characterization of [EMs] may be relevant in another context, the question presented here is one of jurisdiction, and it is the intent behind the Legislature's grant of jurisdiction to the Court of Claims, through MCL 600.6419 in particular, that must direct this Court's analysis." (COA Opinion, p 19) (citing *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 521; 821 NW2d 117 (2012) ("[T]he first step of statutory interpretation is to review the language of the statute at issue, not that of another statute.")).

(2015), as follows:

- MCL 141.1546(1)(b); MCL 141.1549(1): "An [EM] is *appointed by the governor* following a determination by the governor that a local government is in a state of financial emergency" (COC Opinion, pp 15-16) (emphasis added).
- MCL 141.1515(5)(d); MCL 141.1549(3)(d): "The [EM] *serves at the governor's pleasure*. *Kincaid*, 311 Mich App at 88." (*Id*) (emphasis added).
- MCL 141.1549(3)(d) and (6)(a): "The [EM] can be *removed by the governor or by the Legislature* through the impeachment process." (*Id*) (emphasis added)).
- MCL 141.1549(3)(e) and (f): "The *state provides the financial compensation for the* [EM]." (*Id*) (emphasis added).
- MCL 141.1552(1)(a) – (ee): "Those powers include *powers not traditionally within the scope of those granted municipal corporations*." (*Id*) (emphasis added)).
- MCL 141.1552(1)(f), (x), (z) and (3); MCL 141.1555(1): "The *Legislature conditioned the exercise of some of those powers upon the approval of the governor* or his or her designee or the state treasurer." (*Id*) (emphasis added).
- MCL 141.1549(9): "The Legislature has also subjected the [EM] to various codes of conduct *otherwise applicable only* to public servants, public officers and *state officers*." (*Id*) (emphasis added).
- MCL 141.1551(2): "Through the various provisions within the act, the *state charges the [EM] with the general task of restoring fiscal stability to a local government placed in receivership* – a task which protects and benefits both the state and the local municipality and its inhabitants. The *[EM] is statutorily obligated to create a financial and operating plan for the local government that furthers specific goals set by the state and to submit a copy of the plan to the state treasurer for the treasurer's 'regular[] reexamin[ation]*.'" ((*Id*) (emphasis added).
- MCL 141.1557: "The [EM] is *also obligated to report to the top elected officials of this state and to the state treasurer his or her progress* in restoring financial stability to the local government." (*Id*) (emphasis added).
- MCL 141.1562(1) and (2): "[T]he Act tasks *the governor, and not the [EM], with making the final determination whether the financial emergency declared by the governor has been rectified by the [EM's] efforts*." (*Id*) (emphasis added).

(COA Opinion, p 20). Thus, based on this analysis, the Court of Appeals, "agree[d] that the totality of the circumstances indicate that an [EM] operates as administrative officer of the state." *Id*; *see* 65 Am Jur 2d, Receivers, § 128, p 745 (A receiver's duties are administrative).

State Defendants attempt to distract from the recitation of the aforementioned sources of authority by citing to MCL 141.1549(2),[44] for the purported proposition that "the Legislature

[44] State Defendants also contend that MCL §141.1560(2)(b) and (c) support their attempt to distinguish between State officers and EMs, because those sections require the Attorney General

expressly made [EMs] local in character and distinguished them from state officials." (State Def App, p 45). This is not accurate. §1549(2) reads: "…an [EM] *shall act for and in the place and stead of the governing body*…" (emphasis added). In other words, the EM usurps the power of the local governing body *on behalf of the state*. Section 1549(3), as cited by the Court of Appeals above, goes on to state in subsections (d) and (e) that the EMs shall serve at the pleasure of the governor and that their compensation shall be paid by the State set forth in a contract approved by the Treasurer. Further §1549(5) clarifies that the EM is directly accountable to the Governor and State Treasurer, requiring the EM to submit quarterly reports to each of them as well as to the state representative who represents the local government in receivership. And §1549(9)(c) specifically provides that an EM is subject to: 1968 PA 318, MCL 15.301 to 15.310, *as if he or she were a state officer*. (emphasis added).[45]

A. The Emergency Managers Themselves Stipulate That the Court of Claims has Subject Matter Jurisdiction Over Them.

As pointed out by the Court of Appeals, the EM Defendants have themselves not asserted the defense of subject matter jurisdiction. (COA Opinion, p 18 n. 12). Indeed, the EM Defendants

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to defend "State officials and officers" under subsection (b) and "Emergency Managers" under subsection (c). The State Defendants argue that this distinction would be unnecessary if EMs were State officers. The Court of Appeals correctly observed that this does not tell us whether EMs are also State officers. (COA Opinion, pp 19–20). Indeed, both subsections are different in scope. Subsection (b) imposes on the Attorney General a duty to defend State officers engaged in activity under PA 436. Thus, an equally sound interpretation of these subsections is that EMs are State officers, but unlike other State officers, the Attorney General's duty to defend them is narrower.

[45] State Defendants also cite to MCL 141.1560(4) & (5) relating to the local government's coverage of the Emergency Manager's insurance policies and MCL 141.1549 (9)(c) requiring the Emergency Managers to abide by State ethical standards. (State Def App, p 46). For the reasons articulated by the Emergency Managers in their Answer filed April 5, 2018, pp 10-11, Plaintiffs agree that the State Defendants' reliance on these provisions misses the mark completely. Moreover, there is no way to harmonize the State Defendants' interpretation of these three statutory provisions with the thirty or more that that the Court of Appeals relied upon in determining that the Emergency Managers are officers of the State. (COA Opinion, pp 19-20).

have filed an answer on April 5, 2018, requesting that this Court reject the State Defendants' application for leave relating to whether EMs fall within the scope of the term "state officers" as defined by the CCA, MCL §600.6401 *et seq.* This is particularly significant because the CCA, MCL §600.6419(7), expressly states:

> As used in this section, "the state or any of its departments or officers" means this state or any…arm, or agency of the state, or an officer, **employee**, or volunteer **of this state** or **any…arm** or agency of this state, acting, **or who reasonably believes that he or she is acting**, within the scope of his or her authority while engaged in or discharging a governmental function in the course of his or her duties. (emphasis added).

Clearly, EM Defendants Earley and Ambrose – employees[46] of the Governor and paid directly by the State – in this case have such a reasonable belief. Moreover, EMs fall into one of the well-delineated categories of those actors against whom suit may be brought, as well as those who may bring suit in the Court of Claims pursuant to PA 436. (*See* COA Opinion, p 21) (recognizing that such an authorization acknowledges the status of an emergency manager as a state officer consistent with the CCA);(*See also* State Def Rep, Exh. 1 at p 6, paragraph 7.1) ("Pursuant to the Act, [ ] the [EM] is engaging in a governmental function and is immune from liability for any action taken in which the [EM] believes to be within the scope of the [EM's] authority granted by the Act. . . ").

Indeed, §1552(1)(q) of PA 436 gives EMs, as state officials, the power to bring suit in the

[46] In the State Defendants' reply brief, they reference paragraph 5.8 of the contracts with the State and the EMs to argue that the EM Defendants were not "employees." (State Def Rep, p 6). However, as aptly noted by the Court of Appeals, EMs are "political appointees [and] serve as **at-will** employees of the government agency that appointed them." (COA Opinion, p 21) (citing *James v City of Burton*, 221 Mich App 130, 133-134; 560 NW2d 668 (1997) (emphasis added)). Indeed, the contracts make clear that the "[EM] serves at the pleasure of the Governor" and "[t]he Governor has the power to rescind the appointment and terminate this Contract **at any time**" as is the case with an at-will employee. (*See* State Def Rep, Exh. 1 at 6, paragraph 9.1a.)(emphasis added).

Court of Claims against parties over whom the Court of Claims would not otherwise have jurisdiction. This is consistent with the CCA, which provides that the Court of Claims has jurisdiction to hear claims brought by the "*state* or any of its departments *or officers* against *any claimant*." MCL 600.6419(1)(b) (emphasis added). *See also* MCL 600.6419(7).[47]

Moreover, State Defendants' reliance on *Sailors v Bd of Kent County*, 387 US 105 (1987) and *Phillips v Snyder*, 836 F3d 707 (CA 6, 2016) in their reply is inapplicable. (State Def Rep, p 7). While the US Supreme Court in *Sailors* did hold that a state may create local appointed – as opposed to elected – positions, that holding is explicitly limited to the power of the state to create a local governmental unit whereby the local community appoints rather than elects the representatives to that unit. Indeed, the facts of *Sailors* are quite distinguishable on this question, insofar as the state had passed a law allowing for the local community *itself* to appoint, rather than elect, certain administrative board positions. Unlike *Sailors*, however, in the instant case, the power of the appointed EM not only comes directly from the state, but the state controls every aspect of the EM's power and authority.

Furthermore, the issue of whether EMs are "state officials" or purely "local officials" was

[47] State Defendants also cite *Michigan Ass'n of Home Builders v Dir of Dep't of Labor & Economic Growth*, 481 Mich 496, 500–501 (2008) to purportedly support their argument that while there is a provision addressing the ability for an EM to bring suit in the Court of Claims, the absence of a provision addressing jurisdiction by the Court of Claims in cases in which suit is brought against EMs was deliberate—"the expression of one thing is the exclusion of another." (State Def App, p 44). State Defendants' reliance on the *Home Builders* case is, however, misplaced. That case concerned the procedure for judicial review of an administrative determination and a statute that provided such a procedure for contested cases only, not uncontested cases. Unlike the instant case, in *Home Builders*, no other statute overlapped with the provision or was applicable to the judicial review statute in question. On the contrary, in the instant case, there is an identifiable interaction between the Court of Claims Act, MCL 600.6419(7); PA 436; MCL 141.1552(1)(q); and 141.1549(2), (3) and (5), with regard to EMs, their relationship to the state and the jurisdiction of the Court of Claims over them. *Michigan Ass'n of Home Builders* is therefore distinguishable from the case at bar.

not addressed at all in *Phillips*. In that case, the US Court of Appeals, in upholding the constitutionality of PA 436, noted that ". . . an emergency manager's power . . . are extensive and arguably *displace* all of those of the local government officials." *Id*, at 710 (emphasis added). The Court further noted that the EM's activities are essentially controlled by the governor, insofar as PA 436 "…allows the state treasurer to oversee the activities of the emergency managers when the governor so chooses. §141.1549(8)." *Id* at 711. Finally, in ruling that PA 436 does not impair local electors' right to vote under the Equal Protection Clause, the court pointed out that in municipalities where the governor has appointed an emergency manager, the local elected officials remain in office, and that PA 436, a state statute, ". . . simply vests the powers of the local government in an emergency manager." *Id*, at 718. That is EMs do not become local officials; rather, they simply usurp the power of those local officials as agents of the state.

B. State Defendants' Mischaracterize the *Schobert* and *Kincaid* Holdings.

Defendants point to *Schobert v Inter-Co Drainage Bd of Tuscola, Sanilac & Lapeer Cos for White Creek No 2 Inter-Co Drain*, 342 Mich 270 (1955) to argue that PA 436, the act creating EMs, governs the determination of whether the EMs are State officials. (State Def App, p 43). However, the analysis in *Schobert* was specifically limited to considerations for whether there was jurisdiction by a circuit court to issue a writ of mandamus for members of a drainage board. The *Schobert* court was cognizant that the determination of whether a governmental official is a "state official" varies depending on the circumstances to wit:

> We are not so bold as to attempt an all-embracing definition of "State officer." The precise delineation of the term will await our rulings as cases are brought before us. In each instance the meaning of the term "State officer" will be governed by the purpose of the act or clause in connection with which it is employed.

Id at 282. Here, the Court of Appeals correctly noted that the question is a matter of statutory interpretation, and analyzed whether the EMs are State officers in the context of both the CCA *and*

PA 436. (COA Opinion, pp 19-23).

State Defendants also mischaracterize the court's holding in *Kincaid v City of Flint*, 311 Mich App 76 (2015). (State Def App, pp 45, 47). As the Court of Appeals observed, the *Kincaid* holding in no way precludes a finding that emergency managers are employees of the state subject to the jurisdiction of the Court of Claims under MCL 600.6419. (COA Opinion, p 23). First, contrary to State Defendants' assertion otherwise, the issue in *Kincaid* was whether the full range of power held by the EM as defined by PA 436 included the governor's power to ratify. While *Kincaid* did hold that EMs do not, as a matter of law, inherit all the powers of the governor, *id* at 88[48], the court did not hold that EMs are not agents of the state ***or*** do not act on behalf of the Governor[49] as State Defendants' posit. (State Def App, p 47).

C. The Court of Appeals Correctly Held PA 436's Use of Receivership Analogy Supports the Jurisdiction of the Court of Claims.

State Defendants' attempt to downplay the applicability of receivership principles to the powers and authority of EMs is blatantly dishonest. To start with, they falsely state that the Legislature used the *word* "receivership" in MCL 141.1542(q). (State Def App, p 47). In fact, the statute is replete with 64 separate references to principles of receivership, starting with the definition of "receivership" as "the process under this act by which a financial emergency is addressed through the appointment of an [EM]." MCL 141.1542(q).[50] After citing several

[48] "We . . . reject [the] argument that an act of the EM is an act of the governor."

[49] *Kincaid* thus does not support State Defendants' position. The Court of Appeals in *Kincaid* was very careful in its holding that, while the EM's authority did not extend to ratification power of the governor, his authority is defined by state law and by the statutory language of PA 436, not as a local official, but rather as a state official, serving at the pleasure of and accountable to the governor, MCL §141.1549(3)(d), with certain powers defined by State law, and that in their capacity as state officials, their power " . . . is superior to and supersedes that of local government officials, employees and entities." *Kincaid*, at p. 89, fn. 13.

[50] *See also*, §§ 1548(1) ["…the governor may place the local government in receivership."]; 1549(2) [EM "...shall have broad powers in receivership..."], (5) [EM "…shall submit quarterly

provisions under PA 436 discussing receivership, the Court of Appeals found that the powers and responsibilities delegated to EMs under PA 436 clearly mirror those of an appointed receiver. (COA Opinion, pp 21-22).

Moreover, just as a receiver serves as the administrative arm or officer of the authority exercising the power of appointment – *i.e.*, the court in that instance – an EM serves at the will of the appointing governor exercising the power of that appointment and is thus a state official. *See* MCL 141.1549(3)(d) (the [EM] shall serve at the pleasure of the governor). Because an EM is accountable to the governor in the same way that a receiver is accountable to the court, the question with regard to who benefits is irrelevant. As such, the analysis between a receiver and an EM is entirely applicable.

As a result, the Court of Appeals concluded that it "has long been recognized that a receiver serves as the administrative arm or officer of the authority exercising the power of appointment" thereby supporting the conclusion that EMs are subject to the Court of Claims' jurisdiction. (COA Opinion, p 22)(citation omitted).

III. THE COURT OF APPEALS PROPERLY RECOGNIZED PLAINTIFFS' CLAIMS FOR DAMAGES AGAINST THE STATE FOR VIOLATION OF THE MICHIGAN CONSTITUTION

The Court has acknowledged that Plaintiffs may seek damages for violations of the

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reports to the state treasurer with respect to the financial condition of the local government in receivership…"] and (7) ["…local government shall be removed from receivership when…"]; 1551(1)(f) and (5); 1552(1)(k)(iv), (bb), (ff) and (2) ["…during the pendency of the receivership…" all power of the governing powers "..shall be suspended and vested in the emergency manager."]; 1553; 1554; 1556; 1557 [EM to submit quarterly reports to the governor, the state treasurer, state representative and clerk of local government that is in receivership]; 1558(1); 1560(3), (5) and (6); 1561(1) and (2); 1562(3)(a) and (b), (4) [The governor has the power to remove the local government from receivership]; 1563(1), (2), (3), (4), (5)(c), (e) and (h), and (6) [Receivership transition advisory board, appointed by governor before removing local government from receivership]; 1564; 1565(1); 1567(3); and 1572.

Michigan Constitution in appropriate cases. *Jones v Powell*, 462 Mich 329, 336; 612 NW2d 423 (2000). The *Jones* Court followed the US Supreme Court's established holdings that where Congress has not created a statutory avenue for remedying violations of federal constitutional rights committed under color of law, the right to assert a private damage action directly under the Constitution exists. S*ee Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388, 396-97 (1971)[51] (damage action appropriate to remedy federal officers' conduct in violation of Fourth Amendment); *Davis v Passman*, 422 U.S. 228, 245-49 (1979) (Fifth Amendment equal protection right gives rise to damage action against a US Congressman); *Carlson v Green*, 446 US 14 (1980) (Eighth Amendment cause of action exists and federal tort claims remedy no bar to *Bivens* action).

In *Smith v Dep't of Public Health*, 428 Mich 540, 544 (1987), *aff'd sub nom Will v*

[51] State Defendants citation to the US Supreme Court's decision in *Ziglar v Abbasi*, 137 S Ct 1843 (2017) is particularly unpersuasive. (State Def App, pp 36-37). In *Ziglar*, the Supreme Court first determined that the constitutional right asserted in that case was not recognized as protected by precedent (unlike this case where the right asserted in the long-recognized right by these cases, under the Fourth Amendment). Therefore, the *Ziglar* Court analyzed the case under a "special factors" analysis. Thus, *Ziglar* held that a *Bivens*-type action was not appropriate, as it would interfere with a sensitive national security matter involving the detention of 84 foreign aliens in the aftermath of the September 11 attacks. It held that "were this [ ]to be allowed in a private suit for damages" it would require an "inquiry into sensitive issues of national security" and "the *Bivens* action would assume dimensions far greater than those present in *Bivens* itself . . ." *Id* at 1861. Indeed, before it reached its holding in *Ziglar*, the US Supreme Court stated that: "this opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Id* at 1856. In this case, arising directly under the Michigan Constitution, it should also be noted that the claims against the State of Michigan arise from a devastating harm that was caused to an entire community by direct actions of the State. Thus if there were any danger of interference with a governmental program under a "special factors" analysis, it would be interference with a policy and programs that provides poisoned water to people, without justification. Such a policy calls out for a judicial remedy directly under the Michigan Constitution. As the Court of Appeals rightly noted, in affirming the Court of Claims, "…it is appropriate to give significant weight 'to the degree of outrageousness of the state actor's conduct as alleged by plaintiffs.' [citation omitted]...We agree that the egregious nature of defendants' alleged constitutional violations weighs considerably in favor of recognizing a remedy." (COA Opinion, p31)(citing COC Opinion, p 43).

Michigan Dep't of State Police, 491 US 58 (1989), the Court recognized the existence of a claim for damages against both the state and against a state official in his official capacity, arising from a violation by the State of Michigan. *Id* at 71.[52] Indeed, since *Smith*, Michigan courts have followed the federal lead, and recognized the validity of *Bivens*-type actions against the State of Michigan under the correlative constitutional due process clause, Const. 1963, art 1, §17. *See e.g.*, *Jones v Powell*, 462 Mich 329, 336-37 (2000); *Neal v Corrections Dep't*, 230 Mich App 202, 211-12 (1998); and *Burdette v State of Michigan*, 166 Mich App 406, 408-09 (1988).

Here, after the Court of Appeals correctly determined that Plaintiffs have alleged a clear violation of the Michigan Constitution, it recognized that a damages remedy for the alleged Constitutional violation is the *only* available avenue for Plaintiffs to obtain monetary relief from these Defendants. (COA Opinion, p 29). Now, for the first time in their Application, State Defendants argue that "Michigan law has experienced [an] evolution" when it comes to authorizing damages action against private persons without express legislative authorization to do so. (State Def App, p 37) (citing *Lash v City of Traverse City*, 479 Mich 180, 193 (2007)). This argument is a red herring as the Michigan authorities that the State Defendants' rely upon involve the denial of private causes of actions for damages brought pursuant to *statutes* and not directly under the Michigan Constitution as was the case in *Smith*. *See Lash*, 479 Mich at 638-639 (holding residency requirement statute did not create a private cause of action); *Myers v City of Portage*, 304 Mich App 637 (2014) (statute governing inspection of officers' involuntary statements does not permit a private cause of action for damages); *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479 (2005) (federal Head Start Act governing public access

[52] As noted above, both the Court of Claims and the Court of Appeals held that the Emergency Managers operated as officers of the state, rejecting the State Defendants' claims that they were "local, not state officials." (COC Opinion, pp 13-16; COA Opinion, pp 20-23).

to information does not support a private cause of action). These decisions do not represent anything novel let alone an "evolution" in Michigan law. Had that been the case, State Defendants would have cited these cases in their briefs below before the Court of Appeals. As a result, there is no basis to "walk back" *Smith* as the State Defendants' posit on page 35 of their Application.

The Court of Appeals followed well settled precedent in holding that Plaintiffs' claims for damages against Defendants for violation of Plaintiffs' constitutional due process rights should proceed. (COA Opinion, pp 28-31). The Court of Appeals did not commit error.

A. Defendants' Arguments for Overturning the Court of Appeals' Ruling is Based on the Faulty Premise that the Presence of Other Remedies for their Injuries Preclude Plaintiffs' Claims Against Defendants for Violations of Plaintiffs' Constitutional Rights.

A plaintiff asserting a violation of the Michigan Constitution must allege sufficient facts to establish that the state action at issue: 1) was executed pursuant to an official custom or policy,[53] and 2) deprived the plaintiff of his or her constitutionally guaranteed rights. *Carlton v Dept of Corrections*, 215 Mich App 490, 505; 546 NW2d 671 (1996) citing *Monell v Dep't of Soc Servs of City of New York*, 436 US 658, 694 (1978).

After recognizing that Plaintiffs satisfied the criteria for establishing a damage remedy for "an injury consequent to a violation of our Michigan Constitution" by establishing a violation of Plaintiffs' constitutional right to bodily integrity as a result of state policies, the Court of Appeals addressed the additional factors identified by *Smith* to conclude that this is an appropriate case for

[53] Defendant/policymakers, acting in their official capacity, knowingly created the vast toxic danger for Plaintiffs by deciding – for reasons that were neither fiscally nor scientifically sound – to switch the water source for Flint residents, from Lake Huron to the Flint River, despite their knowledge that the Flint River had been professionally evaluated for use and rejected as dangerous and unsafe. (Am. Compl., ¶¶ 8, 28, 39-41, 48-50, 53-54, 57-62, 64-65, 68, 72-73, 75-77, 80, 83, 100, 129, 135-37). Indeed, the decision was promulgated by officials in charge and approved at the highest levels. (Am. Compl., ¶¶ 49-50, 48-50, 53-54, 57-59, 73-74).

such a claim.[54] *Smith*, 428 Mich at 648, 651-52 (Opinion by Boyle, J.); (COA Opinion, pp 24-31).

Defendants' central argument is that the Court of Appeals erred in recognizing a damage remedy because "[m]ultiple other lawsuits arising out of these same facts and circumstances are pending in multiple other courts." (EM Def App, p 23; *see also* State Def App, pp 33-34). Defendants first overstate the implication of the availability of other remedies by insisting that the availability of "alternative remedies [would] bar a constitutional tort claim." (EM Def App, p 25; State Def App, pp 40-41). This language does not appear in the holding of the majority decision in *Smith* nor as noted by both the Court of Claims and Court of Appeals, is this a fair reading of the cases. (COA Opinion, pp 29-31, 38; COC Opinion, p 32). The majority in *Smith* held that the only test for determining whether Plaintiffs have a constitutional claim against the State, is whether they, by virtue of custom or policy, have violated a right conferred by the Michigan Constitution. Such a claim for damages may be recognized in "appropriate cases." *Smith*, *supra* at 544. The question of an alternative remedy is simply a consideration, among other factors in determining whether a specific case is an "appropriate" case to allow a claim for damages based on the State's violation of Plaintiffs' constitutional rights. Just as the lack of any other remedy does not guarantee an inferred damage claim for an alleged constitutional violation, the existence of or in this case the pursuit of an alternative remedy does not foreclose this right.

Defendants, however, disregard a fair reading of *Smith* and *Jones* to argue that the availability of any other remedy would bar a constitutional tort claim. In *Smith*, the appropriate analysis was established by Justice Boyle who noted only that the absence of other remedies, "heightens the urgency" of the need to infer direct constitutional causes of actions. This statement

[54] Plaintiffs address herein at Section IV, pp 56-60, support for establishing constitutional violations predicated on injuries resulting from violation of Plaintiffs' bodily injury.

does not support Defendants' argument that the possible existence of alternate common law claims, against different Defendants, only in their *individual* capacities, or the availability of injunctive remedies somehow insulates the State from liability.

Defendants reliance on *Jones v Powell* is similarly misplaced. The *Jones* court held only that there is no inferred damage remedy for violation of the Michigan constitution for claims against a *municipality or a city employee in their individual capacity*, since unlike the state and state officials sued in an official capacity, municipalities are not protected by Eleventh Amendment immunity. *Jones*, supra, (explicitly limiting its ruling to municipalities and "cases involving entities other than the state as party defendants" . . . "because municipalities, unlike states and state officials sued in an official capacity, are not protected by the Eleventh Amendment. . .").

As the Court of Claims recognized in rejecting Defendants' interpretation, "the *Jones*' Court's discussion of the availability of other remedies derived from the fact that it was addressing (as was the Court principally addressing in *Smith*) claims against a municipality and individual municipal employees (rather than a state or individual state officers who generally enjoy greater immunities.)" (COC Opinion, p 32). Likewise, the Court of Appeals declined to hold that the availability of an alternative remedy acts as a complete bar. (COA Opinion, p 31).

Unlike *Jones*, the instant case involves only claims against the state and state officials sued in an official capacity.[55] Indeed, the *Jones* case affirms that, as to these Defendants, there is no other remedy available to vindicate these Plaintiffs' substantive rights other than this Court of Claims action directly under the Michigan Constitution. As Justice Boyle instructed in *Smith*,

[55] To the extent Defendants have referenced Plaintiffs' claims in federal and Genesee County Circuit Court, including the case against the Environmental Protection Agency ("EPA"), Plaintiffs have no pending claims for damages as a result of violation of their due process rights against these State officials acting in their respective official capacities.

liability should be imposed on the state in "those cases in which the state's liability would, but for the Eleventh Amendment, render it liable under the standard for local governments as set forth in 42 USC § 1983 and articulated in *Monell . . . Smith*, 428 Mich at 642 (Boyle, J., concurring in part, dissenting in part); *see Carlton v Dep't of Corrections*, 215 Mich App 490, 504; 546 NW2d 671 (1996). Thus, the State is directly liable for a violation of its constitution in cases where a policy mandated the official's actions. *Reid v State of Michigan*, 239 Mich App 621, 628-29; 609 NW2d 215 (2000); *Carlton*, 215 Mich App at 504-05.

While the availability of other adequate remedies is a factor to consider it is not a prerequisite to a direct cause of action against the State for violations of the Constitution. *See Carlson v Green*, 446 US 14; 100 SCt 1468 (1980) (cited by *Jones* for the recognition that the existence of a federal tort claim remedy was no bar to a *Bivens* action). As the court in *Bivens* recognized, there are circumstances where a constitutional right can only be vindicated by a damage remedy. This is such a case where, as the trial court noted, "[s]ignificant favorable weight must be given to the degree of outrageousness of the state actors' conduct as alleged by Plaintiffs, *e.g.* that various state actors allegedly intentionally concealed data and made false statements in an attempt to downplay the health dangers posed by using Flint's tap water, despite possessing scientific data and actual knowledge that the water supply reaching the taps of Flint water users was contaminated with Legionella bacteria and dangerously high levels of toxic lead . . ." (COC Opinion, p 43).

Finally, Defendants also ignore the relevant portion of the Court of Appeals' decision which addressed Plaintiffs' constitutional cause of action against the State as to the State Defendants. The court recognized that "a claim for damages against the State arising from violations by the State of the Michigan Constitution may be recognized in "applicable cases" and

stated that the only requirements to establish such a violation are whether the state action was executed as an official custom or policy, and whether the state action deprived plaintiff of his or her constitutionally guaranteed rights. (COA Opinion, p 38).

B. Defendants Misunderstand both the Appropriate Weight to be Given to the Existence of a Legislative Scheme in Determining Whether a Damage Remedy is Allowed and the Relevance of the Safe Drinking Water Acts.

Emergency Managers[56] also argue that the State and Federal SDWAs create a legislative scheme which provides for a remedy for Plaintiffs' injuries and lends further support for granting their application for leave to appeal. The Court of Claims did not address Defendants' argument that the State and Federal SDWA provides adequate remedies, thereby precluding Plaintiffs' claim because Defendants did not raise this issue in the Court of Claims. Defendants failed to preserve this argument by improperly raising it for the first time on appeal. *In re Forfeiture of Certain Personal Property*, 441 Mich 77, 84; 490 NW 2d 322 (1992) ("Issues and arguments raised for the first time on appeal are not subject to review."); *Burns v City of Detroit* (on remand), 253 Mich App 608, 614-15; 660 NW2d 85 (2002) (arguments not presented to the trial court are not preserved on appeal). Despite this, the Court of Appeals fully addressed and ***rejected*** Defendants' arguments because "the SDWA and its Michigan counterpart do not provide a legislative scheme for vindication of constitutional violations alleged that 'militate against a judicially inferred damage remedy' under *Jones*, 462 Mich at 337." (COA Opinion, p 30).

Indeed, numerous cases, including a recent and related federal Sixth Circuit Court of Appeals decision, have made clear that the SDWA's statutory scheme which provides only

[56] While the State Defendants do not go as far as the Emergency Managers, (EM Def App, pp 24-29), to argue that the SDWA could suffice to remedy devastating injuries to Flint families, they do imply this and make reference to SDWA litigation and other litigation generally. (State Def App, p 16). However, **not one** of the cases referenced by Defendants make claims for *damages* as a result of violation of Plaintiffs' due process rights against these State officials.

injunctive relief for ensuring the quality of drinking water for citizens was not intended to foreclose remedies for constitutional violations. *See Boler v Earley*, 865 F3d 391, 409 (CA 6, 2017) *cert den nom City of Flint v Boler*, 138 S Ct 1294 (2018),[57] *see also Charvat v Easter Ohio Reg Wastewater Auth*, 246 F3d 607, 614 (CA 6, 2001). Foreclosure of a constitutional remedy because of the existence of a statutory scheme requires demonstration that the Plaintiffs' statutory claims "are virtually identical to its constitutional claims," and that the remedies provided in the statute indicate Congress' intention to preclude Plaintiffs' constitutional claims. *Community for Equality v Michigan High Sch Athletic Ass'n*, 459 F 3d 676, 685 (CA 6, 2006) *cert den* 549 US 1322 (2007).

Here, the rights and protections afforded by the State and Federal SDWA differ significantly from those afforded by the due process claims presented by Plaintiffs in this case. In fact, these statutes do not reach or address the conduct that is at issue in this case where these Defendants "deliberately and knowingly breached the constitutionally protected bodily integrity of Plaintiffs by creating and perpetrating the ongoing exposure to contaminated water with deliberate indifference to the known risks of harm." (Am. Compl., ¶ 142). *See Fitzgerald v Barstable Sch Comm*, 555 US 246, 257 (2009).

Defendants' malfeasance and deliberate indifference to advising Plaintiffs of the dangers of which they were aware, and then actively and fraudulently concealing those dangers, is different from the breach of their duty to provide clean water. While the result was injury due to poisoned

[57] "Under some circumstances, actions that violate the SDWA may also violate the . . . Due Process Clause. The Defendants argue that this is necessarily the case, and that the Plaintiffs' [constitutional] claims could not be pursued without showing a violation of the SDWA. But as noted, that is often not the case, particularly where the SDWA does not even regulate a contaminant harmful to public drinking water users. The contours of the rights and protections of the SDWA and those arising under the Constitution, and a plaintiff's ability to show violations of each, are 'not . . . wholly congruent.' This further supports the conclusion that Congress did not intend to foreclose [constitutional claims under § 1983] by enacting the SDWA." *Id* (citation omitted).

water, the character of the service Defendants were to provide is not the material point, but rather, Defendants' deliberate infliction of the harm on the service recipients is the relevant consideration.

Defendants have further failed to meet their burden by citing ***any*** legislative history in which Congress or the State legislation intended to use the SDWA's remedial mechanism as the sole basis for enforcing constitutional rights. There is none. As recognized by the Court of Appeals' ruling, the standards for evaluating the constitutional claims ("shocks the conscience") are vastly different than under the SDWA.[58] (COA Opinion, p 30).

Thus, as Defendants have demonstrated no error in the Court of Appeals' ruling, their Applications must be denied.

C. State Defendants Invocation of the GTLA is Misplaced.

State Defendants argue that the Court of Appeals' ruling allows Plaintiffs to circumvent the legislative restriction of damage suits against the state established by uniform rules for immunity in Michigan's Governmental Tort Liability Act, 1964 PA 170, MCL 691.1401, *et seq* ("GTLA"). (State Def App, pp 38-39). The GTLA has no bearing on Plaintiffs' claims against the State for violation of our Constitution. As the Court of Appeals recently held in *LM v State*, 370 Mich App 685; 862 NW2d 246 (2014):

> Governmental immunity is not available in a state court action where it is alleged that the state has violated a right conferred by the Michigan Constitution.... [D]efendant cannot claim immunity where the plaintiff alleges that defendant has violated its own constitution. Constitutional rights serve to restrict government conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional restrictions.

LM v State, 307 Mich App 685, 695 (2014).

[58] The actions of the State resulted in devastating injuries to Flint families including permanent damage to children's development and in some cases death. Defendants, rather cavalierly, given their actions in this case, proffer that Plaintiffs' remedies under the federal or state SDWA, which allows only for injunctive relief should suffice. (EM Def App, p 25).

Further, the Court of Appeals did not err in holding that Plaintiffs' suit against the Governor, in his official capacity, is a suit against the State. There is nothing novel in this well accepted recognition that a suit against the highest state officer in his official capacity is "no different from a suit against the state itself." *Will v Michigan Dep't of State Police*, 491 US 58, 71; 109 SCt 2304 (1989)[59]. As the Court of Appeals has clearly recognized:

> Official capacity suits, in contrast [to suits seeking to impose personal liability upon a government official for actions he takes under color of state law] generally represent only another way of pleading an action against an entity of which an officer is an agent…It is not a suit against the official personally, for the real party in interest is the entity.

Carlton v Dep't of Corrections, 215 Mich App 490, 500-01 (1996). Defendants do not even attempt to distinguish the holdings on this issue and fail to demonstrate any error in the Court of Appeals' analysis in this regard. (COA Opinion, p 39 n. 18).

IV. THE COURT OF APPEALS CORRECTLY HELD THAT PLAINIFFS ALLEGED SUFFICIENT FACTS TO ESTABLISH A SUBSTANTIVE DUE PROCESS BODILY INTEGRITY CLAIM AGAINST DEFENDANTS

The parties, the trial court and the Court of Appeals all agree on the basic legal framework underlying Plaintiffs' bodily integrity claim – that the Due Process Clause of Michigan Constitution protects the fundamental right of bodily integrity, coextensive with the right as set

[59] In spite of this clear language from the US Supreme Court, which has also been echoed by Michigan courts, *see, e.g., Carlton v Dep't of Corrections*, 215 Mich App at 500-01, Defendants argue that "there is no basis in Michigan law for finding that a judgment against an official in his or her 'official capacity' is the equivalent of a judgment against the State." (State Def App, p 39). This is nonsensical. It requires no more than a cursory look at Michigan case law to see that it is replete with situations in which Court of Claims jurisdiction has been extended to state officers acting in their official capacities. *See, e.g., Carlton*, 215 Mich App at 500-01; *Steele v Dep't of Corrections*, 215 Mich App 710, 715 (1996), *lv den* 454 Mich 853 (1997); *Kell v Johnson*, 186 Mich App 562, 564 (1990); *Lowery v Dep't of Corrections*, 146 Mich App 342, 349 (1985); *Hamilton v Reynolds*, 129 Mich App. 375, 379-380 (1983), *lv den* 422 Mich 891 (1985). *See also, Will v Michigan Department of State Police*, 491 U.S. 58, 71 (1989) (Suit brought against a state official in his official capacity is "no different from a suit against the state itself.").

forth in the US Constitution, which protects against an intrusion into the bodily integrity of a person's body by conduct of a governmental actor that "shocks the conscience." (State Def App, p 33; EM Def App, pp 16-17).

The Court of Appeals, correctly looked to federal case law to guide evaluation of Plaintiffs' claims brought under the Michigan Constitution. (COA Opinion, pp 24-26). In *Hunt v Sycamore Cmty Sch Dist Bd of Ed*, 542 F3d 529 (CA 6, 2008), the Sixth Circuit set forth a detailed analysis of substantive due process culpability. Ultimately, where there is the opportunity for Defendants to have engaged in "reflection and unhurried judgments," as alleged here, showing deliberate indifference to a risk of harm satisfies the "shocks the conscience" standard. *Hunt*, supra, at 540.[60] Moreover, deliberate indifference is defined as "subjective recklessness," where the "state official 'knows of and disregards an excessive risk to the victim's health or safety.'" *Ewolski v City of Brunswick*, 287 F3d 492 (CA 6, 2002).

Here, Defendants err in their assertion that Plaintiffs cannot meet the "shocks the conscience" test[61] of a substantive due process claim. (State Def App, pp 41-43; EM Def App, p 21). Misrepresenting the standard, Defendants contend that, to be "conscience shocking," an official's conduct must be intended to injure or cause physical harm. *Id*. This is plain wrong. The

[60] As detailed herein, State Defendants' assertion that the DEQ officials did not make false statements like EPA officials in *Lombardi v Whitman*, 485 F3d 73, 83 (CA 2, 2007) is not supported by the record. (State Def App, p 42). On the contrary, Governor Snyder has testified otherwise and the attorney general has pleaded in parallel criminal cases that misconduct and criminal concealment of the crisis occurred at the hands of the Emergency Managers, MDEQ and MDHHS officials, thereby exacerbating the harm to the public.

[61] Plaintiffs allege that Defendants violated their constitutionally protected liberty interest in their bodily integrity by intentionally poisoning them – *i.e.*, knowingly delivering to them drinking water contaminated with Legionella bacteria and dangerous levels of lead, creating a public health emergency, and then exacerbating that emergency by orchestrating a cover-up, which prevented Plaintiffs from being able to help themselves by stemming the damage to their bodies. (Am. Compl., ¶¶ 8, 28, 52-54, 57-65. 68-69, 72-77, 80-83, 94-108, 129-131, 142).

US Supreme Court has explained that official conduct that "shocks the conscience" is that which is so "'offensive' that it [does] not comport with traditional ideas of fair play and decency," *Whitley v Albers*, 475 US 312, 327 (1986); *see Rochin v California*, 342 US 165, 169 (1952). However, whether certain conduct shocks the conscience depends on the facts and circumstances of the particular case. *Ewolski*, supra, at 510. "At a minimum, the standard requires a showing beyond mere negligence," *Id*, citing *Daniels v Williams*, 474 US 327, 332 (1986), and extends to "conduct *intended* to injure in some way unjustifiable by any governmental interest." *Id*, citing *Sacramento Co v Lewis*, 523 US 833, 845-46 (1998); *Range v Douglas*, 763 F3d 573, 590 (CA 6, 2014). An intent to injure is required when circumstances afforded the official no opportunity to deliberate, while the "deliberate indifference" standard is appropriate for situations in which actual deliberation was practical. *Ewolski*, 287 F3d at 510-11. The critical question is "whether the circumstances allowed the state actors time to fully consider the potential consequences of their conduct." *Range v Douglas*, 763 F3d at 590 (internal quotation marks and citation omitted). Here, Defendants were well aware of the dangers of the Flint River water and there was absolutely no legitimate government purpose that justified taking the risk of poisoning tens of thousands of people.

Defendants further argue that the Court of Appeals erred because Plaintiffs failed to allege specific conduct by them, including the Emergency Managers,[62] to satisfy their claim. (State Def

[62] In addition to the allegations cited by the EMs on pages 20-21 of their Application, Plaintiffs' Complaint pleads as follows with respect to their role in their claim that:

- Defendant Earley directed the April 25, 2014, switch to using Flint River water, despite Flint Water Department supervisor Michael Glasgow's warning that the water treatment plant was not ready (Am. Comp., ¶¶58, 59);
- Defendant Earley resisted returning to the available clean water provided by the Detroit Water and Sewerage Department, ignoring reports by Flint water users that the Flint River water was making them ill. (Am. Comp., ¶¶62, 63, n. 7);

App, pp 41-42; EM Def App, pp 20-23). However, Defendants ignore significant portions of the COA Opinion and Plaintiffs' Complaint that address those allegations.

> With respect to bodily integrity, the Court of Appeals held:
>
> > We agree with the Court of Claims' conclusion that "[s]uch conduct on the part of the state actors, and especially the allegedly intentional poisoning of the water users of Flint, if true, may be fairly characterized as being so outrageous as to be 'truly conscience shocking'" [COC Opinion, p 28] Plaintiffs allege that defendants made the decision to switch the city of Flint's water source to the Flint River after a period of deliberation, despite knowledge of the hazardous properties of the water. . . . According to plaintiffs' complaint, various state actors intentionally concealed scientific data and made false assurances to the public regarding the safety of the Flint River water even after they had received information suggesting that the water supply directed to plaintiffs' homes was contaminated with Legionella bacteria and dangerously high levels of toxic lead. At the very least, plaintiffs' allegations are sufficient to support a finding of deliberate indifference on the part of the governmental actors involved here.

(COA Opinion, pp 27-28). Finally, EM Defendants cite an unpublished decision out of the federal District of New Jersey, *Branch v Christie*, Civil Action No 16-2467 (JMV) (MF), 2018 WL 337751 (DNJ. Jan 8, 2018), to make the specious argument that Plaintiffs here are somehow seeking a constitutional right to "a healthful environment." (EM Def App, pp 18-19). In the extrajurisdictional decision of *Branch*, the court dispensed with the bodily integrity claims based on serious deficiencies in pleading with sufficient specificity to support Plaintiffs' arguments. *Id* at * 3. Unlike the situation here, the court found that Plaintiffs' were unable to point to where defendants had done anything in actually creating elevated levels of lead in the water supply. *Id* at

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- Defendant Ambrose similarly refused to reconnect to Detroit's system, despite a vote by Flint City Council to do so and ignoring warnings that Flint River water was dangerous to the health of Flint water users (Am. Comp., ¶86); and
- These basic facts, among others, form the basis of Plaintiffs' claim that these Defendants created and perpetuated their ongoing exposure to contaminated water, with deliberate indifference to the known risks of harm, which caused serious bodily injury to Plaintiffs and that Defendants' conduct was so egregious that it shocks the conscience (Am. Comp., ¶¶142-144).

* 3. The court did not hold that the introduction of contaminated substances in water could never form the basis for an injury to a bodily integrity claim. (*See also* COA Opinion, p 36 n. 16)(rejecting arguments that plaintiffs' right to bodily integrity is not implicated in the context of drinking water).[63]

Thus, the Court of Appeals correctly held that Plaintiffs sufficiently pled a violation of their substantive due process rights to bodily integrity against the governmental actors, including the EMs, involved here. (*See also* COC Opinion, pp 27-28).[64]

V. THE COURT OF APPEALS CORRECTLY FOUND THAT PLAINTIFFS PROPERLY PLED ALL ELEMENTS OF AN ACTION FOR INVERSE CONDEMNATION

Plaintiffs asserted a claim for inverse condemnation as a result of the damage to their property and diminution in value caused by the Defendants' actions to switch the source of Flint's water to the inadequately treated toxic water drawn from the Flint River. (Am Compl., ¶ 150). Applying settled Michigan law, the trial court found that Plaintiffs' allegations were sufficient to plead an inverse condemnation claim. (COC Opinion, p 49). Similarly, the Court of Appeals found that Plaintiffs "*alleged injuries unique among similarly situated individuals, i.e. municipal water users, caused directly by governmental actions that resulted in exposure of their property to*

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[63] *Cf Kallstrom v City of Columbus*, 136 F3d 1055 (CA 6, 1998) where the mere publication of the names of undercover officers violated of their right to bodily integrity ("Individuals have 'a clearly established right under the substantive component of the Due Process Clause to personal security and to bodily integrity.'" internal cites omitted), *id* at 1063.

[64] "[P]laintiffs allege that . . . the **emergency managers** and **other state officials**…developed an interim plan to use Flint River water…and…delivered Flint River water to the taps of the Flint water users . . . the alleged decisions of various state officials to defend the original decision to switch to using the Flint River as a water source, to resist a return to the Detroit water distribution system, to downplay and discredit accurate information gathered by outside experts regarding lead in the water supply and elevated lead levels in the bloodstreams of Flint's children, and to continue to reassure the Flint water users that the water was safe and not contaminated with lead or Legionella bacteria, played a role in the alleged violation of plaintiffs' constitutional rights and the infliction of injury. . ." (emphasis added).

specific harm." (COA Opinion, p 37 (emphasis added)). Because no error was committed below, Defendants' requests for leave to appeal should be denied.

As the Court of Appeals acknowledged, "there is no exact formula to establish a de facto taking but, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). (COA Opinion, p 35).[65] Generally a plaintiff alleging inverse condemnation must establish 1. that the government's actions were a substantial cause of the decline of the property's value, and 2. that the government abused its powers in affirmative actions directly aimed at the property. *Hinojosa*, 263 Mich App at 548. A plaintiff must also demonstrate a causal connection between the government's actions and the alleged damages. *Id*. Plaintiffs properly pled each of these elements.

Plaintiffs alleged that Defendants made the decision to switch to the Flint River despite knowledge of the dangers posed by the water. (Am. Compl ¶¶ 40-1, 52-4, 58, 60). Plaintiffs also alleged that Defendants concealed data and made false statements to downplay the dangers caused by the toxic water from the Flint River. (Am. Compl¶¶ 68-79, 93). Plaintiffs further alleged the toxic water which flowed directly from the Flint River through the service lines and plumbing to the taps of the individual users damaged the plumbing, water heaters and service lines leaving the

[65] Eminent domain or condemnation is the power of a government to take private property for public use. *Silver Creek Drain District v Extrusions Division, Inc*, 468 Mich 367, 373-4; 663 NW2d 436 (2003). The Michigan Constitution requires that "private property shall not be taken for public use without just compensation." Const 1963, Art 10, §2. A property owner may commence an inverse condemnation action seeking just compensation for a de facto taking when the state fails to bring a condemnation proceeding. *Electro-Tech Inc v HF Campbell* Co, 433 Mich 57, 88-9 (1989). An inverse condemnation action is appropriate when private property has been damaged rather than formally taken for public use by government actions. *In the matter of Acquisition of Land – Virginia Park*, 121 Mich App 153, 158; 328 NW2d 602 (1982). Even a partial or fractional loss of the value or use of property by an act of government, which directly affects it, constitutes an appropriation. *Peterman*, 446 Mich at 190.

infrastructure unsafe to use even after Flint was reconnected to the DWSD. (Am. Compl ¶¶ 108-9; 150-2). Finally, Plaintiffs alleged a reduction in property value caused by the damage to plumbing, service lines and water heaters. *Id.*

State Defendants attack the decision below first asserting that Plaintiffs did not allege any affirmative state actions, claiming that it was the decision of Flint *not* the State to switch water sources. (State Def App, pp 48-49). This is patently false. Plaintiffs allege that state officials including Dillon and Kurtz developed the plan to use the Flint River water until KWA became operational. (Am. Compl ¶51). Plaintiffs further allege that the Governor authorized the use of the Flint River despite knowledge that it had been rejected as dangerous and unsafe. (Am. Compl., ¶53). Thus, Plaintiffs clearly pled affirmative actions by state actors.

Next the Defendants argue that the Court of Appeals erred in finding that the actions were directed specifically at Flint water users, not the general public. In *Spiek v DOT*, 456 Mich 331; 572 NW 2d 201 (1998) the Michigan Supreme Court found that an inverse condemnation suit exists only where the plaintiff can allege "a unique or special injury, that is, an injury different in kind, not simply degree, from the harm suffered by all persons similarly situated." *Id* at 348. In *Spiek*, the plaintiffs alleged that they were entitled to compensation for damage to their property as a result of dust, vibration and fumes caused by the proximity of their property to an interstate freeway. The Supreme Court rejected the claim because the damage to plaintiffs' property was no different than the "effects incurred by all property owners who reside adjacent to freeways or other busy highways." *Id* at 332.

Defendants claim that the Court of Appeals misapplied the *Spiek* holding. (State Def App, pp 49-50; EM Def App, p 32). Again, Defendants' assertions are incorrect. The Court of Appeals found that the damages suffered by Plaintiffs were different in kind than others similarly situated,

i.e. those water users who the state did not require to receive toxic, contaminated, corrosive and inadequately treated water from the Flint River. (COA Opinion, pp 36-37). Unlike *Spiek*, Plaintiffs here suffered a unique and special injury not endured by all water users.[66]

Although the Defendants claim that the Court of Appeals erred by comparing Flint water users to non-Flint water users, they cite no authority for their position. (State Def App, p 50; EM Def App, p 32). In fact, Flint water users are similarly situated to non-Flint water users, just as in *Spiek*, the plaintiffs were similarly situated to all property owners living near any freeway, not just the freeway at issue in that case. The claim in *Spiek* failed because the damages suffered by the plaintiffs was common to all similarly situated, not just the property owners living near the roadway. Here the damage to Plaintiffs' property was not common to all similarly situated water users. Plaintiffs' damages were unique and caused directly by Defendants. Thus, *Spiek* was correctly applied below.

Defendants also assert that Plaintiffs claim an injury which is only different in degree, not kind, from other similarly situated water users relying on *Blue Harvest, Inc v Dep't of Trasp*, 288 Mich App 267 (2009). (State Def App, p 49; EM Def App, pp 30-31). In that case, the plaintiff, a commercial blueberry farm, alleged a trespass-nuisance and inverse condemnation arising from the DOT's use of salt on the highway. According to plaintiff, the salt damaged its blueberry bushes. The Court of Appeals rejected the claim finding that the injury to the blueberry crop was merely a difference in degree of injury than that suffered by other property owners located near other roads

[66] Plaintiffs could also be compared to those water users whose communities signed on to the KWA. All those individuals required an interim plan for water until the pipeline was completed. Those outside Flint continued to receive water from DWSD so suffered no injury as a result of State action unlike Flint water users who experienced a loss in property and property values because of the harm caused by the toxic Flint River water. Thus, Plaintiffs have identified a unique injury, not suffered by those similarly situated.

salted by the DOT. *Id* at 283. Here, the injury suffered by Plaintiffs was not simply different in degree from other municipal water users. Other water users, did not suffer any injury or damage to their property. Since only Plaintiffs, the Flint water users, suffered damages to their plumbing infrastructure due to the Defendants' actions, Plaintiffs have satisfied the requirement of alleging damages different in kind and degree than others similarly situated.

Finally, Defendants' contend that Plaintiffs' inverse condemnation claim[67] fails because Plaintiffs did not allege that the government's actions were a substantial cause of their injury. This argument is absurd[68] as Plaintiffs' Amended Complaint is replete with allegations that the damage to the plumbing infrastructure including pipes, water heaters and service lines were a direct result of the state actors' decision to require Flint water users to obtain their water from the Flint River until the KWA pipeline was completed. It was this Interim Plan which resulted in the damage to their property and diminution in property values. Thus, Defendants did not need to actually physically pump the water into the homes to be the substantial cause of the injury.[69] They made

[67] Without citing any authority for their position, State Defendants claim that the Court of Appeals has somehow altered the state's inverse-condemnation jurisprudence. (State Def App, p 49).

[68] Emergency Managers make the nonsensical argument that the affirmative actions by state actors were "aimed at the City's own treatment processes" and not "plaintiff's property." (EM Def App, p 31). As detailed above, and as aptly put by the Court of Appeals: "this is not a situation where plaintiffs have alleged an incidental reduction in property value resulting from some unrelated administrative action by the government. Here, plaintiffs allege deliberate actions taken by defendants that directly led to toxic water being delivered through Flint's own water delivery system *directly into* plaintiffs' water heaters, bathtubs, sinks, and drinking glasses, causing actual, physical damage to plaintiffs' property and affecting plaintiffs' property rights." (COA Opinion, p 36)(emphasis in original). It is for this reason, among others, that the Court of Appeals rejected Defendants' reliance on *Murphy v City of Detroit*, 201 Mich App 54, 56; 506NW2d 5 (1993). *Id*; (EM Def App, p 31).

[69] Emergency Managers continue to compare the devastating act of changing Flint's water supply to Detroit's act of removing adjacent residential neighborhoods in *Murphy*. (EM Def App, pp 30-31). This contention that a city's removal of adjacent neighborhoods in *Murphy* represents a more egregious allegation of inverse condemnation is quite the overstatement. In *Murphy*, the plaintiffs alleged inverse condemnation claims for the loss of revenues from

the decision that toxic Flint River water would be pumped into Plaintiffs' homes and thereby were the substantial cause of the injury.

Plaintiffs' allegations satisfy each element necessary to establish a claim for inverse condemnation. Accordingly, this Court should deny Defendants' Applications.

CONCLUSION

The Court of Appeals correctly found that Plaintiffs may seek damages against the State and its officials, including the Emergency Managers, for violations of the Michigan Constitution. Therefore, for all the reasons cited herein, Plaintiffs-Appellees respectfully request that this Court deny Defendants' applications for leave to appeal.

Date: May 4, 2018

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businesses owned near residential neighborhoods leveled for urban renewal projects. Finding that the defendants did not take away the right of plaintiffs to possess or use their property, the Court concluded that no deliberate action was taken toward the plaintiffs' property. Unlike *Murphy*, the Plaintiffs in this case were deprived of the use of their property due to deliberate action of the Defendants directed ***directly at*** Plaintiffs' property. Therefore, *Murphy* is inapposite and does not change the correct result reached below.

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STATE OF MICHIGAN
IN THE SUPREME COURT

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

v

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-Appellants,
_____/

Supreme Court Nos.: 157335, 157340-42

Court of Appeals Nos.: 335555, 335725, 335726

Court of Claims No.: 16-000017-MM

PROOF OF SERVICE

The undersigned certifies that on May 4, 2018, I directed that a copy of the **Plaintiffs-Appellees' Corrected Omnibus Answer to State Defendants' and Former Emergency Managers Earley and Ambrose's Applications 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 appeared below.

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