STATE OF MICHIGAN
IN THE SUPREME COURT

GRANT BAUSERMAN and TEDDY BROE, individually and on behalf of similarly situated persons,

Plaintiffs-Appellees,

v

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Defendant-Appellant.
_____/

Supreme Court No. 160813

Court of Appeals No. 333181

Court of Claims No. 15-202-MM

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY'S SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Despite appellees' attempts to misstate them, the Unemployment Insurance Agency's arguments in this case are straightforward. First, this Court should follow the U.S. Supreme Court's lead and recognize that it is the proper role of the legislature – not the courts – to create remedies for constitutional torts. Second, even if it were a proper judicial function, it would be inappropriate to infer a money-damages remedy in this case because (a) the identified custom or policy was not the moving force behind the deprivation of appellees' property, and (b) the Legislature designed a comprehensive statutory scheme for challenging unemployment adjudications that does not permit a money-damages remedy.

ARGUMENT

I. This Court should not infer a money-damages remedy for constitutional violations.

A. The possibility of a judicially inferred money-damages remedy first suggested in *Smith* was based on federal caselaw that no longer retains solid footing.

In *Smith v Department of Public Health*, 428 Mich 540 (1987), a majority of the justices agreed that claims for money damages could be appropriate in certain cases alleging violations of the state Constitution. *Id*. at 544. In separate opinions, the justices cited extensively to *Bivens v Six Unknown Federal Narcotics Agents*, 403 US 388 (1971), as the beginning point for analyzing potential claims for money damages for constitutional violations. The Court of Appeals below noted that "[c]onsitutional-tort claims originated in *Bivens*." *Bauserman, et al v*

Unemployment Ins Agency (On Remand), 330 Mich App 545, 560 (2019). Stated another way, *Bivens* "broke new ground in inferring causes of action for damages for constitutional violations." *Mays, et al v Governor, et al*, 506 Mich 157, 253 n 72 (2020) (VIVIANO, J., concurring in part and dissenting in part).

Yet, appellees insist that this Court recognized money damages based on a constitutional violation by the State nearly 100 years ago in *Bishop v Vandercook*, 228 Mich 299 (1924). (Appellees' Supplemental Br, pp 6–7.) But appellees misread *Bishop* because the claims being pursued were not against the State or a State entity, nor were they based on a violation of the Constitution. Thus, appellees are incorrect in saying that the cause of action for damages in *Bishop* was "predicated on a governmental violation of a provision in the Michigan Constitution." (Appellees' Supplemental Br, p 7.) The commanding-officer defendants claimed they were immune from suit based on a *statute*. *Bishop*, 228 Mich at 279–280. The Court held that the statute did not confer the immunity the defendants claimed it did, and the Court noted that the Constitution said that the military was generally subject to civil law (absent a state of military or martial law). *Id*. at 280–282. But *Bishop* was not a constitutional-tort case and it has no bearing here.

Returning then to *Smith*'s opening of the door (with a push from *Bivens*) to the possibility of a judicially inferred money-damages claim for violations of the state Constitution, the analysis on whether to expand on *Smith* should include an examination of what the U.S. Supreme Court has done since *Bivens*. Appellees assert, however, that *Bivens* and later caselaw is irrelevant. (Appellees'

Supplemental Br, pp 37–41.) For the reasons offered in its supplemental brief, the Agency respectfully disagrees that federal *Bivens* jurisprudence has no bearing on this case. (See Agency Supplemental Br, pp 12–16.)

And, contrary to appellees' arguments, the Agency is not asking this Court to take its cue from Washington on how to interpret the Michigan Constitution. (Appellees' Supplemental Br, pp 39–41.) The fact of the matter is that our Constitution says nothing about money damages or when the judiciary may infer that form of relief. Rather, that idea was a creature of caselaw that was built on a foundation of U.S. Supreme Court caselaw. Thus, the Agency suggests that the Court look at the continued stability of that foundation. Rather than build on that foundation, the U.S. Supreme Court has progressively chipped away at it to the point where it can no longer support an inferred money-damages remedy.

B. Allowing the Legislature to decide whether to create a money-damages remedy under the state Constitution does not disrespect this Court's role in interpreting the Constitution.

This Court has recognized that the Legislature has the authority to decide whether the State can be sued, and if so, what the limitations on the State's liability should be. See *McCahan v Brennan*, 492 Mich 730, 736 (2012). Thus, caselaw shows that if a cause of action for money damages against the State should exist under Michigan's Constitution, the Legislature should be the branch to create it.

This is not a controversial take. Indeed, three Justices in *Bivens* and two Justices in *Smith* said the legislative branches should be the ones to create a damages remedy. See *Bivens*, 403 US at 411–412, 427–430, 430 (BURGER, C.J.,

BLACK, J., and BLACKMUN, J.); and *Smith*, 428 Mich at 632 (opinion by BRICKLEY, J., joined by RILEY, C.J.). This makes sense because whether to create such a remedy involves considering difficult public policy concerns and issues.

So the question becomes, who is best suited to weigh the competing policies, goals, and priorities? In *Lash v City of Traverse City*, 479 Mich 180 (2007), a case relied on by appellees, this Court held that it was not the judiciary's role to "assess what would be most fair or just or best public policy." 479 Mich at 197, quoting *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 504 (2002).

And asking this question does not, as appellees suggest, diminish this Court's role in interpreting the provisions of our Constitution. (See Appellees' Supplemental Br, pp 18–19.) It is true that this Court held in *In re Certified Questions (Midwest Institute of Health, PLLC, et al. v Governor of Michigan, et al.)*, 506 Mich 332 (2020), that the judicial branch is required to "identify whether the Constitution has been breached and undo such breaches. . . ." 506 Mich at 374. But the Agency has never questioned the Court's role in determining when a constitutional violation has occurred at the hands of the State. But a reasonable distinction can be drawn between finding a violation and creating a new remedy. This Court said as much in *Lewis v State of Michigan*, 464 Mich 781 (2001), when it recognized the obvious distinction between the judiciary calling out and invalidating "unconstitutional government action" and the judiciary creating remedies, with the latter being a legislative function. 464 Mich at 788–789. The distinction between (1) noting and acting on a violation of established rules and (2) creating new

remedies for the violation of those rules is readily apparent in non-legal settings. For example, no one questions an umpire's ability to award a walk after calling four balls; but surely we would scratch our heads if the umpire unilaterally decided to award two bases to the runner instead of one. Likewise here, the Agency does not contend that courts cannot consider constitutional claims against the State or call out constitutional violations. Rather, the question is whether courts can create or infer a money-damages remedy against the State. The answer should be "no."

Since *Smith*, this Court has recognized the important separation of powers principles associated with this issue and has demonstrated restraint and respect for legislative role in providing for money-damages remedies against a governmental entity like the State. In *Lash*, the Court expressly held that a money-damages remedy could not be inferred against a governmental entity absent explicit authorization from the Legislature. *Lash*, 479 Mich at 183. Appellees offer *Lash* and *Gardner v Wood*, 429 Mich 290 (1987), as supporting the assertion that this Court has embraced a four-part test for courts to use in deciding whether to infer a money-damages cause of action. (Appellees' Supplemental Br, pp 22–23 n 9.) But the *Lash* Court rejected the application or extension of this test "to allow a private cause of action for money damages to be implied *against a governmental entity*. . . ." *Lash*, 479 Mich at 193–194 (emphasis in original). For that to occur, the Court required "express legislative authorization." *Id*. at 194.

In sum, the legal sand has shifted since *Smith* on the issue of judicially inferred money-damages claims for constitutional violations by the State. The U.S.

Supreme Court has recognized this, and this Court has recognized the limitations imposed by the separation of powers on the judiciary inferring such remedies. This case presents an opportunity for the Court to continue following that path.

II. Even if it were appropriate for a court to infer a money-damages remedy, the Court should decline to do so in this case.

Even assuming this Court were inclined to infer a money-damages remedy for constitutional violations by the State, this case is not an appropriate one to infer a money-damages remedy against the Agency. The possible circumstances established in *Smith* that could support such a remedy do not exist here.

A. Appellees have not sufficiently identified an Agency policy or custom that caused a deprivation of their property without notice and an opportunity to be heard.

As previously noted, this Court has held that the State could be subject to liability if a plaintiff shows that the implementation or execution of a governmental policy or custom caused a violation of the plaintiffs' constitutional rights. (See Agency Supplemental Br, pp 22–23 (citations and quotations omitted).) In response, appellees assert that their amended complaint contains sufficient allegations to survive a motion for summary disposition under MCR 2.116(C)(8). (Appellees' Supplemental Br, pp 27–29.)

The essence of the allegations that appellees call sufficient is that the Agency utilized MiDAS to detect possible instances of fraud and determine whether a claimant committed fraud, without giving claimants notice or an opportunity to be heard. (*Id*. at 28.) But even accepting this bald allegation as true, appellees still

fail to sufficiently allege how that alleged policy or custom caused their property to be deprived in violation of due process. That is, appellees fail to link this alleged policy and custom to the actionable harm of a procedural due process claim—the deprivation of their property. As the Agency previously contended, there are too many potential intervening events between the alleged policy or custom and the deprivation of a claimant's property. (Agency Supplemental Br, pp 29–31.)

Thus, appellees have failed to satisfy the requirements of sufficiently identifying a specific policy or custom that was the moving force in depriving them of their property without notice and an opportunity to be heard.

B. A judicially inferred money-damages remedy is not the only remedy available to appellees.

In *Smith*, Justices Boyle and Cavanaugh said they might recognize a money-damages remedy for a violation of the state constitution where there would be no other or no alternative remedy available. *Smith*, 428 Mich at 647, 651 (BOYLE, J., concurring in part and dissenting in part, joined by CAVANAGH, J.). This Court later described *Smith* as recognizing only "a narrow remedy against the State on the basis of the unavailability of any other remedy." *Jones v Powell*, 462 Mich 329, 337 (2000). Appellees go so far as saying that this should be the sole factor to be considered in determining whether a judicially inferred money-damages remedy is appropriate. (Appellees' Supplemental Br, pp 29–33.)

But the Agency has already identified the alternative remedies available to claimants who allege that the Agency deprives them of due process in processing,

analyzing, and deciding their unemployment claims. (Agency Supplemental Br, pp 40–42.) Thus, the Agency is not "advocating" that such claims "would go completely unredressed." (Appellees' Supplemental Br, p 32.)

Appellees cite *Durant v State*, 456 Mich 175 (1997), to support their assertion that a money-damages remedy is the only way to effectively punish the State for violating the Constitution. (Appellees' Supplemental Br, p 32, citing *Durant*, 456 Mich at 206.) It is true that the *Durant* Court held that declaratory or injunctive relief was not an effective way to enforce the constitutional provisions at issue in that case. But the facts of that case and the unique language of the constitutional provision at issue make *Durant* of no help to appellees here.

The constitutional provision at issue in *Durant* permitted a taxpayer to bring suit in the Court of Appeals "*to enforce* the provisions of Sections 25 through 31. . . ." *Durant*, 456 Mich at 204, quoting Const 1963, art 9, § 32 (emphasis added). The *Durant* Court seized on the "to enforce" language and held that this gave the Court "the duty and authority" to enforce the constitutional provision in the most effective manner possible. *Id*. at 205. The Court also noted that declaratory relief, not money damages, would normally be the most effective way to enforce Article 9, § 29 of Michigan's 1963 Constitution. *Id*. at 205–206, 208. The Court ultimately decided to award money damages in *Durant* based on the case's unique and (from the Court's perspective) frustrating factual and procedural history. The Court held that it had "no choice but to award damages against the State" because it concluded that the State had ignored a prior Court of Appeals' decision, and had introduced a legal

argument several years into the litigation, and then did not honor the repeated rejections of that argument. *Id*. at 210, 217. In sum, the *Durant* Court's decision to award money damages was based on two principal reasons that do not apply here: "the people's use of the emphatic word 'enforce'" in Article 9, § 32 (*Id*. at 217); and the state defendants' failure to abide by prior appellate decisions, making declaratory relief insufficient. If anything, *Durant* shows how reluctant this Court is to award money damages in cases like these, absent clear and convincing circumstances that are not present here.

More recently, this Court rejected appellees' argument about money damages being the only effective remedy against the government. In *Lash*, the plaintiff argued that a private cause of action was the only "effective redress" for a violation of the statute at issue. 479 Mich at 185. The Court rejected this argument and pointed to injunctive or declaratory relief. *Id*. at 196. This relief may not have been as appealing to the plaintiffs, but the Court could not find any authority for the suggestion that a court could create a cause of action for money damages against a governmental entity simply because other available remedies were not as "economically advantageous to plaintiff[s]." *Id*. at 197.

Appellees also assert that the statutory scheme established in the Michigan Employment Security Act (MES Act) does not provide a meaningful alternative remedy because the administrative tribunals cannot decide constitutional issues, and because the MES Act does not provide for money damages. (Appellees' Supplemental Br, pp 36–37.) First, appellees continue to overlook the fact that a

claimant can appeal an Agency adjudication to the appellate courts and make constitutional arguments. An appellate court could review the claim that the Agency violated a claimant's due process rights and determine whether to grant that claimant various forms of relief under the MES Act. Second, the lack of a money-damages remedy in the MES Act reflects the Legislature's decision not to create such a remedy for the wrongful adjudication of unemployment claims. In *Smith*, Justice Boyle observed that such a legislative decision was a specific factor "militating against a judicially inferred damage remedy." See *Smith*, 428 Mich at 651 (BOYLE, J., concurring in part and dissenting in part, joined by CAVANAGH, J.).

CONCLUSION AND RELIEF REQUESTED

For the reasons stated in the Unemployment Insurance Agency's supplemental brief and in this reply brief, the Agency respectfully asks that this Court grant leave to appeal and reverse the Court of Appeals' decision.

Respectfully submitted,

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