

STATE OF MICHIGAN  
IN THE SUPREME COURT  
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

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

Plaintiffs-Appellees

v.

MICHIGAN UNEMPLOYMENT  
INSURANCE AGENCY,

Defendant-Appellant.

Docket No. 160813

Court of Appeals No. 333181

Lower Court No. 15-202-MM  
Michigan Court of Claims

**Filed Under AO 2019-6**

---

**BRIEF AMICUS CURIAE OF**  
**MICHIGAN ASSOCIATION FOR JUSTICE**

Robert B. June (P51149)  
Law Offices of Robert June, P.C.  
415 Detroit Street, 2nd Floor  
Ann Arbor, MI 48104-1117  
(734) 481-1000  
bobjune@junelaw.com

*Attorney for Amicus Curiae*  
*Michigan Association for Justice*

**I. TABLE OF CONTENTS**

I. Table Of Contents ..... ii  
II. Index Of Authorities ..... iii  
III. Interest Of Amicus Curiae .....iv  
IV. Question Presented.....v  
V. Argument Of Amicus Curiae .....1  
VI. Conclusion And Request For Relief.....7  
VII. Certificate Of Compliance ..... I

**II. INDEX OF AUTHORITIES**

**Cases**

*Bank of Hamilton v. Dudley's Lessee* (1829), 27 U.S. (2 Pet) 492 (7 L Ed 496) .....3

*Kearney v Bd of State Auditors*, 189 Mich 666; 155 NW 510 (1915) . 2

*Marbury v Madison*, 5 US (1 Cranch) 137, 175; 2 L Ed 60, 73 (1803) ..... 2, 5

*McCulloch v. Maryland* (1819), 17 U.S. (4 Wheat) 316 (4 L Ed 579) 1

*Richardson v Secretary of State*, 381 Mich 304; 160 NW2d 883 (1968) .....3

*Smith v State*, 428 Mich 540; 410 NW2d 749 (1987) .....5, 6

*Traverse City Sch Dist v AG*, 384 Mich 390; 185 NW2d 9 (1971)1, 2, 5, 6

**Treatises**

Cooley's Const Lim 81 ..... 2

**Constitution**

Const 1963, art 1, § 17 ..... v, 2, 4

Const 1963, art 3, § 2 ..... v, 1

### **III. INTEREST OF AMICUS CURIAE**

The Michigan Association for Justice is an organization of Michigan lawyers engaged primarily in litigation and trial work, typically representing plaintiffs in civil lawsuits. MAJ recognizes an obligation to assist this Court on important issues that would substantially affect the orderly administration of justice in the courts of this state. This case presents such issues, particularly insofar as the outcome may affect the availability of remedies for violation of the Due Process Clause of the Michigan Constitution.

#### **IV. QUESTION PRESENTED**

Whether the separation of powers established under the Michigan Constitution, Const 1963, art 3, § 2, precludes this Court from recognizing a constitutional tort and the right to a remedy for violations of the Due Process Clause of the Michigan Constitution, Const 1963, art 1, § 17.

## V. ARGUMENT OF AMICUS CURIAE<sup>1</sup>

There are situations where deference to the legislature or a state agency is appropriate. This is not one of them. The argument of Appellant Michigan Unemployment Insurance Agency rests in large part on its view of the separation of powers established in the Michigan Constitution. (Appellant's Supp Brf, pp 16-21, citing Const 1963, art 3, § 2). However, adhering to the Agency's separation-of-powers analysis would actually consolidate powers in the legislative branch, violating the core principle of separation of powers. The Court, and only the Court, is the final arbiter of constitutional interpretation, and the Court should not subordinate its role to that of the legislature in this case.

This case requires the construction of a constitution, where the technical rules of statutory construction do not apply. *Traverse City Sch Dist v AG*, 384 Mich 390, 405; 185 NW2d 9 (1971), citing *McCulloch v. Maryland* (1819), 17 U.S. (4 Wheat) 316, 407 (4 L Ed 579). The Michigan Constitution is not a mere statute, and the principles of constitutional construction are neither new nor novel. "The primary rule is the rule of 'common understanding' described by Justice Cooley:

A constitution is made for the people and by the people.  
*The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.* 'For as the Constitution does not derive its

---

<sup>1</sup> No counsel associated with any party participated in authoring this brief in whole or in part. No party, or counsel for any party, made any monetary contribution intended to fund the preparation or submission of this brief, and all monetary contributions for preparation of this brief were made by the Michigan Association for Justice.

force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding*, and ratified the instrument in the belief that that was the sense designed to be conveyed.’”

*Id.*, quoting Cooley's Const Lim 81 (emphasis added in original).

Second, “[i]n construing constitutional provisions where the meaning may be questioned, the court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished.” *Id.*, quoting *Kearney v Bd of State Auditors*, 189 Mich 666, 673; 155 NW 510 (1915). Third, “[i]f any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction.” *Traverse City Sch Dist*, 384 Mich at 406, quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 175; 2 L Ed 60, 73 (1803).

It is axiomatic that the Due Process Clause of the Michigan Constitution was designed to protect citizens from the potential excesses of all of the branches of government:

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Const 1963, art 1, § 17.

In suggesting that there is no remedy for a due process violation unless the legislature creates one, the Agency to render the Due Process Clause inoperative and insulate itself from enforcement of fundamental constitutional rights. No one branch should be able to determine if or when the government must follow the Constitution and return the people's property to them when the government unconstitutionally takes it. The Constitution created the executive branch. It created the legislative branch. And it created the judicial branch, vesting it with the power to ensure the sanctity of the Constitution. As explained in *Richardson v Secretary of State*, 381 Mich 304, 309; 160 NW2d 883 (1968):

Michigan Constitution of 1963, art 3, § 2, divides the powers of the State's government into three branches. It forbids exercise of the powers of one branch by another. Const 1963, art 6, § 1, vests the judicial power of the State exclusively in one court of justice. Interpretation of the State Constitution is the exclusive function of the judicial branch. Construction of the Constitution is the province of the courts and this Court's construction of a State constitutional provision is binding on all departments of government, including the legislature. See 16 Am Jur 2d, Constitutional Law, § 58, p 230. As said in *Bank of Hamilton v. Dudley's Lessee* (1829), 27 U.S. (2 Pet) 492, 524 (7 L Ed 496):

“The judicial department of every government is the rightful expositor of its laws; and emphatically of its supreme law.”

The legislature does not get to decide when Michiganders have the right to due process; instead the Constitution makes it clear that

neither the legislature nor the executive branch has the right to infringe on Michiganders' right to due process. Const 1963, art 1, § 17.

Ironically, if the Agency's argument is correct, the legislature has infringed on Michiganders' due process rights by failing to implement legislation to provide a remedy when any branch of government fails to provide due process.

But the Agency's argument is not correct. The Constitution is self-implementing and specifically identifies the few circumstances where the legislature is required to take action to support its implementation. The Constitution is clear that the government may not deprive its citizens of their property without due process of law. Const 1963, art 1, § 17. The Constitution is clear that the right of all people to fair and just treatments in legislative and executive investigations and hearings *shall not be infringed. Id.* In this case, it is alleged that the government, by and through the Agency, took its citizens' property without due process and has not given it back, causing damages.

The allegations made in this case cannot be ignored. If true, Michigan accused people of fraud unjustly and without due process, making people repay up to 4 times the amount of benefits they were entitled to receive, by taking up to 50% of their weekly wages and all of their tax refunds. The repercussions of these lost wages and funds axiomatically would lead to a failure to be able to pay bills in full and timely, placing these citizens in a downward economic spiral where they would be subject to higher credit rates as their credit ratings were

destroyed. There must be a remedy if these facts are true or the promise of due process rights found in Michigan's Constitution is just a fallacy.

This is a fundamental reason for rejecting the agency's construction and adhering to the obvious meaning of the Due Process Clause in this case. *Marbury*, 5 US (1 Cranch) at 175. We simply cannot say that "reasonable minds, the great mass of the people themselves," would interpret the Due Process Clause as protecting them against deprivation of property only if the legislature provides a remedy. *See, Traverse City Sch Dist*, 384 Mich at 405. Nor would any study of the circumstances surrounding the "adoption and the purpose sought to be accomplished" by the Due Process Clause lead to the conclusion that its enforcement is limited to those situations where the legislature acquiesces. *Id.*

The Agency in this case tries to rely on cases involving statutory interpretation, not constitutional interpretation, even while knowing that "[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith v State*, 428 Mich 540, 544; 410 NW2d 749 (1987). The Agency fully acknowledges that the opinion of Justices Boyle and Cavanaugh in that case "laid out a case for why it was good policy for the State of Michigan to recognize claims for money damages against the state for alleged violations of constitutional rights." (Appellant's Supp Brf, p 17, citing *Smith*, 428 Mich at 642-44). We agree with this, but the Agency then argues that creation of a remedy for a constitutional violation involves public policy concerns, and "those policy

determinations are best left to legislative bodies.” (Appellant’s Supp Brf, p 17). Here, we differ. The public policy concerns underlying the Michigan Constitution were determined by the people who ratified it, and they are not up to the legislature to determine. Again, “[t]he intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.” *Traverse City Sch Dist*, 384 Mich at 405.

When the people of Michigan ratified our Constitution, they intended to preserve for themselves real rights and real protections against potential government excesses. For over thirty years, the legislature relied on this Court’s holding in *Smith*, which allowed for money damages to be available under certain circumstances for constitutional violations, such as those alleged in this case. The legislature has not challenged this ruling and has taken no action to legislate regarding constitutional remedies. Instead, the Agency argues that, even if it did violate the constitutional rights of Michiganders, there are no consequences because the legislature has not enacted a remedy for such constitutional violations. This destruction of the sanctity of the Constitution, of the powers of the rights it gives its citizens, cannot be condoned. Instead, this Court need only follow its own precedent and reaffirm its decision in *Smith*, 428 Mich at 544, which has been the law in Michigan for over 30 years.

**VI. CONCLUSION AND REQUEST FOR RELIEF**

For these reasons, Amicus Curiae Michigan Association for Justice requests this Honorable Court to affirm the decision of the Court of Appeals in this case, and to clarify the right to a constitutional tort remedy for violations of the Due Process Clause of the Michigan Constitution.

Respectfully submitted,

*s/Robert B. June*

Robert B. June (P51149)  
Law Offices of Robert June, P.C.  
415 Detroit Street, 2nd Floor  
Ann Arbor, MI 48104-1117  
(734) 481-1000  
bojune@junelaw.com

*Attorney for Amicus Curiae  
Michigan Association for Justice*

Date: September 29, 2021

**VII. CERTIFICATE OF COMPLIANCE**

In accordance with AO 2019-6, this document has 1,746 countable words and is formatted using Equity Text A 14-point font.

Respectfully submitted,

*s/Robert B. June*

Robert B. June (P51149)  
Law Offices of Robert June, P.C.  
415 Detroit Street, 2nd Floor  
Ann Arbor, MI 48104-1117  
(734) 481-1000  
bojune@junelaw.com

*Attorney for Amicus Curiae  
Michigan Association for Justice*

Date: September 29, 2021