STATE OF MICHIGAN

COURT OF CLAIMS

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN and RHONDA KELSO, Plaintiffs, v GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, DARNELL EARLEY and JERRY AMBROSE, Defendants.	**OPINION AND ORDER** Case No. 16-000017-MM Hon. Mark T. Boonstra

This putative class action arises out of the water contamination crisis commonly referred to as the "Flint Water Crisis." Plaintiffs commenced this litigation on behalf of the water users and property owners of the City of Flint. Named as defendants are various state defendants[1] and two former emergency managers of Flint. Plaintiffs seek, in part, to recover monetary damages attributable to alleged violations of the due process and fair and just treatment clauses of Const

[1] The state defendants are: Governor Rick Snyder, the State of Michigan, the Michigan Department of Environmental Quality, and the Michigan Department of Health and Human Services. This use of the term "state defendants" in this opinion derives from the manner in which the parties have identified themselves in the briefing of the pending motions, and is not indicative of any conclusion by the Court on the issue presented regarding whether the former emergency manager defendants are state or local officials. That issue will be discussed later in this opinion and without regard to the characterization of certain named defendants as the "state defendants."

1963, art 1, § 17, and the taking clause of Const 1963, art 10, § 2. Before the Court are dual motions seeking summary disposition pursuant to MCR 2.116(C)(4) (lack of jurisdiction), (C)(7) (immunity granted by law) and (C)(8) (failure to state a claim); one is brought by the state defendants and one is brought by the former emergency managers, Darnell Earley and Jerry Ambrose. For the reasons detailed in this opinion, the Court GRANTS summary disposition in favor of all defendants on Counts I and III of plaintiffs' first amended complaint. The Court DENIES summary disposition, as to all defendants, without prejudice, on Counts II and IV.[2]

I. FACTUAL BACKGROUND

Because the instant matter presents on motions for summary disposition that were filed at an early stage of this litigation, the factual record is yet to be developed. For the limited purpose of providing context for the rulings that follow with regard to the merits of defendants' motions for summary disposition brought pursuant to MCR 2.116(C)(8), the Court accepts as true, as it must (for purposes of the pending motions), plaintiffs' well-pleaded allegations and views those allegations in a light most favorable to plaintiffs. In doing so, the Court acknowledges that defendants offer a different view of the facts; the state defendants expressly maintain, for example, that "the State and Governor recognize the seriousness of these issues," and recite to a

[2] Defendants Earley and Ambrose also seek summary disposition with regard to plaintiffs' request for injunctive relief. That request for summary disposition is not properly before the Court. "It is well settled that an injunction is an equitable remedy, not an independent cause of action." *Terlecki v Stewart*, 278 Mich App 644, 663; 754 NW2d 899 (2008). Summary disposition may be granted with respect to a claim or a defense. MCR 2.116(B)(1). A remedy is neither a claim nor a defense and, thus, is not subject to summary disposition. Consequently, the Court concludes that the summary disposition request is improperly brought as it pertains to the request for injunctive relief. The propriety of the remedy of injunctive relief is more properly addressed after a finding, if any, of liability.

number of steps that they maintain have been taken that "demonstrate[] their commitment to resolving the crisis;" similarly, defendants Earley and Ambrose offer that "[t]he Flint Water Crisis has resulted in the mass mobilization of resources by city, county, state, federal, and non-governmental actors as they work to protect the residents of the City of Flint . . . and Genesee County, identify the root causes of the Crisis, prevent its reoccurrence, and address the long term issues that have resulted or will result." In any event, having acknowledged that the parties hold differing perspectives regarding the facts and circumstances that have given rise to this litigation, the Court reiterates that it is its obligation at this juncture of the proceedings to accept plaintiffs' factual allegations as true for purposes of a (C)(8) motion, and the Court therefore will not in this opinion further summarize defendants' factual contentions. Rather, the factual recitation that follows is, for the reasons noted, derived entirely from plaintiffs' first amended complaint. The reader should therefore appreciate that, for these reasons, and given the early stage of this litigation, this factual description does not reflect any findings by the Court.

From 1964 through late April 2014, the Detroit Water and Sewage Department ("DWSD") supplied Flint water users with their water, which was drawn from Lake Huron. Flint joined Genesee, Sanilac and Lapeer Counties and the City of Lapeer, in 2009, to form the Karegondi Water Authority ("KWA") to explore the development of a water delivery system that would draw water from Lake Huron and serve as an alternative to the Detroit water delivery system. On March 28, 2013, the State Treasurer recommended to the Governor that he authorize the KWA to proceed with its plans to construct the alternative water supply system. The State Treasurer made this decision even though an independent engineering firm commissioned by the State Treasurer had concluded that it would be more cost efficient if Flint continued to receive its water from the DWSD. Thereafter, on April 16, 2013, the Governor authorized then-Flint

Emergency Manager Edward Kurtz to contract with the KWA for the purpose of switching the source of Flint's water from the DWSD to the KWA beginning in mid-year 2016.

At the time Emergency Manager Kurtz contractually bound Flint to the KWA project, the Governor and various state officials knew that the Flint River would serve as an interim source of drinking water for the residents of Flint. Indeed, the State Treasurer, the emergency manager and others developed an interim plan to use Flint River water before the KWA project became operational. They did so despite knowledge of a 2011 study commissioned by Flint officials that cautioned against the use of Flint River water as a source of drinking water and despite the absence of any independent state scientific assessment of the suitability of using water drawn from the Flint River as drinking water.

On April 25, 2014, under the direction of then Flint Emergency Manager Earley and the Michigan Department of Environmental Quality ("MDEQ"), Flint switched its water source from the DWSD to the Flint River and Flint water users began receiving Flint River water from their taps. This switch was made even though Michael Glasgow, the City of Flint's water treatment plant's laboratory and water quality supervisor, warned that Flint's water treatment plant was not fit to begin operations. The 2011 study commissioned by city officials had noted that Flint's long dormant water treatment plant would require facility upgrades costing millions of dollars.

Less than a month later, state officials began to receive complaints from Flint water users about the quality of the water coming out of their taps. Flint residents began complaining in June of 2014 that they were becoming ill after drinking the tap water. On October 13, 2014, General Motors announced that it was discontinuing the use of Flint water in its Flint plant due to concerns about the corrosive nature of the water. That same month, Flint officials expressed

concern about a Legionellosis outbreak and possible links between the outbreak and Flint's switch to the river water. On February 26, 2015, the United States Environmental Protection Agency ("EPA") advised the MDEQ that the Flint water supply was contaminated with iron at levels so high that the testing instruments could not measure the exact level. That same month, the MDEQ was also advised of the opinion of Miguel Del Toral of the EPA that black sediment found in some of the tap water was lead.

During this time, state officials failed to take any significant remedial measures to address the growing public health threat posed by the contaminated water. Instead, state officials continued to downplay the health risk and advise Flint water users that it was safe to drink the tap water while at the same time arranging for state employees in Flint to drink water from water coolers installed in state buildings. Additionally, the MDEQ advised the EPA that Flint was using a corrosion control additive with knowledge that the statement was false.

By early March 2015, state officials knew they faced a public health emergency involving lead poisoning and the presence of the deadly Legionella bacteria, but actively concealed the health threats posed by the tap water, took no measures to effectively address the dangers, and publically advised Flint water users that the water was safe and that there was no widespread problem with lead leaching into the water supply despite knowledge that these latter two statements were false.

Through the summer and into the fall of 2015, state officials continued to cover up the health emergency, discredit reports from Del Toral of the EPA and Professor Marc Edwards of Virginia Tech confirming serious lead contamination in the Flint water system, conceal critical information confirming the presence of lead in the water system, and advise the public that the

drinking water was safe despite knowledge to the contrary. In the fall of 2015, various state officials attempted to discredit the findings of Dr. Mona Hann-Attisha of Hurley Hospital, which reflected a "spike in the percentage of Flint children with elevated blood lead levels from blood drawn in the second and third quarter of 2014." (First Amended Complaint, p 21, ¶ 102.)

In early October of 2015, however, the Governor acknowledged that the Flint water supply was contaminated with dangerous levels of lead. He ordered Flint to reconnect to the Detroit water system on October 8, 2015, with the reconnection taking place on October 16, 2015. This suit followed.

II. SUMMARY DISPOSITION STANDARDS

Summary disposition is appropriate under MCR 2.116(C)(4) when the trial court lacks subject matter jurisdiction. *Packowski v United Food and Commercial Workers Local 951*, 289 Mich App 132, 138; 796 NW2d 94 (2010). To determine whether summary disposition is appropriate under this subrule, this Court must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate a lack of subject matter jurisdiction. *Id*. at 139 (internal quotation marks and citation omitted).

A motion for summary disposition brought pursuant to MCR 2.116(C)(7) (on which defendants rely in this case in asserting "immunity granted by law") requires this Court to accept as true the well-pleaded allegations of plaintiffs and to construe those allegations in favor of plaintiffs, unless the allegations are specifically contradicted by the affidavits or other appropriate documentation submitted by the movant. *Adair v State of Michigan*, 250 Mich App 691, 702; 651 NW2d 393 (2002), aff'd in part and rev'd in part on other grounds 470 Mich 105 (2004). "If the pleadings demonstrate that a party is entitled to judgment as a matter of law, or if

the affidavits or other documentary evidence show that there are no genuine issues of fact, judgment must be rendered without delay." *Id*.

A trial court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). When deciding a motion brought under this subrule, this Court accepts all well-pleaded factual allegations as true and views those allegations in a light most favorable to the nonmoving party. *Id*. at 304-305. A party may not support a motion under subrule (C)(8) with documentary evidence. *Id*. at 305. Summary disposition should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id*.

III. JURISDICTIONAL ISSUES

A. The Notice Requirement of MCL 600.6431(3)

Generally, governmental entities in Michigan are statutorily immune from tort liability. Because the government may voluntarily subject itself to tort liability, however, it may also place conditions or limitations on the liability imposed. *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012). Moreover, "it being the sole province of the Legislature to determine whether and on what terms the state may be sued, the judiciary has no authority to restrict or amend those terms." *Id*. at 732. In other words, "no judicially created savings construction is permitted to avoid a clear statutory mandate." *Id*. at 733. Thus, courts may not engraft an actual prejudice requirement or otherwise reduce the obligation to fully comply with the legislatively-imposed conditions or limitations. *Id*. at 747.

One such condition precedent on the right to sue the state is satisfaction of the notice provision of the Court of Claims Act, MCL 600.6431. *McCahan*, 492 Mich at 736; see also, *Fairley v Dep't of Corrections*, 497 Mich 290, 292; 871 NW2d 129 (2015). The notice provision at issue in this litigation provides: "In all actions for property damage or personal injuries, 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." MCL 600.6431(3). This provision applies to constitutional torts. *Rusha v Dep't of Corrections*, 307 Mich App 300, 301, 304; 859 NW2d 735 (2014). "Section 6431(3) is an unambiguous 'condition precedent to sue the state,' *McCahan v Brennan*, 291 Mich App 430, 433; 804 NW2d 906 (2011), aff'd 492 Mich 730 (2012), and a claimant's failure to comply strictly with this notice provision warrants dismissal of the claim, even if no prejudice resulted, *McCahan v Brennan*, 492 Mich 730, 746-747; 822 NW2d 747 (2012)." *Rusha*, 307 Mich App at 307. "[S]ubstantial compliance does not satisfy MCL 600.6431(3)." *McCahan*, 291 Mich App at 433.

Plaintiffs commenced the instant suit on January 21, 2016.[3] According to defendants, the six-month notice period set forth in MCL 600.6431(3) began to run either in June of 2013, the date on which plaintiffs allege that "the State created a dangerous public health crisis for the users of Flint tap water" by "order[ing] and set[ting] in motion the use of highly corrosive and toxic Flint River water knowing that the [water treatment plant] was not ready" (First Amended

[3] Plaintiffs did not separately file a "notice of intention to file a claim," MCL 600.6431(1), (3). Rather, plaintiffs allege that their "original Complaint [wa]s filed within six months of the accrual of Plaintiffs' claim and satisfies all timeliness requirements of MCL §§ 600.6431 . . . ." (First Amended Complaint, p 7, ¶ 34).

Complaint, p 12, ¶ 59), or on April 25, 2014, the date Flint water users began receiving Flint River water from their taps (First Amended Complaint, p 12, ¶¶ 58-59). Regardless of which date is selected, defendants assert that the conclusion in the same: plaintiffs failed to file the requisite notice within six months of either date and, therefore, their complaint must be dismissed in its entirety pursuant to MCR 2.116(C)(4) and (7). The Court is unpersuaded by defendants' argument. Were the Court to accept defendants' position, it would have to find that plaintiffs' 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. The Court is disinclined to so find. Rather, the Court finds that defendants' request for summary disposition on this ground is at best premature for the reasons that follow.

Plaintiffs assert only constitutional claims. In *Rusha*, the Court of Appeals acknowledged that "Michigan courts routinely enforce statutes of limitation where constitutional claims are at issue." *Rusha*, 307 Mich App at 311. The Court also acknowledged that an exception to such enforcement lies where it can be demonstrated that a statute of limitations is so harsh and unreasonable in the consequences that it "effectively divest[s]" a plaintiff "of the access to the courts intended by the grant of the substantive right." *Rusha*, 307 Mich App at 311 (citations and internal punctuation omitted). The Court then observed that no obvious reason existed not to extend this exception to statutory notice requirements, particularly the notice requirements of MCL 600.6431(3). The Court elaborated:

> We see no reason – and plaintiff has provided none – to treat statutory notice requirements differently. Indeed, although statutory notice requirements and statutes of limitations do not serve identical objectives, *Davis v Farmers Ins Group*, 86 Mich App 45, 47; 272 NW2d 334 (1978), both are *procedural* requirements that ultimately restrict a plaintiff's remedy, but not the substantive right. See [*American States Ins Co v Dep't of Treasury*, 220 Mich App 586, 599; 560 NW2d 644 (1996)] (statutory notice periods are " 'devices . . . which have the

> effect of shortening the period of time set forth in' statutes of limitation") (omission in *American States*), quoting *Carver v McKernan*, 390 Mich 96, 99; 211 NW2d 24 (1973), overruled on other grounds by [*Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 213, 222-223; 731 NW2d 41 (2007)]; see also *Brown v United States*, 239 US App DC 345, 362; 742 F2d 1498 (1984) (en banc) (Bork, J., dissenting) ("Like statutes of limitations, notice-of-claims provisions go primarily to remedy.") (citation omitted). [*Rusha*, 307 Mich App at 311-312 (emphasis in original).]

The Court then concluded, however, that on the facts presented, there was no reason to relieve the plaintiff in that case from compliance with the notice requirement. The Court explained:

> Here, it can hardly be said that application of the six-month notice provision of § 6431(3) effectively divested plaintiff of the ability to vindicate the alleged constitutional violation or otherwise functionally abrogated a constitutional right. Again, plaintiff waited nearly 28 months to file a claim. But § 6431 would have permitted him to file a claim on this very timeline had he only provided notice of his intent to do so within six months of the claim's accrual. Providing such notice would have imposed only a minimum procedural burden, which in any event would be significantly less than the "minor 'practical difficulties' facing those who need only make, sign and file a complaint within six months." *Brown*, 239 US App DC at 365 (Bork, J., dissenting), quoting *Burnett v Grattan*, 468 US 42, 51; 104 S Ct 2924; 82 L Ed 36 (1984). To be sure, providing statutory notice " 'requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of this [statutory notice provision] that would not be applicable to any other statute of limitation.' " *Rowland*, 477 Mich at 211, quoting *Ridgeway v Escanaba*, 154 Mich 68, 73; 117 NW 550 (1908). [*Rusha*, 307 Mich App at 312-313.]

In the present litigation, unlike in *Rusha*, a granting of summary disposition at this stage of the proceedings could potentially divest plaintiffs of the ability to vindicate the alleged constitutional violations by depriving them of access to the courts. Unlike a suit, for example, brought to recover for personal injuries sustained in an automobile accident where the event giving rise to the cause of action is the accident, *McCahan*, 492 Mich at 734; *Kline v Dep't of Transportation*, 291 Mich App 651, 652, 654, 657 n 1; 809 NW2d 392 (2011), in the present suit the event giving rise to the cause of action was not readily apparent at the time of its happening. Similarly, a significant portion of the injuries alleged to persons and property likely became

manifest so gradually as to have been well established before becoming apparent to plaintiffs because the evidence of injury was concealed in the water supply infrastructure buried beneath Flint and in the bloodstreams of those drinking the water supplied via that infrastructure. Matters 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. Under these unique circumstances, and assuming plaintiffs' allegations to be true, providing statutory notice would have required much more than "only ordinary knowledge and diligence on the part of the injured and [their] counsel," such that there indeed is "reason for relieving them from the requirements of this [statutory notice provision]." *Rusha*, 307 Mich App at 312 (citations and internal quotation marks omitted). Rather, and again under these unique circumstances, and assuming plaintiffs' allegations to be true, such affirmative acts of concealment and obfuscation would "effectively divest[] plaintiff[s] of the ability to vindicate the alleged constitutional violation or otherwise functionally abrogate[] a constitutional right," *id*., if 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. See e.g., *The Cooke Contracting Co v Dep't of State Highways #1 (On Rehearing)*, 55 Mich App 336, 339; 222 NW2d 231 (1974).[4] In

[4] In so concluding, the Court does not adopt and, to the contrary, rejects plaintiffs' argument that the fraudulent concealment tolling provision found in MCL 600.5855 should be applied in this case. MCL 600.5855 extends the time for commencing an action, notwithstanding that it "would otherwise be barred by the period of limitations," "[i]f 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

light of these circumstances and the Court's review of the allegations contained in plaintiffs' first amended complaint and the content of the documentary evidence presented by the parties, the Court finds, at a minimum, that there are fact questions that if answered favorably to plaintiffs would, under the established exception recognized by existing caselaw, justify "relieving [plaintiffs] from the requirements of" MCL 600.6431(3). *Rusha*, 307 Mich App at 312.[5]

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for the claim from the knowledge of the person entitled to sue on the claim." The Court of Appeals has twice declined to import this provision into MCL 600.6431 because the latter provision is a notice provision and not a statute of limitation provision. See *Brewer v Central Michigan Univ Bd of Trustees*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2013 (Docket No. 312374), unpub op at 2-3; *Zelek v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2012 (Docket No. 305191), unpub op at 2. Although "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis," MCR 7.215(C)(1), an unpublished opinion can be instructive or persuasive, *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). More telling, however, is the fact that the Legislature imported the fraudulent concealment provision into the statute of limitation provisions of the Court of Claims Act, MCL 600.6452(2); MCL 600.5855, but not into the notice provisions of the Act. The absence of such a similar provision is persuasive evidence that the Legislature did not intend for the fraudulent concealment tolling provision of MCL 600.5855 to be read into the notice provisions of MCL 600.6431.

Yet, while the Court of Appeals in *Brewer* and *Zelek* properly declined to import the fraudulent concealment tolling provision of MCL 600.5855 into the notice provisions of the Court of Claims Act, MCL 600.6431, the Court finds it noteworthy, as did the Court of Appeals in *Brewer*, that the plaintiff in that case had timely knowledge of his injuries yet waited years before asserting (or giving notice of) his claim. Further, the claim in *Zelek* arose from a motor vehicle accident, an identifiable event of which the plaintiff obviously was aware at the time of its occurrence. Although the plaintiff claimed that she should have been advised that the vehicle with which she had collided was an unmarked state police vehicle, the accident reports sufficiently identified the vehicle and driver that the plaintiff with due diligence could have ascertained that she was required to file a timely notice in the Court of Claims. Thus, the unique and distinctive circumstances of the instant case stand in stark contrast to the very distinguishable circumstances that were present in *Brewer* and *Zelek*, and while those cases properly support the non-importation of the tolling provisions of MCL 600.5855 into the notice provisions of MCL 600.6431, they do not in any way address or undermine this Court's recognition and application of the established exception recognized in *Rusha*.

[5] The Court notes that the Michigan Supreme Court denied leave to appeal in *Rusha*. See, *Rusha*, 498 Mich 860; 865 NW2d 28 (2015).

Nevertheless, even if strict compliance with the notice requirements were 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).

For these reasons, summary disposition pursuant to MCR 2.116(C)(4) and (7) based on an application of the six-month notice provision is denied.

B. Emergency Managers

The state defendants assert that the Court of Claims lacks subject matter jurisdiction over plaintiffs' claims against defendants Earley and Ambrose because neither former emergency manager acted in the capacity of a state officer while serving Flint in the office of emergency manager. Rather, the state defendants argue that defendants Earley and Ambrose, when acting as

emergency managers for the City of Flint, "were local, not state, officials."[6] For this reason, the state defendants assert that summary disposition pursuant to MCR 2.116(C)(4) is appropriate as to defendants Earley and Ambrose on all counts of plaintiffs' first amended complaint. This Court disagrees with the underlying premise of the state defendants' argument, and therefore declines to grant summary disposition in favor of defendants Earley and Ambrose on this ground.

Under MCL 600.6419(1)(a), the Court of Claims possesses exclusive subject-matter jurisdiction to hear and determine "any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable or declaratory relief . . . against the state or any of its departments or officers." See also, *Fulicea v Michigan*, 308 Mich App 230, 231; 863 NW2d 385 (2014). The Legislature defined the phrase "the state or any of its departments or officers" in MCL 600.6419(7). In relevant part, that phrase means "this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state . . . ." MCL 600.6419(7).

[6] The state defendants advance this argument not in support of their own motion for summary disposition, but instead in response to the separate motion for summary disposition filed by defendants Earley and Ambrose. Defendants Earley and Ambrose do not make the same argument, and the state defendants acknowledge that Earley and Ambrose "accept . . . as accurate" plaintiffs' contention that the emergency managers were acting as "official agents/policymakers for the State of Michigan." (First Amended Complaint, p 7, ¶ 29).

The Court finds that defendants Earley and Ambrose operated as officers of the state, while executing their responsibilities as emergency managers and overseeing the receivership[7] of Flint. As observed by this Court in its prior decision in *Collins v City of Flint*, 16-000115-MZ, its finding is consistent with

> the long-recognized principle that a receiver serves as the administrative or ministerial arm or officer of the authority exercising the power of appointment. See *Arbor Farms, LLC v Geostar Corp*, 305 Mich App 374, 392; 853 NW2d 421 (2014) (A receiver serves as an arm of the court.); *In re Guaranty Indemnity Co*, 256 Mich 671, 673; 240 NW 78 (1932) ("Generally speaking a receiver is not an agent, except of the court appointing him[.] He is merely a ministerial officer of the court, or, as he is sometimes called, the hand or arm of the court."); *Woodliff v Frechette*, 254 Mich 328, 329; 236 NW2d 799 (1931) (A receiver serves as an arm of the court.*); Detroit Trust Co v Wayne Circuit Judge*, 223 Mich 49, 52; 193 NW 879 (1923) (A receiver serves as an arm of the court.); *Band v Livonia Associates*, 176 Mich App 95, 108; 439 NW2d 285 (1989) ("A receiver is sometimes said to be the arm of the court . . . ."). [*Collins*, 8/25/16 opinion & order, pp 12-13.]

The Court's finding is also supported by the provisions of the local financial stability and choice act, MCL 141.1541 et seq. Again, as explained in *Collins*,

> [a]n emergency manager is a creature of the Legislature with only the power and authority granted by statute. *Kincaid v City of Flint*, 311 Mich App 76, 87; 874 NW2d 193 (2015). An emergency manager is appointed by the governor following a determination by the governor that a local government is in a state of financial emergency. MCL 141.1546(1)(b); MCL 141.1549(1). The emergency manager serves at the governor's pleasure. MCL 141.1515(5)(d); MCL 141.1549(3)(d); *Kincaid*, 311 Mich App at 88. The emergency manager can be removed by the governor or by the Legislature through the impeachment process. MCL 141.1549(3)(d) and (6)(a). The state provides the financial compensation for the emergency manager. MCL 141.1549(3)(e) and (f). All powers of the emergency manager are conferred by the Legislature. MCL 141.1549(4) and (5); MCL 141.1550 – MCL 141.1559; *Kincaid*, 311 Mich

[7] The local financial stability and choice act, MCL 141.1541 et seq., which provides for the appointment of emergency managers, describes the resulting state of affairs as a "receivership." MCL 141.1549(2); MCL 141.1542(q).

> App at 87. Those powers include powers not traditionally within the scope of those granted municipal corporations. See MCL 141.1552(1)(a) – (ee). 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. MCL 141.1552(1)(f), (x), (z) and (3); MCL 141.1555(1). The Legislature has also subjected the emergency manager to various codes of conduct otherwise applicable only to public servants, public officers and state officers. MCL 141.1549(9). Through the various provisions within the act, the state charges the emergency manager 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 emergency manager 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]." MCL 141.1551(2). The emergency manager 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. MCL 141.1557. Finally, the Act tasks the governor, and not the emergency manager, with making the final determination whether the financial emergency declared by the governor has been rectified by the emergency manager's efforts. MCL 141.1562(1) and (2). Under the totality of these circumstances, the core nature of the emergency manager may be characterized as an administrative officer of state government. See 65 Am Jur 2d, Receivers, § 128, p 745 (A receiver's duties are administrative in nature.). [*Collins*, 8/25/16 opinion & order, pp 13-14.]

For the foregoing reasons, and at all times relevant to this action, defendants Earley and Ambrose acted as state officers while executing their duties as an emergency manager. Consequently, this Court has jurisdiction over plaintiffs' claims against the former emergency managers. Summary disposition pursuant to MCR 2.116(C)(4) is denied.[8]

[8] Among the arguments advanced by the state defendants for the proposition that emergency managers are local, not state, officials, is the fact that, according to the state defendants, "[t]he Legislature expressly requires the *local*, not state government, to represent emergency managers and pay for judgments against them. MCL 141.1560(5)." The Court rejects the state defendants' position that the Legislature's creation of such a "liability arrangement," to use the state defendants' terminology, converts the emergency managers into local, rather than state, officials for purposes of this action. Conceivably, issues may arise at some juncture regarding whether the state may have a claim for those damages, if any, or those litigation expenses, if any, that may arise out of the actions or defense of defendants Earley and Ambrose. However, those

IV. CONSTITUTIONAL TORTS

Plaintiffs advance three theories of recovery under Const 1963, art 1, § 17: first, in Count I, a constitutional tort predicated on an application of the state-created danger theory; second, in Count II, a constitutional tort predicated on a violation of the protection afforded to an individual's bodily integrity by the substantive component of the due process clause; and third, in Count III, a constitutional tort predicated on a violation of the fair and just treatment clause. The Court agrees with defendants that plaintiffs have failed to state a claim with regard to Counts I and III of their first amended complaint. Defendants are entitled to summary disposition with regard to those counts pursuant to MCR 2.116(C)(8). With regard to Count II, however, the Court finds that plaintiffs have properly pleaded a cognizable substantive due process claim for a violation of their respective individual rights to bodily integrity. Summary disposition is inappropriate with regard to Count II.

A. General Principles

Under Michigan law, it is settled that a damage remedy for a violation of the Michigan Constitution may be recognized against the state in appropriate cases. *Jones v Powell*, 462 Mich 329, 336; 612 NW2d 423 (2000); *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Dep't of State Police*, 491 US 58, 109 S Ct 2304, 105 L Ed 2d 45 (1989). "[T]he state will be liable for a violation of the state constitution only 'in cases where a state "custom or policy" mandated the official or employee's action.' " *Carlton v Dep't of Corrections*, 215 Mich App 490, 505; 546 NW2d 671 (1996), quoting *Smith*, 428 Mich at 642

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issues are not currently before the Court, and the Court expressly declines to address them at this time.

(Opinion by BOYLE, J.). Moreover, "[t]he tortious conduct alleged 'must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing *government* power . . . . [I]t must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.' " *Williams v Berney*, 519 F3d 1216, 1221 (CA 10, 2008), quoting *Livesy v Salt Lake Co*, 275 F3d 952, 957-958 (CA 10, 2001); see also, *Collins v City of Harker Heights*, 503 US 115, 128; 112 S Ct 1061; 117 L Ed 2d 261 (1992) (The substantive component of the federal Due Process Clause is violated by executive action only if it can be classified, in a constitutional sense, as arbitrary or shocking to the conscience.); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 198-202; 761 NW2d 293 (2008) ("[W]hen executive action is challenged in a substantive due process claim, the claimant must show that the action was so arbitrary [in a constitutional sense] as to shock the conscience."). Whether conduct shocks the conscience depends on the matter at hand. *County of Sacramento v Lewis*, 523 US 833, 849; 118 S Ct 1708; 140 L Ed 2d 1043 (1998); *Williams*, 519 F3d at 1220-1221; *Robinson v Michigan*, unpublished opinion[9] per curiam of the Court of Appeals, issued November 7, 2006 (Docket No. 270781), unpub op at 3. "The case law . . . recognizes official conduct may be more egregious in circumstances allowing for deliberation . . . than in circumstances calling for quick decisions." *Williams*, 519 F3d at 1220-1221. "Substantive due process protections 'apply to transgressions above and beyond those covered by the ordinary civil tort system; the two are not coterminous.' " *Johnson v City of*

[9] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). Unpublished opinions can be instructive or persuasive, however. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

Murray, 909 F Supp 2d at 1265, 1292 (DC Utah, 2012), aff'd 544 Fed Appx 801 (CA 10, 2013), quoting *Williams*, 519 F3d at 1221.

For purposes of deciding the merits of defendants' motions, the Court must determine whether a violation of the Michigan Constitution by virtue of a governmental custom or policy has been alleged with regard to each of the three constitutional torts asserted. *Smith*, 428 Mich at 545; *Johnson v Wayne Co*, 213 Mich App 143, 156; 540 NW2d 66 (1995); *Estate of Braman*, unpublished opinion per curiam of the Court of Appeals, issued March 1, 2012 (Docket Nos. 302545; 302622), unpub op at 7. If plaintiffs' allegations, when taken as true, are sufficient to sustain any of the claimed violations of art 1, § 17, then the Court must determine whether this case would be an appropriate one to recognize a damage remedy under art 1, § 17. *Estate of Braman*, unpub op at 7.

B. Count I - State-Created Danger

The state defendants assert that Count I of plaintiffs' first amended complaint must be summarily dismissed pursuant to MCR 2.116(C)(7) and (8) because plaintiffs have failed to satisfy the threshold criteria for the recognition of a viable cause of action under the state-created danger theory. It is unnecessary for this Court to reach the issue of whether such a cause of action is or should be recognized, however, because even if the state-created danger theory is a viable theory of recovery in Michigan, plaintiffs have not alleged, and cannot allege, facts to state a claim under the theory. Thus, Count I of plaintiffs' first amended complaint must be dismissed pursuant to MCR 2.116(C)(8).

The Michigan Constitution commands that the state cannot deprive any person of "life, liberty or property without due process of law." Const 1963, art 1, § 17. Substantive due

process protects the individual from arbitrary and abusive exercises of government power; certain fundamental rights cannot be infringed upon regardless of the fairness of the procedures used to implement them. *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998).

The state-created danger theory has its genesis in *DeShaney v Winnebago Co Dep't of Social Services*, 489 US 189; 109 S Ct 998; 103 L Ed 2d 249 (1989). In *DeShaney*, the United States Supreme Court considered whether the due process clause of the Fourteenth Amendment imposed upon the states an affirmative duty to protect an individual against private violence where a special relationship exists between the state and private individual. A minor commenced suit against several social workers and other local officials after the boy was beaten and permanently injured by his father. The minor asserted that the social workers and other officials deprived him of his due process liberty interest when they failed to remove him from the custody of his father despite receiving complaints that the child was being abused by his father and despite having reason to believe that this was the case. *Id*., 489 US at 191. The Supreme Court began its analysis by recognizing that the purpose of the Due Process Clause is to protect the people from the state, not to impose an affirmative obligation on the state to protect people from each other. *Id*., 489 US at 195-196. Nevertheless, the Supreme Court noted that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id*., 489 US at 198. The Court elaborated:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. . . . The affirmative duty to protect arises not from the State's

> knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. . . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.
>
> . . . Petitioners concede that the harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor. While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua. [*Id*., 489 US at 199-201 (internal citations omitted).]

Applying these principles to the facts in *DeShaney*, the Supreme Court found no due process violation because the harms suffered by the child occurred while he was in the custody of his father and because the harm faced by the child was no greater due to any affirmative state action. *Id*., 489 US at 201.

As observed in *Kneipp v Tedder*, 95 F3d 1199, 1205 (CA 3, 1996), "[i]n *DeShaney*, the Supreme Court left open the possibility that a constitutional violation might have occurred despite the absence of a special relationship when it stated: 'While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.' " Various federal circuit courts of appeals have relied on this sentence from *DeShaney* as support for employing a state-created danger theory to establish a constitutional claim under 42 USC 1983, although the theory has yet to be recognized by the United States Supreme Court. *Walker v Detroit Pub School Dst*, 535 Fed Appx 461, 464 (CA 6, 2103); *Henry v City of Erie*, 728 F3d 275, 282 (CA 3, 2013); *Jane Doe 3*

v White, 409 Ill App 3d 1087; 951 NE2d 216, 230 (2011), aff'd 362 Ill Dec 484; 973 NE2d 880 (2012); *Aselton v Town of East Hartford*, 277 Conn 120, 134 n 8; 890 A2d 1250, 1258 n 8 (2006); *Nelson v Driscoll*, 295 Mont 363, 379-380; 983 P2d 972, 983 (1999). Although the state-created danger theory is recognized by most federal circuits, the test employed by the various circuits somewhat varies among jurisdictions. *Nelson*, 983 P2d at 983; compare *Henry*, 728 F3d at 282; *Cartwright v Marine City*, 336 F3d 487, 493 (CA 6, 2003); *Currier v Doran*, 242 F3d 905, 918 (CA 10, 2001); *Nelson*, 983 P2d at 983. The United States Court of Appeals for the Sixth Circuit has articulated the test as follows:

> To show a state-created danger, plaintiff must show: 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff. [*Cartwright*, 336 F3d at 493.]

The Michigan Court of Appeals has applied this same test to claims brought under 42 USC 1983. See *Manuel v Gill*, 270 Mich App 355, 365-366; 716 NW2d 291 (2006), aff'd in part and rev'd in part 481 Mich 637 (2008); *Dean v Childs*, 262 Mich App 48, 54-57; 684 NW2d 894 (2004), rev'd in part on other grounds 474 Mich 914 (2005); *Buck v City of Highland Park*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2015 (Docket No. 320967), unpub op at 2-3; *Doe v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued December 8, 2009 (Docket No 285274), unpub op at 1-3; *Lofton v Detroit Bd of Ed*, unpublished opinion per curiam of the Court of Appeals, issued September 30, 2008 (Docket No. 276449), unpub op at 7-9; *Robinson v State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued November 7, 2006 (Docket No. 270781), unpub op at 4-5; *Conley v Bobzean*, unpublished opinion per curiam of the Court of Appeals, issued January 12, 2006 (Docket No.

257276), unpub op at 5-6; *Rollo v Guerreso*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 2005 (Docket No. 251826), unpub op at 6-7; *Fortune v City of Detroit Public Schools*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2004 (Docket No. 248306), unpub op at 2-4.

Defendants assert that plaintiffs have failed to state a claim under the state-created danger theory because plaintiffs have failed to allege that defendants' actions "created or increased the risk that plaintiff[s] would be exposed to an act of violence by a third party." Plaintiffs respond, however, that harm committed by a private third party is not a necessary requirement for the imposition of liability under the state-created danger theory. Plaintiffs refer this Court to *Stiles v Grainger Co, Tennessee*, 819 F3d 834, 854 (CA 6, 2016), wherein the Sixth Circuit set forth the elements of the state-created danger theory as follows:

> To prevail on a state-created danger theory, Plaintiffs must establish three elements: (1) an affirmative act that creates or increases the risk to the plaintiff, (2) a special danger to the plaintiff as distinguished from the public at large, and (3) the requisite degree of state culpability.

What plaintiffs fail to recognize is that *McQueen v Beecher Community Schools*, 433 F3d 460, 464 (CA 6, 2006), the case cited in *Stiles* to support the above-quoted statement of the elements of the offense, expressly states that "[l]iability under the state-created danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence." (Quoting *Kallstrom v City of Columbus*, 136 F3d 1055, 1066 [CA 6, 1998]). They also fail to point out that *Stiles* itself involved a claim of third party violence, i.e., student-on-student sexual harassment. *Stiles*, 819 F3d at 840-847, 854-855. Thus, neither *Stiles* nor *McQueen* provides persuasive support for plaintiffs' assertion that a showing of harm inflicted by a private third party is not a prerequisite to an application of

the state-created danger theory. Under the applicable caselaw, the Court is therefore constrained from applying the theory as broadly as plaintiffs suggest it should apply, even though the very name of the theory, i.e. state-created danger, facially suggests that it could implicate what happened in Flint and even though other jurisdictions may not condition an application of the theory on the presence of private violence. See e.g., *Kneipp*, 95 F3d 1199.

The Court further declines to apply the theory expansively in light of the general reluctance of this state's appellate courts to expand the doctrine of substantive due process. *Sierb*, 456 Mich at 528, 531-533; *Smith*, 428 Mich at 544; *Bestway Recycling, Inc* v *State of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2002 (Docket No. 226926), unpub op at 2. Likewise, the United States Supreme Court has underscored its own reluctance to expand the doctrine of substantive due process, explaining:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. . . . The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field. [*Collins v City of Harker Heights*, 503 US 115, 125; 112 S Ct 1061; 117 L Ed 2d 261 (1992).]

As noted, to the extent that the Michigan Court of Appeals has addressed the state-created danger theory, the Court has restricted its application to the more narrow application involving private violence. See e.g., *Manuel*, 270 Mich App at 367. Finally, this Court concludes that a narrow application of the theory is consistent with *DeShaney*. *DeShaney* expressly recognized a single exception to the general rule that a state's failure to protect an individual from private violence does not violate due process. That exemption applies whenever an individual suffers harm from private third-party violence while the state has physical custody of the victim and the aggressor through incarceration or institutionalization or other similar

restraint of personal liberty. *DeShaney*, 489 US at 195, 199-200. This general exception did not apply in *DeShaney* because the child was injured by an act of private violence while the child was outside state custody. Nevertheless, the *DeShaney* Court left open the possibility that a constitutional violation might have been cognizable under the circumstances present in *DeShaney*, despite the absence of a special relationship arising from a custodial situation, when it stated: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." This comment informs the scope of the state-created danger theory. The genesis of the theory is in language cognizant that the dangers faced by the child in the free world were dangers associated with private violence. Under such circumstances, the quoted language suggests "a *narrow exception*, which applies only when a state actor affirmatively acts to create, or increase[] a plaintiff's vulnerability to danger from private violence. It does not apply when the injury occurs due to the action of another state actor." *Gray v Univ of Colorado Hosp Authority*, 672 F3d 909, 921 (CA 10, 2012), quoting *Moore v Guthrie*, 438 F3d 1036, 1042 (CA 10, 2006) (italics in original).

For these reasons, the Court concludes that if the state-created danger tort is a cognizable constitutional tort in Michigan, the tort would be narrow in scope and limited to circumstances involving a state actor's affirmative acts that either created or increased the risk that the plaintiff would be exposed to an act of private violence. Inasmuch as this Court is bound to apply the law as it exists, any expansion of the scope of that constitutional tort must come from a higher court. Because plaintiffs have not alleged any harm caused by private violence, summary disposition is appropriate, in favor of all defendants, on Count I of plaintiffs' first amended complaint, pursuant to MCR 2.116(C)(8).

C. Count II - Injury to Bodily Integrity

The state defendants assert that Count II of plaintiffs' first amended complaint must be summarily dismissed pursuant to MCR 2.116(C)(7) and (8) because plaintiffs have failed to satisfy the threshold criteria for the recognition of a viable cause of action for a violation of their respective individual rights to bodily integrity under the substantive due process component of Const 1963, art 1, § 17. Defendants further assert that Count II must be summarily dismissed pursuant to MCR 2.116(C)(8) because plaintiffs have not stated, and cannot state, a cause of action for damages. The Court finds defendants' arguments unpersuasive.

1. Requirements for Establishing the Constitutional Tort

The Court begins its analysis of the merits of defendants' arguments by examining the allegations of a substantive due process violation. *Estate of Braman*, unpub op at 7. Substantive due process has long been recognized, at least in the context of the federal constitution, as encompassing a "right to bodily integrity." See, e.g., *Albright v Oliver*, 510 US 266, 272; 114 S Ct 807; 127 L Ed 2d 114 (1994); *Sierb*, 456 Mich at 523, 529 (interpreting the Michigan due process provision as "coextensive with the federal provision"). As observed above, an actionable constitutional tort does not exist unless a state "custom or policy" mandated the actions of the governmental official or employee and, thus, was the "moving force behind the constitutional violation." *Carlton*, 215 Mich App at 505. A government's policy or custom may be "made by its lawmakers or by those whose acts or edicts may fairly be said to represent official policy." *Monell v New York City Dep't of Social Services*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978). A single decision by such a body "unquestionably constitutes an act of official government policy" regardless whether that body had taken similar action in the

past or intended to do so in the future. *Pembaur v City of Cincinnati*, 475 US 469, 480; 106 S Ct 1292; 89 L Ed 2d 452 (1986). "To be sure, 'official policy' often refers to formal rules or understandings – often but not always committed to writing – that intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Id*., 475 US at 480-481. In other words, "[i]f a decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of government 'policy' as that term is commonly understood." *Id*., 475 US at 481.

In the present suit, plaintiffs allege that the Governor and the State Treasurer approved Flint's participation in the KWA's water delivery system, and that the State Treasurer, the emergency managers and other state officials, including state officials employed by the MDEQ, developed an interim plan to use Flint River water before the KWA project became operational and, through the implementation of that plan, delivered Flint River water to the taps of the Flint water users. These allegations, taken as true, establish a series of decisions to adopt a particular course of action made by the state's authorized decision-makers and, thus, establish the existence of state policies. These policies played a role in the alleged violation of plaintiffs' constitutional rights and the infliction of injury. Likewise, 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. With regard to allegations of covering up the health crisis created by the switch to Flint River water, plaintiffs

allege a coordinated effort involving, among others, MDEQ's Chief of Office of Drinking Water and Municipal Assistance Liane Shekter-Smith, MDEQ's Water Treatment Specialist Patrick Cook, MDEQ District Supervisor Stephen Busch, MDEQ Engineer assigned to Genesee County Michael Prysby, MDEQ spokesperson Brad Wurfel, and Michigan Department of Health and Human Services Director Nick Lyon. These latter allegations are sufficient, when taken as true, to establish a decision to adopt a particular course of action made by the state's authorized decision-makers and, thus, establish that the state officers and employees' alleged tortious conduct occurred while implementing a state policy.

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 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 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."

Defendants correctly observe that the California Court of Appeals has opined that an individual's right to bodily integrity is not implicated in the context of public drinking water and that the neither state nor federal substantive due process protections guarantee a right to a healthful or contaminant-free environment. *Coshow v City of Escondido*, 132 Cal App 4th 687, 709-710; 34 Cal Rptr 3d 19 (2005). Indeed, the California court also noted that "the right to bodily integrity is not coextensive with the right to be free from the introduction of an alleged contaminated substance in the public drinking water." *Id*. at 709. The court's rulings were informed, however, by the fact that the alleged contaminating substance at issue was fluoride, and by the court's acknowledgement that "courts throughout the United States have uniformly upheld the constitutionality of adding fluoride to the public water supply as a reasonable and proper exercise of the police power in the interest of public health" and that "[n]o court has recognized a substantive due process claim entitling citizens to drinking water in a form more pure than that required by federal and state drinking water standards." *Id*. *Coshow* did not address whether substantive due process protections are implicated where state actors allegedly abuse state police powers by knowingly and intentionally delivering drinking water contaminated with Legionella bacteria and dangerous levels of lead to a discrete population and thereby create a public health emergency. Moreover, none of the cases relied on by the court in *Coshow* address circumstances even remotely similar to those present in this case. Thus, the Court finds that *Coshow* provides no persuasive rationale to support defendants' request for summary disposition.

For the foregoing reasons, the Court concludes that plaintiffs have alleged sufficient facts, when taken as true, to establish a violation of each plaintiff's respective individual right to

bodily integrity under the substantive due process component of art 1, § 17. Summary disposition on that basis, pursuant to MCR 2.116(C)(8), is therefore inappropriate.

2. Availability of a Damage Remedy

Because plaintiffs have pleaded facts that could establish a claim for a violation of their respective individual rights to bodily integrity, the question becomes whether this case is an appropriate one, assuming plaintiffs' allegations to be proven, in which to impose a damage remedy on the state for a violation of art 1, § 17. To answer this question, the Court looks to the factual allegations set forth in plaintiffs' first amended complaint and the documentary evidence supplied by the parties, and takes guidance from Justice Boyle's separate opinion in *Smith*, as have the appellate courts of this state. See e.g., *Jones*, 462 Mich at 336-337; *Reid*, 239 Mich App at 628-629. Justice Boyle observed that the "first step in recognizing a damage remedy for injury consequent to a violation of our Michigan Constitution is, obviously, to establish the constitutional violation itself. *Smith*, 428 Mich at 648 (Opinion by BOYLE, J.). As previously noted, plaintiffs have alleged facts, if proven, that are sufficient to establish a violation of the protection constitutionally afforded to an individual's bodily integrity. Consequently, this factor weighs in favor of recognizing the availability of a damage remedy for the injuries alleged.

Justice Boyle identified the second step of the analysis as requiring a review of "the text, history, and previous interpretations of the specific provision for guidance on the propriety of a judicially inferred damage remedy." *Smith*, 428 Mich at 650 (Opinion by BOYLE, J.). There are several Michigan appellate decisions that acknowledge that the substantive component of the federal due process clause protects an individual's right to bodily integrity. See e.g., *Sierb*, 456 Mich at 527, 529; *Fortune v City of Detroit Public Schools*, unpublished opinion per curiam of

the Court of Appeals, issued October 12, 2004 (Docket No. 248306), unpub op at 2. There are no Michigan appellate decisions expressly recognizing the same protection under art 1, § 17, even though the due process clauses of the state and federal constitutions are considered coextensive, *Cummins v Robinson Twp*, 283 Mich App 667, 700-701; 770 NW2d 421 (2009). There are also no Michigan appellate decisions, published or unpublished, that recognize a stand-alone constitutional tort predicated on a violation of the right to bodily integrity. These circumstances weigh against recognizing the availability of a damage remedy for the injuries alleged.

Finally, Justice Boyle instructed that

> various other factors, dependent upon the specific facts and circumstances of a given case may militate against a judicially inferred damage remedy for violation of a specific constitutional provision. For example, the federal courts have refused a damage remedy in the face of Congress' exercise of its special authority over the military, see *Chappell v Wallace*, [462 US 296, 304; 103 S Ct 2362; 76 L Ed 2d 586 (1983)], and its special role in personnel management vis-à-vis federal employees, *Bush v Lucas*, [462 US 367; 103 S Ct 2404; 76 L Ed 2d 648 (1983)]. Other concerns, such as the degree of specificity of the constitutional protection, should also be considered. For example, there was no question in *Bivens* [*v Six Unknown Federal Narcotics Agents*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971)], that the defendants had violated the warrant requirements of the Fourth Amendment. These search and seizure protections are, however, relatively clear-cut in comparison to the Due Process and Equal Protection Clauses. See Monaghan, The Supreme Court, 1974 term forward: *Constitutional common law*, 89 Harv L R 1, 44-45 (1975) (substantive guarantees of due process and equal protection are troubling in their character). The clarity of the constitutional protection and violation in a given case should be a factor in determining the propriety of a judicially imposed damage remedy. Another factor important in federal cases has been the availability of another remedy. In *Bivens*, *supra*, the lack of any alternative remedy was certainly a matter of concern to the United States Supreme Court. On the other hand, the presence of an alternative remedy in *Chappell v Wallace*, *supra*, was a factor weighing against a damage remedy for constitutional violations. [*Smith*, 428 Mich at 651-652 (Opinion by BOYLE, J.).]

Defendants assert that plaintiffs have other remedies available to vindicate a violation of their respective rights to bodily integrity, should plaintiffs be able to prove such a violation. To

determine whether there is an alternative remedy available to an award of monetary damages under a constitutional tort theory, the Court begins its analysis with the following backdrop of legal principles. First, as noted, the Michigan Supreme Court in *Smith* held 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*, 428 Mich at 544. This was reaffirmed by the Supreme Court in *Jones*, 462 Mich at 337 ("*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy."). The *Jones* Court's use of the term "only" 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 officials who generally enjoy greater immunities).

Defendants in this case nonetheless seize on certain language from *Jones* (referencing the availability of alternative remedies both against "a municipality" and "against an individual defendant" to suggest that *Jones* necessarily precludes a constitutional tort claim against *any* individuals, including individual state officials. Defendants thus argue that, as a matter of law, plaintiffs cannot assert a constitutional tort against the Governor or Earley and Ambrose. This Court disagrees, and finds that a proper reading of the pertinent caselaw compels the conclusion that the remedy allowed in *Smith*, while narrow, extends beyond the state itself to also reach state officials acting in their official capacity. The Supreme Court in *Jones*, for example, evaluated the availability of alternative remedies against municipalities and their employees as "[u]nlike states *and state officials sued in an official capacity*." *Jones*, 462 Mich at 337 (emphasis added). In doing so, it affirmed the opinion of the Court of Appeals (authored by now Chief Justice Young), which even more expressly stated, "we conclude that the *Smith* rationale simply does not apply outside the context of a claim that *the state* (*or a state official sued in an official*

capacity) has violated individual rights protected under the Michigan Constitution." *Jones*, 227 Mich App at 675 (emphasis within parenthetical added).

Plaintiffs have sued the Governor, Earley and Ambrose not in their respective capacities as individual government employees, but in their official capacities only. As observed in *Will v Michigan Dep't of State Police*, 491 US 58, 71; 109 S Ct 2304; 105 L Ed 2d 45 (1989), "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." (Internal citations omitted.); see also, *McDowell v Warden of Michigan Reformatory at Ionia*, 169 Mich 332, 336; 135 NW 265 (1912); *Carlton*, 215 Mich App at 500-501. The named state officials are merely "nominal party defendant[s]." *McDowell*, 169 Mich at 336. Thus, plaintiffs' suit "is not a suit against the official personally," and plaintiffs can pursue a state constitutional tort claim against the Governor, Early and Ambrose in this case because, in the eyes of the law, state officers acting in their official capacities are indistinguishable from the state. *Jones*, 462 Mich at 337; *Estate of Braman*, unpub op at 6 n 7. However, plaintiffs must look to the state to recover on a judgment for monetary damages should one enter in their favor; the Governor and the former emergency managers may not be held personally liable for any such damages. *Carlton*, *supra*.

This Court thus concludes that the caselaw does not preclude a damage remedy arising out of plaintiffs' constitutional tort claims against the individual named defendants in this action—Governor Snyder and former emergency managers Earley and Ambrose—who are sued only in their official capacity. The Court reiterates, however, that because those individuals are sued only in their official capacity, they in essence are nominal defendants only, such that the

state and the state alone (and not the individuals themselves) are accountable for any damage award that may result in this action.

Having determined that a damage remedy against state officials sued in their official capacity is not precluded, the Court will examine whether, in fact, there are alternative remedies available. Defendants suggest that plaintiffs have alternative remedies available in part because plaintiffs have not alleged that a constitutional tort claim is their only available remedy. Defendants have provided no authority, however, nor has the Court located any, for the proposition that a failure to *allege* the lack of an alternative available remedy is a pleading deficiency that is fatal to a plaintiff's constitutional tort claim.[10]

Defendants further argue that plaintiffs in fact are pursuing certain "virtually identical" claims (albeit under the federal constitution, rather than the Michigan Constitution) against individual state officials in federal court, and that they also are pursuing certain similar claims against individual state officials in the Genesee Circuit Court. Based on the complaints filed in

[10] The Court notes that MCL 600.6440 expressly provides that, although a claim in this Court may not proceed if there is "an adequate remedy upon [the] claim in the federal courts," "*it is not necessary in the complaint filed to allege that claimant has no such adequate remedy*, but that fact may be put in issue by the answer or motion filed by the state or the department, commission, board, institution, arm or agency thereof." (Emphasis added).

Further, the Court recognizes that our Michigan Supreme Court has held, in the context of state-law tort claims, that a "plaintiff must plead [his] case in avoidance of immunity." *Mack v City of Detroit*, 467 Mich 186, 203; 649 NW2d 47 (2002). Further, "[a] plaintiff pleads in avoidance of governmental immunity by stating a claim that fits within a statutory exception or by pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental or proprietary function." *Id*. at 204. However, this requirement is inapplicable here, because plaintiffs have in this case alleged claims arising under the Michigan Constitution. As the Court held in *Smith*, "[w]here it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action." *Smith*, 428 Mich at 544. Therefore, plaintiffs in this case need not plead in avoidance of immunity.

those cases, as appended to the parties' briefs in this case, defendants' position in that regard appears to be correct. The Court notes, however, that plaintiffs name the Governor and the state as defendants in the federal suit for the purposes of prospective injunctive relief only.[11] See *Bay*

[11] The Court recognizes that a panel of the Court of Appeals in *77th District Judge v State of Michigan*, 175 Mich App 681, 696; 438 NW2d 333 (1989), overruled on other grounds by *Parkwood Limited Dividend Housing Ass'n v State Housing Development Authority*, 468 Mich 763; 664 NW2d 185 (2003), stated, in rejecting a damage remedy under an equal protection challenge, that the plaintiff "has as an alternative the remedy of prospective injunctive relief." However, this Court does not find that statement to be controlling or dispositive here, for several reasons. First, the Court in *77th District Judge* acknowledged that "equal protection is a broad and amorphous concept, not readily lending itself to the relative degree of certainty associated with theories underlying recognized constitutional torts." *Id*. Second, the opinion in that case was issued shortly after the fractured opinions were released in *Smith*, and before subsequent decisions by Michigan appellate courts that endorsed the reasoning of Justice BOYLE's separate minority opinion (whereas the Court in *77th District Judge* principally relied on the separate minority opinion of Justice BRICKLEY, which this Court in any event principally reads as favoring a finding "that there is no implicit right to sue the state for damages on the basis of violations of Const. 1908, art. 2, §§ 1 and 16 of the Michigan Constitution," *Smith*, 428 Mich at 639 (Opinion by BRICKLEY, J.)). Third, the Court in *77th District Judge* expressly limited its holding to "the specific facts, circumstances, and theories advanced in [that] case." *Id*., 175 Mich App at 696. Fourth, because *77th District Judge* was overruled on the basis of its jurisdictional ruling, the balance of its analysis was dicta. *Harvey v State of Michigan*, 469 Mich 1, 14 n 14; 664 NW2d 767 (2003). Finally, because *77th District Judge* is not precedentially binding under MCR 7.215(J)(1), prudence dictates that this Court await more definitive and precedential authority from our appellate courts before disallowing a damage remedy for a constitutional tort simply because a plaintiff may be seeking, or may be able to seek, prospective injunctive relief in another court.

That being said, the Court does note that plaintiffs' related federal court action, while purportedly seeking against the Governor "exclusively . . . prospective equitable relief to correct the harm caused and prolonged by state government and to prevent future injury," and while similarly indicating that it seeks "prospective relief only" against the State of Michigan, it describes the equitable relief sought as an order "to remediate the harm caused by defendants [sic] unconstitutional conduct including repairs or [sic] property, [and] establishment of as [sic] medical monitoring fund . . . ." Plaintiffs also generally seek an award of compensatory and punitive damages. Developments in that and other Flint Water Crisis litigation, including the extent to which any "equitable" relief awarded may essentially equate to an award of monetary damages, may impact this Court's future conclusions both with regard to the availability of alternative remedies and other matters, including the remedies, if any, that may be appropriate in this action.

Mills, 244 Mich App at 749 (Under certain circumstances, suits against state officers for injunctive relief under § 1983 are allowed.). Moreover, plaintiffs name none of the defendants in this suit as party defendants in the Genesee Circuit Court action. Yet, defendants have not provided the Court with any authority, nor has the Court located any, for the proposition that an available remedy against a *different* party constitutes an available "alternative remedy" within the meaning of *Smith* and *Jones*. To the contrary, this Court concludes that it must look to a particular named defendant and discern whether a plaintiff would have recourse to enforce his or her rights against *that* defendant by means other than an award of monetary damages under a constitutional tort theory. See *Jones*, 462 Mich App at 335-337 (contrasting claims against the state and state officials, on the one hand, with claims against municipalities and individual municipal employees, on the other hand); *Estate of Braman*, unpub op at 6 n 7 (same).

The Court next observes that, regardless of what claims plaintiffs have actually asserted in other courts, the dispositive question is whether plaintiffs have alternative remedies *available* to them. See, e.g., *Jones*, 462 Mich at 337 ("*Smith* only recognized a narrow remedy against the state on the basis of the *unavailability* of any other remedy.") (emphasis added). Again, the Court begins its analysis of that question with certain general principles. A suit for monetary damages brought under 42 USC 1983, for a violation of rights guaranteed by the federal constitution or a federal statute, cannot be maintained in either a federal court or a state court against a state or a state agency or a state official sued in his or her official capacity, all of which have traditionally enjoyed Eleventh Amendment immunity. *Howlett v Rose*, 496 US 356, 365; 110 S Ct 2430; 110 L Ed 2d 332 (1990); *Bay Mills Indian Community v State of Michigan*, 244 Mich App 739, 749; 626 NW2d 169 (2001); *Hardges v Dep't of Social Services*, 201 Mich App 24, 27; 506 NW2d 532 (1993). Further, "the elective or highest appointive executive official of

all levels of government" is absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority." MCL 691.1407(5). "[T]here can be no dispute" that this includes the Governor. *Duncan v State of Michigan*, 284 Mich App 246, 271-272; 774 NW2d 89 (2009), aff'd on other grounds 486 Mich 906 (2010). The defendant state departments similarly are "immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function," absent the application of a statutory exception, MCL 691.1407(1); *Duncan*, 284 Mich App at 266-267, while, generally, governmental employees acting within the scope of their authority are immune from tort liability except in cases in which their actions constitute gross negligence, MCL 691.1407(2). Moreover, even if the lower-level state employees are eventually found liable under a gross negligence theory, there would be no vicarious liability as to the state. *Malcolm v East Detroit*, 437 Mich 132; 468 NW2d 479 (1991). Also, there is no intentional tort exception to governmental immunity for intentional torts committed by governmental employees during the exercise or discharge of a governmental function, *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 328; 869 NW2d 635 (2015), and a governmental employer cannot be held vicariously liable for the intentional torts of its employees, *Payton v City of Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995); *Lowery v Dep't of Corrections*, 146 Mich App 342, 357; 380 NW2d 99 (1985); *Trosien v Bay Co*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2005 (Docket Nos. 257363; 257364; 257413), unpub op at 4.

An as yet unanswered question arising from this recitation of general principles is whether former emergency managers Earley and Ambrose fall within the category of "the elective or highest appointive executive official of all levels of government" who, like the

Governor, are absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority," MCL 691.1407(5), or whether, alternatively, they count among the lower-level state employees who lack governmental immunity for acts found to constitute gross negligence, MCL 691.1407(2)(c), or for intentional torts committed by them *other than* during the exercise or discharge of a governmental function, *Genesee Co Drain Comm'r,* 309 Mich App at 328 The Court concludes that they fall within the former category and, therefore, like the Governor, are absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority," MCL 691.1407(5).

Defendant Earley was appointed as the emergency manager for the City of Flint in September 2013. (First Amended Complaint, p 11, ¶ 56.) Defendant Ambrose was appointed as the emergency manager for the City of Flint in January 2015. (First Amended Complaint, p 14, ¶ 70.) Both Earley and Ambrose were appointed pursuant to the local financial stability and choice act, MCL 141.1541 et seq., which became effective on March 28, 2013. See 2012 PA 436. That statute provides in part:

> An emergency manager is immune from liability as provided in section 7(5) of 1964 PA 70, MCL 691.1407. [MCL 141.1560(1).]

The Legislature has thus expressly granted emergency managers the same level of immunity as is granted to the Governor as "the elective or highest appointive executive official of all levels of government," and the emergency managers, like the Governor, are therefore absolutely immune from "tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority," MCL 691.1407(5). Indeed, this

level of immunity for emergency managers flows from other aspects of the statutory scheme that established the emergency manager position. For example, MCL 141.1549 states in part:

> Upon appointment, an emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers in receivership to rectify the financial emergency and to assure the fiscal accountability of the local government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health, safety, and welfare. Following appointment of an emergency manager and during the pendency of receivership, the governing body and the chief administrative officer of the local government shall not exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager or as otherwise provided by this act and are subject to any conditions required by the emergency manager. [MCL 141.1549(2).]

Emergency managers also are obliged to "issue to the appropriate local elected and appointed officials and employees, agents, and contractors of the local government the orders the emergency manager considers necessary to accomplish the purposes of this act, including, but not limited to, orders for the timely and satisfactory implementation of a financial and operating plan . . . ." MCL 141.1550(1). Further, orders issued by an emergency manager are "binding on the local elected and appointed officials and employees, agents, and contractors of the local government to whom it is issued." *Id*. Emergency managers are also empowered to take certain actions if the failure to carry out such an order "is disrupting the emergency manager's ability to manage the local government." MCL 141.1550(2).

As the Court of Appeals has recently observed,

> The Legislature has conferred upon emergency managers broad authority to act for and in place of the governing body of the local government:
>
> * * * [Quoting the above language from MCL 141.1549(2).]
>
> Among other things, emergency managers are specifically empowered to

> "[r]emove, replace, appoint, or confirm the appointments to any office, board, commission, authority, or other entity which is within or is a component unit of the local government," MCL 141.1552(1)(ff), and "[t]ake any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the local government, whether elected or appointed, relating to the operation of the local government," MCL 141.1552(1)(ee). "The power of the emergency manager shall be superior to and supersede the power of any of the foregoing officers or entities." MCL 141.1552(1)(ee).

Martin v Murray, 309 Mich App 37, 48; 867 NW2d 444 (2015).

Thus, while in their capacity as emergency managers of the City of Flint, defendants Earley and Ambrose were state officials (see discussion, *supra*), the Court further concludes that they were "the elective or highest appointive executive official of [a] level[] of government," in this case the City of Flint. Therefore, they, like the Governor, are absolutely immune from "tort liability for injuries to persons or damages to property if [they were] acting within the scope of [their] . . . executive authority," MCL 691.1407(5). See also, *Petripren v Jaskowski*, 494 Mich 190; 833 NW2d 247 (2013) (holding that a village chief of police was the highest appointive executive official of a level of government and acted within the scope of his executive authority even when performing the duties of an ordinary police officer). See also, *Martin*, 309 Mich App at 52 (holding that an emergency manager of a school district had the exclusive authority to fill vacancies on the board of education by appointment, and that the power of the remaining members of the district's board of education was suspended during the financial emergency).

This raises the question of whether the Governor, Earley, or Ambrose were in fact acting within the scope of their executive authority, in relation to the allegations of this case, so as to entitle them to the absolute immunity granted by MCL 691.1407(5). That they were so acting appears in this case to be undisputed, inasmuch as plaintiffs have sued these defendants only in

their official capacity. Similarly, these plaintiffs appear not to have alleged otherwise either in their federal court lawsuit or their Genesee Circuit Court litigation. This indicates that plaintiffs acknowledge that these defendants were acting within the scope of their executive authority such that plaintiffs have no alternative remedy available to them relative to these defendants (and even though, as noted earlier in this opinion, these defendants are nominal defendants only, who are not individually subject to any damage award, and whose appearance in the suit is simply another way of suing the state).

That said, the Court certainly is aware that a multitude of lawsuits have been filed in various state and federal courts relative to the Flint Water Crisis variously naming as defendants numerous state, city, and non-governmental defendants. This Court is not currently in a position to know the full scope and nature of the claims and defenses in that universe of litigation. The Court does take judicial notice, anecdotally, that other plaintiffs in other action(s) have alleged certain claims, including against the Governor, Earley, or Ambrose, that purport to name those defendants in their individual capacity, and that assert claims including gross negligence. The Court must therefore consider whether the seeming potential availability of such claims mandates a conclusion that plaintiffs in this case have alternative remedies available to them with respect to the Governor, Earley, and Ambrose, such that their claims against those defendants should be dismissed.

The Court rejects such a conclusion. First, and without presuming to opine upon the merits of claims or defenses in other litigation, the Court concludes for the reasons noted that the Governor, Earley, and Ambrose are (or were), and are sued as, state officials who are not personally accountable with respect to the claims for damages asserted in this action. Second, while the Court is cognizant that the Court of Appeals in *Estate of Braman* commented that

"[a]lthough plaintiff claims that her available remedies before the circuit courts are not viable, this is irrelevant because the law is concerned with the availability, not the outcome, of plaintiffs' cause of action," *Estate of Braman*, unpub op at 4, n 5, citing *Jones*, 462 Mich at 337, it did so in the context not of state officials, but of lower-level state employees who then were not subject to jurisdiction in the Court of Claims and who enjoyed lesser levels of governmental immunity. Therefore, this Court does not read this observation of the Court in *Estate of Braman* to suggest that this Court must require plaintiffs to pursue alternative remedies against these defendants, in an individual capacity, that their own pleadings recognize would likely be subject to failure by virtue of governmental or sovereign immunity.

Thus, the Court holds that because the state, its agencies, and the Governor and former emergency managers acting in an official capacity, are not "persons" under 42 USC 1983 and enjoy sovereign immunity under the Eleventh Amendment and statutory immunity under MCL 691.1407 from common law claims, plaintiffs have no alternative recourse to enforce their respective rights against them. *Jones*, 462 Mich at 335-337; *Estate of Braman*, unpub op at 6 n 7. However, the Court again reiterates that because the Governor, Earley and Ambrose are sued only in their official capacity in this case, they are nominal defendants only, the state alone remains accountable for any resulting damage liability, and the Governor, Earley and Ambrose suffer no personal exposure to any potential monetary damage liability in this case. The issue whether there is an alternative remedy available against them may therefore be entirely academic in any event. But for these reasons, the Court concludes at this juncture that there is no alternative remedy available against any of the named defendants. With the caveat noted, the

lack of an available alternative remedy weighs in favor of recognizing the availability of a damage remedy for the constitutional tort alleged.[12]

Finally, significant 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, and the well-settled legal precept that substantive due process protections apply to an individual's right to bodily integrity.

Based on the totality of the circumstances set forth above, the Court finds that plaintiffs have alleged sufficient facts, if proven to be true, to establish a violation of the Michigan Constitution. The Court also finds that it would be appropriate at this juncture to recognize the availability of a damage remedy for the injuries alleged.[13] Summary disposition with regard to

[12] The Court notes that although the Supreme Court in *Jones* characterized *Smith* as recognizing a narrow remedy "on the basis of the unavailability of any other remedy," *Jones*, 462 Mich at 337, Justice Boyle in *Smith* described the existence of a legislative scheme providing an alternate remedy as a " 'special factor[] counselling hesitation,' . . . which militate[s] against a judicially inferred damage remedy." *Smith*, 428 Mich at 647 (Opinion by BOYLE, J.), quoting *Bivens*, 403 US at 396. Thus, absent further guidance from our appellate courts, it remains unclear whether the availability of an alternative remedy, if presumed or found to exist, would constitute an absolute bar to inferring a damage remedy for a constitutional tort, or simply a factor to be considered.

[13] The Court's decision in this regard is further informed by the requirement of MCL 600.6458 that "[i]n rendering any judgment against the state, or any department, commission, board, institution, arm, or agency, the court shall determine and specify in that judgment the department, commission, board, institution, arm, or agency from whose appropriation that judgment shall be paid."

Count II is therefore inappropriate under MCR 2.116(C)(7) and (8).[14]

D. Count III - Fair and Just Treatment

The state defendants assert that Count III of plaintiffs' first amended complaint must be summarily dismissed pursuant to MCR 2.116(C)(7) and (8) because plaintiffs have failed to satisfy the threshold criteria for the recognition of a viable cause of action under the fair and just treatment clause of Const 1963, art 1, § 17, which provides: "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." Again, it is unnecessary for this Court to reach the issue of whether such a cause of action is or should be recognized, because even if a cause of action exists for a violation of this clause, plaintiffs have not and cannot allege facts to state a claim under the theory for the reasons set forth below. Count III of plaintiffs' first amended complaint must be dismissed pursuant to MCR 2.116(C)(8).

An individual, firm, corporation, or voluntary association's right to fair and just treatment exists only in the context of legislative and executive hearings and investigations, *By Lo Oil Co v*

[14] Further supporting the denial of summary disposition to the Governor, Earley and Ambrose at this time is the Court's cognizance that plaintiffs seek injunctive relief against these state officials in their official capacities. MCR 2.201(C)(5) requires "[a]n officer of the state" to "be sued in the officer's official capacity" when a plaintiff seeks "to enforce the performance of an official duty." See also, *Gaertner v State of Michigan*, 385 Mich 49, 55; 187 NW 429 (1971) (noting that GCR 1963, 201.3(5), the predecessor rule to MCR 2.201(C)(5), did not require certain state officials to be named as party defendants where the injunction did not require an affirmative act in performance of an official duty and where the presence of the state officials was not necessary to effect complete relief.). At this juncture of this litigation, this Court is unable to determine whether injunctive relief will be proven to be appropriate, and whether the presence of these state officials as named (if nominal) defendants in this case will be necessary to effect complete relief.

Dep't of Treasury, 267 Mich App 19, 40; 703 NW2d 822 (2005); *Johnson v Wayne Co*, 213 Mich App 143, 155; 540 NW2d 66 (1995), and not before a hearing or investigation commences or after a hearing or investigation ceases, *Groves v Dep't of Corrections*, 295 Mich App 1, 12; 811 NW2d 563 (2011). For an investigation to implicate the fair and just treatment clause, the investigation must consist of a "searching inquiry for ascertaining facts" or a "detailed or careful examination of the events surrounding [a] plaintiff's misconduct." *Groves*, 295 Mich App at 12, quoting *Messenger v Dep't of Consumer & Industry Services*, 238 Mich App 524, 534; 606 NW2d 38 (1999); see also *Carmacks Collision, Inc v City of Detroit*, 262 Mich App 207, 210-211; 684 NW2d 910 (2004). Moreover, the fair and just treatment clause requires some "active conduct" engaged in by the state actor during the investigation. *By Lo Oil Co*, 267 Mich App at 41. "[T]he fair and just treatment clause does not mandate adequate investigations." *Traverse Village, LLC, v Northern Lakes Community Mental Health*, unpublished opinion per curiam of the Court of Appeals, issued December 30, 2014 (Docket Nos. 317194; 317211), unpub op at 7. "Further, the historical context in which this clause was adopted suggests that it was intended to protect against the excesses and abuses of Cold War legislative or executive investigations or hearings." *By Lo Oil Co*, 267 Mich App at 40. As observed in *Jo-Dan Ltd v Detroit Bd of Ed*, unpublished opinion per curiam of the Court of Appeals, issued July 14, 2000 (Docket No. 201406):

> we cannot forget that the Constitution of 1963 is a product of those unique times in which certain legislative investigations and hearings, notably those aimed at identifying "subversives," negatively affected citizens even in the absence of proof that they actually committed any illegal conduct. Indeed, Michigan at one time had laws intended to protect government from "subversive" individuals and passed legislation creating a "security investigation division" as well as a "subversive activities investigation division" of the State Police in order to gather information on citizens and then have them register with the government. [Unpub op at 10.]

Like Michigan's Constitution, Alaska's constitution contains a fair and just treatment clause. The clause was included in the Alaska constitution "to protect against abuses of the type experienced during the McCarthy era," *Folsom v Alaska*, 734 P2d 1015, 1018 (Alaska, 1987), including "vilification, character assassination, and an intimation of guilt by association," *Keller v French*, 205 P3d 299, 303-304 (Alaska, 2009). The protections offered by the clause are implicated when a plaintiff is exposed to any such abuses. *Id*. at 304.

Although a plaintiff's recovery for a violation of the fair and just treatment clause is predicated on being personally exposed to the abuse of legislative or executive power, *Groves*, 295 Mich App at 12; *Keller*, 205 P3d at 304, plaintiffs fail to allege any such personal exposure. They do not allege that they were witnesses or potential witnesses in an investigation or investigative targets. They do not allege any facts suggesting that defendants engaged in active conduct that subjected any plaintiff to "vilification, character assassination, . . . an intimation of guilt by association" or other similar abusive behaviors. *Keller*, 205 P3d at 303-304. Rather, their allegations suggest a breach of a duty owed to every individual, firm, corporation and voluntary association of this state. Such allegations are insufficient to state a claim for a violation of art 1, § 17. Moreover, to the extent that plaintiffs assert that their complaints were ignored and went uninvestigated, such facts pertain to acts occurring before any investigation commenced and such acts do not fall within the ambit of the term "investigation" for purposes of art 1, § 17. *Groves*, 295 Mich App at 12. Likewise, plaintiffs' claims of inadequately conducted investigations do not fall within the ambit of art 1, § 17. *Traverse Village, LLC, supra*, unpub op at 7. Plaintiffs fail to allege circumstances under which they could prevail and, thus, is it unnecessary for the Court to reach the issue of whether such a cause of action is or should be

recognized in Michigan. Summary disposition is therefore appropriate, in favor of all defendants, on Count III of plaintiffs' first amended complaint, pursuant to MCR 2.116(C)(8).

V. COUNT IV - INVERSE CONDEMNATION

Finally, defendants maintain that plaintiffs have failed to state a claim for inverse condemnation and, therefore, that Count IV of plaintiffs' first amended complaint must be summarily dismissed pursuant to MCR 2.116(C)(8). The Court disagrees.

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, 373-374; 663 NW2d 436 (2003). "US Const, Am V and Const 1963, art 10, § 2 prohibit the taking of private property for public use without just compensation." *Adams Outdoor Advertising v City of East Lansing (After Remand)*, 463 Mich 17, 23; 614 NW2d 634 (2000). In furtherance of its exercise of the constitutional power of eminent domain, the state may follow the procedures codified in the Uniform Condemnation Procedures Act, MCL 213.51 *et seq*., "and condemn, or 'take,' private property for public use by providing the requisite compensation." *Dorman v Twp of Clinton*, 269 Mich App 638, 645; 714 NW2d 350 (2006). A property owner may commence an inverse or reverse condemnation action seeking just compensation for a de facto taking when the state fails to bring a condemnation proceeding under the Act. *Blue Harvest, Inc v Dep't of Transportation*, 288 Mich App 267, 277; 792 NW2d 798 (2010). Additionally, an inverse condemnation action is appropriately commenced where 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). Not every diminution in property values remotely associated with governmental actions will amount to a "taking."

Attorney General v Ankersen, 148 Mich App 524, 561; 385 NW2d 658 (1986). As observed in *Blue Harvest*,

> "[w]hile there is no exact formula to establish a de facto taking, 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*, 269 Mich at 645] (citation and quotation marks omitted). Generally, a plaintiff's 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, 548; 688 NW2d 550 (2004). "Further, a plaintiff alleging inverse condemnation must prove a casual [sic] connection between the government's action and the alleged damages." *Id*. Additionally,
>
> > [a]ny injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entities him to compensation. So a partial destruction or diminution of value of property by an act of government, which directly and not merely incidentally affects it, is to that extent an appropriation. [*Peterman v Dep't of Natural Resources*, 446 Mich 177, 190; 521 NW2d 499 (1994) (citations and quotation marks omitted).] [*Blue Harvest*, 288 Mich App at 277-278.]

"[T]he courts examine both the intensity and form of the accompanying publicity and the deliberateness of specific actions directed at a particular plaintiff's property by the city to reduce its value." *Heinrich v City of Detroit*, 90 Mich App 692, 698; 282 NW2d 448 (1979).

In the present litigation, plaintiffs allege that state actors made the decision to switch to the Flint River as the source of drinking water despite knowledge of the danger posed by the water, without a state-conducted scientific assessment of the suitability of the use of Flint River water as drinking water, and of the inadequacies of Flint's water treatment plant. They also allege that various state actors concealed data and made false statements in an attempt to downplay the health dangers posed by using Flint's tap water. Moreover, plaintiffs' allege that the contaminated water supply flowed from the river to the water plant and then to the taps of

every Flint water user. These allegations are allegations of affirmative state actions that were directly aimed at the property of Flint water users and that exposed those properties to specific dangers not generally experienced by water users outside of Flint. Plaintiffs allege specific damage to plumbing, water heaters and service lines causes by the introduction of corrosive water that left this infrastructure unsafe to use even after the corrosive water stopped flowing. They also allege a diminution of property values. Applying the settled principles governing the establishment of inverse condemnation, accepting all well-pleaded factual allegations as true and viewing those allegations in a light most favorable to plaintiffs, the nonmoving parties, the Court must conclude that plaintiffs have pleaded sufficient facts to state a cause of action for inverse condemnation. The allegations are sufficient, if proven, to allow a conclusion that the state actors' actions were a substantial cause of the decline of the property's value and that the state abused its powers through affirmative actions directly aimed at the property, i.e., continuing to supply each water user with corrosive and contaminated water with knowledge of the adverse consequences associated with being supplied with such water. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). Therefore, summary disposition pursuant to MCR 2.116(C)(8) is inappropriate with regard to the state and its departments, as further factual development could possibly justify recovery. For the reasons previously expressed in the Court's discussion of Count II, the Court finds in unnecessary to further address whether the Governor, Earley and Ambrose, as state officers acting and sued in their official capacities, are proper parties against which to assert the inverse condemnation claim.

VI. CONCLUSION

For all of these reasons, the Court having fully considered the parties' respective arguments on the pending motions, and being otherwise fully apprised;

IT IS ORDERED that summary disposition in favor of all defendants is GRANTED on Counts I and III of plaintiffs' first amended complaint.

IT IS FURTHER ORDERED that summary disposition is DENIED, without prejudice, as to all defendants, on Counts II and IV of plaintiffs' first amended complaint.

This Order does not resolve the last pending claim and does not close the case.

Dated: October 26, 2016

Hon. Mark T. Boonstra
Court of Claims Judge