STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiffs-Appellants,

v

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY,

Defendant-Appellee.
_____/

Supreme Court No. 156389

Court of Appeals No. 333181

Court of Claims No. 15-202-MM

MICHIGAN LEAGUE FOR PUBLIC POLICY'S MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

The Michigan League for Public Policy ("MLPP") moves this Court for leave to file a brief as *amicus curiae* in support of the plaintiffs-appellants' application for leave to appeal. In support of its motion, the League states the following:

1. MLPP is a Michigan-based, non-partisan policy institute dedicated to economic opportunity for all including but not limited to examining the impact of state revenues and expenditures on low-income people and by advocating for families and individuals in poverty or facing poverty.

2. As an organization, MLPP works with 2,500 organizations, human services professionals, concerned citizens, businesses, labor groups, policymakers, and others to ensure economic security for the people of Michigan.

3. MLPP has served the Michigan population through its policy and community relationships since 1912.

4. MLPP continues to identify and help solve basic health and social welfare problems through research and analysis, information dissemination, and advocacy.

5. Unemployment-related issues affect hundreds of thousands of Michigan families every year, and unemployment leaves Michigan citizens and their families in precarious financial situations.

6. The plaintiffs-appellants in this case are the very population that MLPP serves.

7. The plaintiffs-appellants in this case and their families have been greatly affected by the Unemployment Insurance Agency's actions, which have exposed them to the prospects of bankruptcy, foreclosure, and credit and other issues.

8. MLPP has and continues to be involved with policy changes and impact work to promote the proper accessibility of Unemployment Insurance benefits to Michigan's population.

9. Accordingly, MLPP has a vested interest in and is materially affected by the outcome of this case.

10. The issues raised in the instant case are of great interest and importance to the people of Michigan represented by Amicus Curiae MLPP.

11. The Court of Appeals' holding wrongfully interprets the claim accrual date for claims filed with the Court of Claims. Amicus Curiae, therefore, seeks leave to file a brief in support of the plaintiffs-appellants' application for leave.

12. The proposed Amicus Curiae Brief on behalf of MLPP is submitted herewith.

WHEREFORE, the Michigan League for Public Policy asks this Court to grand its motion and allow it to file the proposed Amicus Curiae Brief in Support of the Application for Leave to Appeal attached hereto.

Dated: October 17, 2017

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF QUESTION ADDRESSED

I. Does a deprivation of property claim under Article 1, Section 17 of the Michigan Constitution accrue under MCL 600.6431(3) when the state seizes property without due process?

Plaintiffs-Appellants answer "Yes."

Defendant-Appellee, answers "No."

Amicus Curiae MLPP answers "Yes."

INTEREST OF AMICUS CURIAE

Plaintiffs-appellants have sought leave to appeal a case that affects thousands of Michigan families' economic fates. The Michigan League for Public Policy ("MLPP") is a Michigan-based, non-partisan policy institute dedicated to economic opportunity for all including but not limited to examining state revenues and expenditures and their impact on low-income people and by advocating for families and individuals in poverty or facing poverty. As an organization, MLPP works with 2,500 organizations, human services professionals, concerned citizens, businesses, labor groups, policy-makers, and others to ensure economic security for the people of Michigan.

Unemployment-related issues affect hundreds of thousands of Michigan families every year, and unemployment leaves Michigan citizens and their families in precarious financial situations. The plaintiffs-appellants in this case are the very population that MLPP serves, and the Unemployment Insurance Agency's actions have exposed them to the prospects of bankruptcy, foreclosure, and credit and other issues.

INTRODUCTION AND GROUNDS FOR RELIEF

MCR 7.305(B)(2) provides for the grant of application for leave to appeal where "the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity." This Court has already ruled that questions involving the application of the statute of limitations to claims involving the Michigan Unemployment Insurance Fund implicate the public interest. *See Unemployment Comp Comm's v Vivian*, 318 Mich 598, 612 (1947) (noting that "questions of public interest [were] involved" in a case deciding whether the three-year statute of limitations applied to claims brought against an employer). Accordingly, the case before the Court is appropriate for the grant of application for leave to appeal and for permitting the filing of this amicus brief.

STATEMENT OF FACTS

Amicus curiae MLPP adopts the Statement of Facts in plaintiffs-appellants' application for leave to appeal from the Court of Appeals' ruling. For the purposes of this brief, the argument focuses on Grant Bauserman's facts and presents the following chart:

DATE	ACTION	CITATION TO THE RECORD
December 3, 2014	Unemployment Insurance Agency ("Agency") issued Bauserman a Notice of redetermination alleging Misrepresentation.	Exhibit 1: Ex. 15 to the Agency's Motion to Dismiss
December 4, 2014	Plaintiff Grant Bauserman ("Bauserman") promptly appealed this redetermination the following day.	Exhibit 2: Ex. 17 to the Agency's Motion to Dismiss
December 2014 and January 2015	Bauserman supplemented his appeal with additional information from his employer.	Exhibit 3: Ex. 19 to the Agency's Motion to Dismiss
March 17, 2015	Having received no response from the Agency, he sent a follow-up letter again explaining that he did not receive any earnings from his employer in 2014	Exhibit 4: Ex. 20 to the Agency's Motion to Dismiss

	and asking the Agency to "provide written notification to [him] that this matter has been closed and the UIA will not pursue collecting any money from [him]."	
Unknown date (after December 2, 2014 but before July 6, 2015)	The Agency transferred the case to the Michigan Administrative Hearing System.	Exhibit 5: Ex. 18 to the Agency's Motion to Dismiss
June 16, 2015	United States Department of Treasury seized Bauserman's income tax refund by the State at the request of the Agency.	Exhibit 6: Bauserman's First Amended Complaint, ¶ 98
July 6, 2015	The Michigan Administrative Hearing System transferred the case back to the Agency. The Michigan Administrative Hearing System noted that the Agency transferred the case in error because it failed to include all the matters relevant to the case.	Exhibit 5
September 9, 2015	Bauserman filed his complaint with the Court of Claims.	
September 30, 2015	The Agency issued another redetermination which voided the December 3, 2014 redetermination of fraud.	Exhibit 7: Ex 26 to the Agency's Motion to Dismiss.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE DUE PROCESS VIOLATION OCCURRED WHEN THE AGENCY MAILED A NOTICE OF REDETERMINATION RATHER THAN WHEN THE STATE SEIZED BAUSERMAN'S MONEY.

This case addresses squarely when a deprivation of property claim against the State accrues under MCL 600.6431(3). The Court of Appeals improperly held that the plaintiffs-appellants' claim accrued when the Unemployment Insurance Agency ("Agency") issued a boilerplate notice of redetermination because a due process claim accrued at the issuance of the redetermination. But whether the Agency's notice practices violate due process is a separate question altogether from whether the Agency deprived plaintiff-appellant Grant Bauserman ("Bauserman") of *property* without due process. Bauserman's claim here is a deprivation of

property claim. The Agency's notice of redetermination did not deprive Bauserman of his tax refund, but instead it simply triggered a possible appeal to protest the Agency's decision. In fact, Bauserman timely pursued his appeal rights as dictated by the redetermination. In the midst of his appeal, the Agency seized his tax refund without an opportunity to be heard, causing the deprivation of property without due process. Thus, the taking of the property without due process completed the deprivation of property claim, and the claim's accrual date started at the time of the taking. Further, Bauserman could not have filed with the Court of Claims while he pursued the available remedy of his administrative appeal. These arguments show that the Court of Appeals' holding is wrong and creates an impossible standard for victims of the Agency's actions.

A. The Agency's December 3, 2014 Redetermination Was Not The Due Process Violation That Deprive Bauserman Of His Property.

The Agency and the Court of Appeals incorrectly asserted that the December 3, 2014 redetermination is the date the plaintiffs-appellants' claim accrued because the boilerplate redetermination "deprived plaintiffs of their right to notice and an opportunity to be heard." Exhibit 8: Court of Appeals' Opinion, page 10. The Agency falsely claims that the redetermination triggered the collection activity that eventually seized Bauserman's money. Exhibit 9: Agency's Brief in Support of Motion to Dismiss, page 9. The Court of Appeals held that "[t]he fundamental requisite of due process of law is the opportunity to be heard.'" *Mullane v Cent. Hanover Bank & Trust Co.*, 339 US 306 (U.S. Apr. 24, 1950), quoting *Grannis v Ordean*, 234 US 385, 394 (1914) (*see also* Exhibit 9 at page 9). However, the Agency and the Court of Appeals fail to consider that the redetermination explained the claimants' appeal rights on page two, which explicitly describes how the claimant can appeal within 30 days and have an

opportunity to be heard by an Administrative Law Judge. Exhibit 1: Ex. 15 to the Agency's Motion to Dismiss. Because of the appeal process available to UI claimants and Bauserman timely appealed, the redetermination cannot be the triggering event because the appeal reopened the Agency's decision and requested an opportunity to be heard. In other words, the Agency did not deprive Bauserman of property without due process when it issued a faulty redetermination alleging fraud. The Agency deprived Bauserman of property without due process when it seized the money rather than allowing Bauserman's requested opportunity to be heard.

1. The Life Cycle of an Unemployed Claimant's Appeals of Agency's Redeterminations.

After an unemployed claimant files and receives unemployment insurance ("UI") benefits, the Agency may review the claimant's eligibility for the benefits. If the Agency learns of new information that may implicate that the claimant fraudulently obtained UI benefits, the Agency can issues a determination and/or redetermination alleging "Misrepresentation." All of these (re)determinations include a detailed "Appeal Rights" page, usually on the second page sent to the claimant. If a UI claimant files an appeal within 30 days or within a year if there is good cause for a late appeal), the Agency reviews the claimant's case and determines whether it believes the claimant. If it does, the Agency issues a new (re)determination clearing the claimant of the previously alleged determination. If it does not, the Agency sends the matter to the Michigan Administrative Hearing System ("MAHS") to have an Administrative Law Judge determine the merits of the redetermination.

The time the Agency takes to review the claimant's appeal before it makes a decision to issue a new redetermination or send the case to MAHS is undeterminable. The Agency may decide in a matter of months, and in some extreme cases, it may take the Agency years to process

the claimant's appeal. During the Agency's review of a claimant's appeal, the Agency ordinarily remains silent and does not contact the claimant.[1] It only contacts the claimant about his or her appeal when it has a decision about the merits. The claimant remains in the dark about the status of the appeal until the Agency sends a redetermination or the claimant receives a notice of hearing from MAHS. Due to this process, the Agency has set up and utilized for years, the Agency's silence in response to letters and appeals is a typical experience for claimants.

2. Bauserman Timely Appealed the December 3, 2014 Redetermination with the Agency.

Bauserman immediately pursued his appeal rights enumerated in the December 3, 2014 redetermination the very next day, December 4, 2014. Exhibit 2: Ex. 17 to the Agency's Motion to Dismiss. To supplement his appeal, Bauserman sent additional letters to the Agency to include additional documentary proof that he did not earn any wages in December 2014 and January 2015. Exhibit 3: Ex. 19 to the Agency's Motion to Dismiss. The Agency responded, as it typically does, with silence. Bauserman justifiably believed that the Agency was reviewing his case and affording his timely appeal due process. He sent a follow up letter on March 17, 2015, asking the Agency to "provide written notification to [him] that this matter has been closed and the UIA will not pursue collecting any money from [him]." Exhibit 4: Ex. 20 to the Agency's Motion to Dismiss. At some point between Bauserman's appeal on December 4, 2014 and July 6, 2015, the Agency sent the case to MAHS, which remanded the case to the Agency for review as

[1] In fact, Michigan State Auditors reviewed the Agency and found that "The UIA did not answer 234,901 (89.1%) of 263,726 calls made to its call center." Exhibit 10: Office of the Auditor General Performance Audit Report of the Agency in April 2016, page 13.

the Agency failed to send over "all matters pertinent to the Claimant's benefit rights." Exhibit 5: Ex. 18 to the Agency's Motion to Dismiss. The Agency accepted Bauserman's appeal and was investigating and reviewing it when the Agency then began collection activity.

The Agency first completed Bauserman's deprivation of property claim when it seized Bauserman's tax refund without an opportunity to be heard. To hold otherwise creates an unfathomable standard for claim accrual that would leave claimants guessing as to when a due process violation occurred. Additionally, a contrary holding would eliminate claimants' opportunity to file a lawsuit against the Agency under the Court of Claims, effectively eviscerating MCL 600.6431. Courts must not interpret a statute to render its provisions meaningless. *People v Rea*, 500 Mich. 422 (2017).

B. The Claim Accrued When The State Seized Bauserman's Money Without An Opportunity To Be Heard.

Bauserman's claim accrued when the Agency took his property without due process. For MCL 600.6431(1), a claim accrues when a "suit may be maintained thereon." *Cooke Contracting Co. v. State*, 55 Mich. App. 336 (Mich. Ct. App. 1974). A claim accrues "following the happening of the event giving rise to the cause of action." MCL 600.6431(3). Further, claim accrual happens when all the elements for a complaint, including the element of damage, are present. *Connelly v. Paul Ruddy's Equipment Repair & Service Co.*, 388 Mich. 146 (Mich. 1972). Where the government seeks to take property from an individual, due process's "fundamental requirement" is "to apprise interested parties of the pendency of the action and [to] afford them an opportunity to present their objections." *Sidun v. Wayne Co. Treasurer*, 481 Mich 503, 509 (2008).

In this case, the Agency allowed Bauserman a chance to present his objections to the December 3, 2014 redetermination, which he did on December 4, 2014. Therefore, the due process violation did not occur when the Agency issued the redetermination on December 3, 2014. While in the midst of this appeal process, the State began garnishing Bauserman's wages and intercepting his tax refunds. It is this distinct act of seizure that created a separate claim, which accrued upon seizure.

A claim accrues "at the time the wrong upon which the claim is based was done." MCL 600.5827. This Court has held that the "wrong" in MCL 600.5827 is "the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which defendant breached his duty." *Frank v. Linkner*, 500 Mich. 133 (2017) (quoting *Moll v Abbott Lab.*, 444 Mich 1, 12 (1993). "To determine when the plaintiffs' actions . . . accrued, this Court must determine the date on which plaintiffs first incurred the harms they assert." *Frank*, 894 N.W.2d 574 at 584. "The relevant 'harms' for that purpose are the actionable harms alleged in a plaintiff's cause of action." *Id*.

Following this Court's reasoning in *Frank*, Bauserman and the similarly situated potential class members first incurred the "harms they assert" when the Agency seized their money during his administrative appeal. The Agency's boilerplate redetermination may have been a breach of the Agency's duty to Bauserman and to UI claimants, but it did not cause the property to be taken without an opportunity to be heard. That happened when it seized Bauserman's money, and therefore, the proper date for claim accrual is when the State seized Bauserman's money on June 16, 2015.

1. The December 3, 2014 Redetermination Cannot Be the Point of Claim Accrual Because the Agency Voided It.

On September 30, 2015, the Agency voided the December 3, 2014 redetermination in response to Bauserman's timely appeal and because MAHS remanded the case back to the Agency to review. Exhibit 7: Ex. 26 to the Agency's Motion to Dismiss. A voided redetermination cannot initiate claim accrual because it is unavailable for any purpose. *See Commercial Bank of Manchester v. Buckner*, 61 U.S. 108, 110 (1857) (stating "if a judgment is null and void, *it is the same thing as though it had never been rendered*, and *is unavailable for any purpose*, and *may be collaterally disallowed and disregarded*.") (citing *Borden v. Fitch*, 15 J.R., 140; *Slocum v. Wheeler*, 1 Day's Con. R., 429, 449) (internal quotations omitted) (emphasis added). Because the redetermination is void, it cannot be used for any purpose, including claim accrual in the present case.

The Agency's voiding of the December 3, 2014 redetermination is further proof that the redetermination cannot be when the claim accrued. With or without the December 3, 2014 redetermination in effect, the due process violation still occurred when the State improperly took Bauserman's money without due process. The Agency's actions in response to Bauserman's appeal (the Agency's investigation, the Agency's referral to MAHS, MAHS's remand to the Agency to review, and the Agency's subsequent decision to void the December 3, 2014 redetermination) all serve as further evidence that the redetermination was not the due process violation that completed the present claim.

C. The Law Prevented Bauserman From Filing A Claim With The Court Of Claims <u>While Pursuing Administrative Remedies</u>.

When Bauserman received the redetermination on December 3, 2014, not only had his constitutional claim against the Agency not yet accrued, but he was also barred from pursuing action against the State in the Court of Claims. It is only possible to sue the State or a state agency in tort *where no other remedy exists*. *Jones v Powell*, 462 Mich 329, 333 (2000) (emphasis added). The Michigan Employment Security Act ("MESA") includes an extensive appeals process and procedure, including remedies that are typically adequate for claimants. The existence of such a legislative scheme is an indication to the courts that they should not infer a private cause of action and damage remedy against the government. *Bivens v Six Unknown Named Agents of Federal Narcotics*, 403 US 388, 396 (1971); *Smith v Dept. of Public Health*, 428 Mich 540, 647 (1989), aff'd sub nom. *Will v. Michigan Dept. of State Police*, 491 US 58 (1989). Claimants are required to pursue other statutory remedies before seeking relief in a tort action against the State because where a statute provides a remedy, the "stark picture of a constitutional provision violated without remedy is not presented." *Jones*, 462 Mich at 336-37.

The MESA lays out an appeals process which the Agency expects claimants to follow. Bauserman was prevented from suing the Agency in the Court of Claims until after he exhausted the MESA appeals procedure and was left without an adequate remedy. Therefore, Bauserman had no constitutional claim against the Agency until after he fully pursued his administrative remedies without satisfaction. A claim "accrues" for purposes of MCL 600.6431(1) when administrative remedies have been exhausted, and in particular, when a defendant "has finally rejected a contested claim in the last step of its claim procedure." *Abhe & Svboda, Inc. v Michigan DOT*, Docket No. 332489 (Mich App, August 29, 2017) (quoting *Oak Construction*

Co. v. State, 33 Mich. App. 561, 565–567 (1971)).[2] Since the Agency seized Bauserman's property before he could exhaust his administrative appeals, his claim for violation of due process accrued when the seizure occurred.

The Agency has claimed both that Bauserman had adequate administrative remedies and that he was barred from seeking a remedy in state court because he had run the clock out in those administrative proceedings. The Agency cannot have it both ways.

Because Bauserman was unable to sue the Agency in the Court of Claims until he had exhausted his administrative remedies, his deprivation of due process claim against the Agency cannot have expired while he was in the process of exhausting those remedies.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals wrongly picked the accrual date here. The result was that Bauserman's and many others' claims have been improperly dismissed. This Court should grant the application for leave and reverse the decision of the Court of Appeals.

Dated: October 17, 2017

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[2] MCL 600.6431(1) and (3) are "related and interdependent" and should be read as a "cohesive whole." *McCahan v Brennan*, 492 Mich. 730, 742 (2012).

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CERTIFICATE OF SERVICE

The undersigned states that on October 17, 2017, he caused to be electronically filed with the Clerk of the Court the foregoing Amicus Motion and Brief using the ECF TruFiling system which will send notification of such filing to all registered users in the case.

Dated: October 17, 2017

Respectfully Submitted,

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