MAYS v. GOVERNOR

2020 WL 4360845
July 29, 2020

Bernstein, J.

This putative class action involves a series of events commonly referred to as the "Flint water crisis." Plaintiffs, who are water users and property owners in the city of Flint, sued former Governor Rick Snyder, the state of Michigan, the Michigan Department of Environmental Quality (MDEQ), and the Michigan Department of Health and Human Services (DHHS) (collectively, the state defendants). Plaintiffs also sued former city of Flint emergency managers Darnell Earley and Jerry Ambrose (collectively, the city defendants). The state defendants and the city defendants brought separate motions for summary disposition under MCR 2.116(C)(4), (7), and (8)… The Court of Claims denied defendants' motions for summary disposition with respect to plaintiffs' claim for violation of their right to bodily integrity under the Due Process Clause of the 1963 Michigan Constitution, art. 1, § 17, and plaintiffs' claim of inverse condemnation. The state defendants appealed, and cross-appeals followed.

I. FACTS

The trial court record is limited because defendants brought their motions for summary disposition before discovery could be conducted. The facts of the case are disputed. However, because this is an appeal from an opinion that mainly concerns motions for summary disposition under MCR 2.116(C)(7) and (8), we accept the contents of the complaint as true unless contradicted by documentation submitted by the movant[3] and we construe the factual allegations in a light most favorable to plaintiffs. The Court of Claims summarized plaintiffs' pleadings as follows:

> From 1964 through late April 2014, the Detroit Water and [Sewerage] 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 [former Governor Snyder] 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.
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> 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 [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 publicly 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 [Hanna]-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."

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.

> [*Mays v. Governor*, unpublished opinion of the Court of Claims, issued October 26, 2016 (Docket No. 16-000017-MM), pp. 3-6 (citation omitted).]

Plaintiffs brought suit against defendants in the Court of Claims, alleging, in part, a claim for inverse condemnation and seeking economic damages both for the physical harm done to their property as well as the diminution of their property's value. Plaintiffs alleged that despite both sets of defendants knowing that the Flint River water was toxic and corrosive, the state defendants authorized the city defendants to service their property with the Flint River water. As a result, plaintiffs alleged that their pipes, service lines, and water heaters were damaged. Plaintiffs also alleged that after the water crisis had become public knowledge, their property's value substantially declined.

Plaintiffs additionally brought a claim for violation of their right to bodily integrity under the Michigan Constitution's Due Process Clause, Const. 1963, art. 1, § 17. Plaintiffs alleged that despite knowing the dangers associated with switching the city of Flint's water source to the Flint River, defendants made the switch with indifference to the known serious medical risks and then misled and deceived the public while concealing information about the toxicity and corrosiveness of the water. Plaintiffs alleged that they sustained personal injury from using and ingesting the Flint water as a result of defendants' actions. Specifically, plaintiffs alleged that as a result of ingesting the tainted water, they have suffered physical symptoms, such as neuropathy, sleepiness, gastrointestinal discomfort, dermatological disorders, hair loss, and other symptoms, as well as substantial economic losses from their medical expenses and lost wages. Plaintiffs also alleged that some Flint citizens suffered life-threatening and irreversible bodily injuries.

The state defendants and the city defendants brought separate motions for summary disposition under MCR 2.116(C)(4), (7), and (8). Both sets of defendants argued that plaintiffs failed to satisfy the statutory notice requirements in MCL 600.6431 of the Court of Claims Act (COCA), MCL 600.6401 *et seq.*; that plaintiffs failed to allege facts to establish a constitutional claim under the Michigan Constitution's Due Process Clause for violation of their right to bodily integrity; that a judicially inferred damages remedy for such a claim is inappropriate; and that plaintiffs otherwise failed to allege sufficient facts to establish the legal elements of their claims.

In an opinion and order, the Court of Claims granted partial summary disposition to defendants and in other respects denied defendants' motions for summary disposition. The Court of Claims determined that plaintiffs satisfied the statutory notice requirements and adequately pleaded claims of inverse condemnation and a violation of their right to bodily integrity. The state defendants appealed, and the city defendants and plaintiffs filed cross-appeals.

In a published opinion, the Court of Appeals affirmed the Court of Claims' rulings on the statutory notice requirements, plaintiffs' claim of violation of their right to bodily integrity, and plaintiffs' claims of inverse condemnation. *Mays v. Governor*, 323 Mich. App. 1, 916 N.W.2d 227 (2018). Both the state defendants and the city defendants then filed applications for leave to appeal in this Court. We granted leave to appeal and heard oral argument on defendants' applications.

II. ANALYSIS

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C. INJURY TO BODILY INTEGRITY

Defendants argue that the Court of Appeals erred by determining that plaintiffs sufficiently pleaded a claim for violation of their substantive due-process right to bodily integrity under Const. 1963, art. 1, § 17. Defendants also argue that the Court of Appeals erred by recognizing the availability of a damages remedy for plaintiffs' claim. We again disagree. Instead, we believe that the Court of Appeals properly held that plaintiffs pleaded a cognizable claim for violation of their right to bodily integrity under the Due Process Clause of Michigan's Constitution. Given that this case is still in the very early stages of the proceedings, we decline to hold at this point that monetary damages are unavailable for this claim. On this issue, the Court of Appeals is again affirmed by equal division.

* * * *

2. LEGAL BACKGROUND

The Legislature has never created an exception to immunity for a constitutional tort. Nonetheless, this Court has recognized that when a plaintiff brings a "constitutional tort" against the state, in certain instances, the government is not immune from liability for violations of its Constitution. *Smith v. Dep't of Pub. Health*, 428 Mich. 540, 544, 410 N.W.2d 749 (1987), aff'd sub nom. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Plaintiffs contend that their claims arise under these circumstances.

Smith was a divided memorandum opinion, but two of the pertinent tenets that a majority of four were able to agree on were the following:

> 5) Where 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.
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> 6) A claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases.

The *Smith* opinion was silent as to why a majority of the Court had agreed on these tenets. A later Court of Appeals panel noted that this lack of analysis was due to the justices' differing views, given that "the Court was only able to agree on the bare proposition that '[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases.' "

After *Smith*, courts have cited Justice BOYLE's separate opinion in *Smith* to explain the reasoning behind the majority's holding that constitutional torts may be recognized in certain circumstances. While Justice BOYLE's reasoning is not binding, it is, in our view, persuasive. Justice BOYLE postulated that because the state's Constitution is preeminent, immunity does not bar recovery for violations of the state Constitution perpetrated by custom or policy. Justice BOYLE wrote:

> Assuming the plaintiff proves an unconstitutional act by the state which is otherwise appropriate for a damage remedy, the question which confronts this Court is whether sovereign or governmental immunity shields the state from liability for damages for its alleged acts which violate our state constitution. We would hold that neither common-law sovereign immunity nor the governmental immunity found in MCL 691.1407; MSA 3.996(107) bars recovery.
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> In our constitutional form of government, the sovereign power is in the people, and "[a] Constitution is made for the people and by the people." The Michigan Constitution is a limitation on the plenary power of government, and its provisions are paramount. It is so basic as to require no citation that the constitution is the fundamental law to which all other laws must conform....
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> In light of the preeminence of the constitution, statutes which conflict with it must fall....
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> MCL 691.1407; MSA 3.996(107) does not, by its terms, declare immunity for unconstitutional acts by the state. The idea that our Legislature would indirectly seek to "approve" acts by the state which violate the state constitution by cloaking such behavior with statutory immunity is too far-fetched to infer from the language ofMCL 691.1407; MSA 3.996(107). We would not ascribe such a result to our Legislature.
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> Neither does common-law sovereign immunity immunize the state from liability for its alleged unconstitutional acts. This Court abrogated common-law sovereign immunity in *Pittman v. City of Taylor*, 398 Mich. 41, 247 N.W.2d 512 (1976). Even absent such general abrogation, however, we would decline to apply sovereign immunity to violations by the state of our state constitution. The curious doctrine of sovereign immunity in America, subject to great criticism over the years, see, generally, Jaffe, *Suits against governments and officers: Sovereign immunity*, 77 Harv. L. R. 1 (1963), should as a matter of public policy, lose its vitality when faced with unconstitutional acts of the state. The primacy of the state constitution would perforce eclipse the vitality of a claim of common-law sovereign immunity in a state court action for damages.
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> For "constitutional torts," liability should only be imposed on the state in cases where a state "custom or policy" mandated the official or the employee's actions....
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> The state's liability should be limited to those cases in which the state's liability would, but for the Eleventh Amendment, render it liable under the 42 USC 1983 standard for local governments articulated in *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).[12] Liability should be imposed on the state only where the action of a state agent "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers ... [or] governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.*, pp. 690-691, 98 S. Ct. 2018.

3. HISTORICAL RECOGNITION OF CONSTITUTIONAL TORTS

Defendants contend that historically, courts have not recognized actions against the state when no waiver of immunity has occurred. Although defendants' general assertion might be true, our precedent with regard to constitutional torts is more nuanced. Michigan courts have indeed recognized the existence of constitutional torts as outlined in *Smith* and, in certain circumstances, have allowed

constitutional-tort claims to survive motions for summary disposition.

The Court of Appeals has repeatedly relied on *Smith* to recognize that immunity is not available in a state-court action in which it is alleged that the state has violated a right conferred by the Michigan Constitution. [citations omitted...]

In *Jones*, 462 Mich. at 336-337, 612 N.W.2d 423, this Court declined to apply a constitutional-tort theory to claims made against a municipality but nevertheless recognized that the theory provided a remedy, albeit a "narrow remedy" against the state. In *Lewis v. Michigan*, 464 Mich. 781, 786, 629 N.W.2d 868 (2001), this Court again recognized the *Smith* majority's holding as to the viability of certain constitutional-tort claims.

4. PLAINTIFFS SUFFICIENTLY ALLEGE A CONSTITUTIONAL TORT FOR VIOLATION OF THEIR BODILY INTEGRITY

We also recognize that when a plaintiff alleges a constitutional tort like the one alleged in this case, recovery is available for constitutional violations pursuant to a state custom or policy and may survive the state's claims of immunity.

The Court of Appeals provided an extensive history of the development of the right to bodily integrity:

> Violation of the right to bodily integrity involves "an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective." *Rogers v. Little Rock, Arkansas*, 152 F.3d 790, 797 (C.A. 8, 1998), citing *Sacramento Co. v. Lewis*, 523 U.S. 833, 847 n. 8, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).... [T]o survive dismissal, the alleged "violation of the right to bodily integrity must be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Villanueva v. City of Scottsbluff*, 779 F.3d 507, 513 (C.A. 8, 2015) (quotation marks and citation omitted); see also *Mettler Walloon, L.L.C. v. Melrose Twp.*, 281 Mich. App. 184, 198, 761 N.W.2d 293 (2008) (explaining that in the context of individual governmental actions or actors, to establish a substantive due-process violation, "the governmental conduct must be so arbitrary and capricious as to shock the conscience").
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> "Conduct that is merely negligent does not shock the conscience, but 'conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.' " *Votta v. Castellani*, 600 F. Appx. 16, 18 (C.A. 2, 2015), quoting *Sacramento Co.*, 523 U.S. at 849, 118 S.Ct. 1708. At a minimum, proof of deliberate indifference is required. *McClendon v. City of Columbia*, 305 F.3d 314, 326 (C.A. 5, 2002). A state actor's failure to alleviate "a significant risk that he should have perceived but did not" does not rise to the level of deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 838, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). To act with deliberate indifference, a state actor must " 'know[ ] of and disregard[ ] an excessive risk to [the complainant's] health or safety.' " *Ewolski v. City of Brunswick*, 287 F.3d 492, 513 (C.A. 6, 2002), quoting *Farmer*, 511 U.S. at 837, 114 S.Ct. 1970. "The case law ... recognizes official conduct may be more egregious in circumstances allowing for deliberation ... than in circumstances calling for quick decisions ...." *Williams v. Berney*, 519 F.3d 1216, 1220-1221 (C.A. 10, 2008).

With this framing of the elements of plaintiffs' claim in mind, we affirm the Court of Appeals and conclude that plaintiffs have alleged facts that, if proved, support a claim for a constitutional violation by defendants.

Plaintiffs allege that defendants' decision to switch the city of Flint's water source to the Flint River, which defendants knew was contaminated, resulted in a nonconsensual entry of toxic water into plaintiffs' bodies. Plaintiffs contend that defendants neglected to upgrade Flint's water-treatment system before switching to the Flint River despite knowing and being warned that the system was inadequate. After receiving information that suggested the Flint River was contaminated with bacteria, toxic levels of lead, and other contaminants, defendants allegedly concealed scientific data and made misleading statements about the safety of the Flint River water.

There is obviously no legitimate governmental objective in poisoning citizens. Plaintiffs' allegations, if true, are so egregious and outrageous that they shock the contemporary conscience and support a finding of defendants' deliberate indifference to plaintiffs' health and safety. See *Villanueva*, 779 F.3d at 513; *Mettler Walloon, L.L.C.*, 281 Mich. App. at 198, 761 N.W.2d 293; *McClendon*, 305 F.3d at 326. Plaintiffs' allegations make out more than a negligent decision to switch water sources. They allege that "Defendants had time for deliberation in their decisions to expose Flint residents to toxic water, and their decision to do so was made with deliberate indifference to the known serious medical risks." Their allegations paint a picture of a public health crisis of the government's own making, intentionally concealed by state actors despite their knowledge that Flint residents were being harmed so long as the untreated water continued to flow through their pipes. We find it difficult to characterize the actions that defendants allegedly took as anything short of shocking to the conscience. "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Sacramento Co. v. Lewis*, 523 U.S. 833, 853, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

Plaintiffs have also alleged that a state "custom or policy" mandated the actions that led to the violation of their substantive due-process right to bodily integrity. *Smith*, 428 Mich. at 544, 410 N.W.2d 749. The state and its officials will only be held liable for violation of the state Constitution " 'in cases where a state "custom or policy" mandated the official or employee's actions.' " *Carlton*, 215 Mich. App. at 505, 546 N.W.2d 671, quoting *Smith*, 428 Mich. at 642, 410 N.W.2d 749 (BOYLE, J., concurring in part and dissenting in part). As the Court of Appeals noted:

> Official governmental policy includes "the decisions of a government's lawmakers" and "the acts of its policymaking officials." *Johnson v. VanderKooi*, 319 Mich. App. 589, 622, 903 N.W.2d 843 (2017) (quotation marks and citation omitted). See also *Monell*, 436 U.S. at 694, 98 S.Ct. 2018 (stating that a governmental agency's custom or policy may be "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy"). A "single decision" by a policymaker or governing body "unquestionably constitutes an act of official government policy," regardless of whether "that body had taken similar action in the past or intended to do so in the future[.]" The [United States Supreme] Court clarified that not all decisions subject governmental officers to liability. *Id.* at 481, 106 S. Ct. 1292. Rather, it is "where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."

Plaintiffs allege that the city of Flint's choice to provide Flint residents with the Flint River water was approved and implemented by the state defendants, arguing that both sets of defendants were decision-makers in the adoption of a plan that, once effectuated, resulted in violations of their substantive due-process rights. Defendants then purportedly made decisions to conceal the consequences of the water-source switch and misled the public about the safety of the Flint River water. Plaintiffs allege that defendants' aforementioned actions exposed them to unnecessary harm for months after the switch was made. Plaintiffs' allegations, if proved, support a conclusion that defendants considered an array of options and made a deliberate choice to effectuate the Flint River switch despite knowing the potential harms of doing so.

Having reviewed plaintiffs' allegations in their totality, we conclude that plaintiffs pleaded a recognizable due-process claim under Michigan's Constitution for a violation of their right to bodily integrity.

5. DAMAGES REMEDY

Because we have determined that plaintiffs' allegations, if proved, are sufficient to sustain a constitutional tort against defendants, we must next determine whether it is appropriate to recognize a damages remedy for the constitutional violation. Not every constitutional violation merits damages. However, at this point in the litigation, we are not prepared to foreclose the possibility of monetary damages.

This Court has never explicitly endorsed a test for assessing a damages inquiry for a constitutional violation. However, we agree with the Court of Claims and the Court of Appeals that the multifactor test elaborated in Justice BOYLE's separate opinion in *Smith* provides a framework for assessing the damages inquiry. Under that test, we weigh various factors, including (1) the existence and clarity of the constitutional violation itself; (2) the degree of specificity of the constitutional protection; (3) support for the propriety of a judicially inferred damages remedy in any text, history, and previous interpretations of the specific provision; (4) the availability of another remedy; and (5) various other factors militating for or against a judicially inferred damages remedy. See *Smith*, 428 Mich. at 648-652, 410 N.W.2d 749 (BOYLE, J., concurring in part and dissenting in part). At this stage of the proceedings, we accept plaintiffs' allegations as true and review them in a light most favorable to plaintiffs.

As to the first factor, we have already determined that plaintiffs set forth allegations to establish a clear violation of the Michigan Constitution. We therefore conclude that the first factor weighs in favor of a judicially inferred damages remedy.

As to the second and third factors, in *Smith*, Justice BOYLE recognized that the protections of the Due Process Clause are not as "clear-cut" as specific protections found elsewhere in the Constitution. Indeed, we have not found a decision of a Michigan appellate court expressly recognizing a protection under the Due Process Clause of the Michigan Constitution or an independent constitutional tort for violation of the right to bodily integrity. We therefore conclude that the second and third factors weigh somewhat against recognition of a damages remedy.

As to the fourth factor, the availability of an alternative remedy, we must determine whether plaintiffs

have any available alternative remedies for their constitutional-tort claim against these specific defendants. Defendants argue that this fourth factor is dispositive and that the availability of any other remedy forecloses the possibility of a judicially inferred damages remedy in this case. Citing *Jones*, 462 Mich. at 337, 612 N.W.2d 423, defendants highlight that "*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy." Like the Court of Appeals and the Court of Claims, we conclude that defendants err in their reading of *Jones*. The *Jones* Court's use of the word "only" referred to a sentence that followed, distinguishing claims against the state and specifically limiting the Court's holding to cases involving a municipality or an individual defendant. We decline to hold that the availability of an alternative remedy acts as an absolute bar to a judicially inferred damages remedy. The existence of alternative remedies is given considerable weight, , but it is not dispositive.

We conclude that because defendants enjoy expansive immunity under federal and state law, plaintiffs have no alternative recourse to vindicate their rights beyond bringing a constitutional-tort claim under Michigan's Constitution. Any suit brought in federal court for monetary damages under 42 USC 1983 for violation of rights granted under the federal Constitution or a federal statute cannot be maintained in any court against a state, a state agency, or a state official sued in his or her official capacity because the Eleventh Amendment affords the state and its agencies immunity from such liability. See *Howlett v. Rose*, 496 U.S. 356, 365, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990).

Generally, under state law, state-government employees acting within the scope of their authority are immune from tort liability unless their actions constitute gross negligence, MCL 691.1407(2), and even if governmental employees are found liable for gross negligence, the state may not be held vicariously liable unless an exception to governmental immunity applies under the governmental tort liability act, MCL 691.1401 *et seq.* State agencies are also "immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). Moreover, the Local Financial Stability and Choice Act, MCL 141.1541 *et seq.*, grants emergency managers immunity from liability as provided in MCL 691.1407.

Defendants suggest that plaintiffs' injuries can be vindicated under the federal Safe Drinking Water Act (SDWA), 42 USC 300f *et seq.*, and the Michigan Safe Drinking Water Act (MSDWA), MCL 325.1001 *et seq*. We disagree. The SDWA and MSDWA do not provide a right to address constitutional violations. As the United States Court of Appeals for the Sixth Circuit recognized in a federal case arising from the Flint water crisis, the protections of the SDWA and the federal Constitution "are 'not ... wholly congruent' " and would not foreclose constitutional claims arising under the federal Constitution. See *Boler v. Earley*, 865 F.3d 391, 408-409 (C.A. 6, 2017) (citation omitted). We conclude that the same is true for the MSDWA. Neither the SDWA nor the MSDWA addresses the alleged conduct at issue in this case, which includes knowingly and deliberately distributing contaminated water as well as fraudulent concealment of the hazardous consequences of consuming and using the Flint River water. The SDWA and MSDWA largely address the regulation of water quality by municipalities. These statutes do not provide an alternative remedy for plaintiffs' claim of injury to bodily integrity. We therefore conclude that the fourth factor is neutral regarding the propriety of an inferred damages remedy.

Finally, as to the fifth factor, which directs us to assess all other relevant considerations, we agree with

the Court of Appeals that it is appropriate to give substantial weight to the shocking and outrageous nature of defendants' alleged conduct. Plaintiffs present allegations involving one of the most troublesome breaches of public trust in this state's history, with catastrophic consequences for Flint citizens' health, well-being, and property. If plaintiffs' allegations are proved true, we agree that the nature of defendants' alleged constitutional violations weighs markedly in favor of recognizing a damages remedy.

In considering each of these five factors, recognizing that discovery has yet to take place and accepting plaintiffs' allegations as true, we believe that a damages remedy for plaintiffs' claim of violation of their right to bodily integrity under Const. 1963, art. 1, § 17 might be the appropriate remedy for plaintiffs' harms.

III. CONCLUSION

We expressly affirm the Court of Appeals with regard to plaintiffs' inverse-condemnation claim. In all other aspects, the Court of Appeals opinion is affirmed by equal division. MCR 7.315(A). We remand to the Court of Claims for further proceedings consistent with this opinion.