STATE OF MICHIGAN
IN THE COURT OF APPEALS

KELLIE SAUNDERS, et al,

Plaintiffs-Appellants,

v

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY AND JULIA DALE,

Defendants-Appellees.
_____/

Court of Appeals No. 362033

Court of Claims No. 2022-000007-MM

MICHIGAN UNEMPLOYMENT INSURANCE AGENCY AND JULIA DALE'S BRIEF IN OPPOSITION TO KELLIE SAUNDERS' APPLICATION FOR LEAVE TO APPEAL

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Plaintiffs seek leave to appeal the Court of Claims' June 13, 2022 opinion and order granting in part and denying in part Defendants' motion for summary disposition. This Court has jurisdiction over Plaintiffs' application for leave to appeal because they timely filed it within 21 days of the lower court's June 13, 2022 opinion and order, as required by MCR 7.205(A).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Courts lack jurisdiction to decide matters delegated to administrative agencies when they are pending at the administrative level. The Michigan Employment Security Act provides the exclusive authority and procedure for claimants to challenge unemployment adjudications. Did the lower court properly determine that it lacked jurisdiction to determine whether the unemployment adjudications comply with the law where available administrative remedies have not been exhausted?

   Defendants-Appellees' answer: Yes.

   Plaintiffs-Appellants' answer: No.

   Trial court's answer: Yes.

2. Where a claim is so unenforceable that no factual development could justify recovery, the complaint must be dismissed. Did the lower court determine that Plaintiffs' due process claims regarding overpayment waiver were insufficient to state a valid cause of action and should be dismissed?

   Defendants-Appellees' answer: Yes.

   Plaintiffs-Appellants' answer: No.

   Trial court's answer: Yes.

3. Preliminary injunctions are equitable relief intended to preserve the status quo. They are inappropriate where the moving party cannot demonstrate a likelihood of success on the merits and where irreparable harm does not exist. Did the lower court properly deny equitable relief to the relevant Plaintiffs?

   Defendants-Appellees' answer: Yes.

   Plaintiffs-Appellants' answer: No.

   Trial court's answer: Yes.

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

Article 1, section 17, of Michigan's 1963 Constitution

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

15 USC 9021(c)(5) Pandemic Unemployment Assistance

> (5) Appeals by an individual
>
> (A) In general
>
> An individual may appeal any determination or redetermination regarding the rights to pandemic unemployment assistance under this section made by the State agency of any of the States.
>
> (B) Procedure
>
> All levels of appeal filed under this paragraph in the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands--
>
> (i) shall be carried out by the applicable State that made the determination or redetermination; and
>
> (ii) shall be conducted in the same manner and to the same extent as the applicable State would conduct appeals of determinations or redeterminations regarding rights to regular compensation under State law.
>
> * * *

MCL 421.32(a) Claims for benefits; examination; determination; notice.

> Claims for benefits shall be made pursuant to regulations prescribed by the unemployment agency. The unemployment agency shall designate representatives who shall promptly examine claims and make a determination on the facts. The unemployment agency may establish rules providing for the examination of claims, the determination of the validity of the claims, and the amount and

duration of benefits to be paid. The claimant and other interested parties shall be promptly notified of the determination and the reasons for the determination.

MCL 421.32a(2) Review of determination; redetermination; notice; reconsideration; applicability of redetermination, disqualification, or ineligibility to compensable period; finality of redetermination; additional transfer provisions; finding of fraud; change in mailing address.

The unemployment agency shall, for good cause, including an administrative clerical error or evidence produced by an interested party showing that a prior determination or redetermination was not sent to the interested party's correct address or an address ascertained under subsection (5), reconsider a prior determination or redetermination after the 30-day period has expired and after reconsideration issue a redetermination affirming, modifying, or reversing the prior determination or redetermination, or transfer the matter to an administrative law judge for a hearing. A reconsideration shall not be made unless the request is filed with the unemployment agency, or reconsideration is initiated by the unemployment agency with notice to the interested parties, within 1 year after the date of mailing or personal service of the original determination on the disputed issue or, if the original determination involved a finding of fraud, within 3 years after the date of mailing or personal service of the original determination.

MCL 421.33 Assignment to administrative law judge; appeals and transferred matters; consolidation of cases; procedure for appeal to Michigan compensation appellate commission.

(1) An appeal from a redetermination issued by the agency in accordance with section 32a or a matter transferred for hearing and decision in accordance with section 32a shall be referred to the Michigan administrative hearing system for assignment to an administrative law judge. If the agency transfers a matter, or an interested party requests a hearing before an administrative law judge on a redetermination, all matters pertinent to the claimant's benefit rights or to the liability of the employing unit under this act shall be referred to the administrative law judge. The administrative law judge shall afford all interested parties a reasonable opportunity for a fair hearing and, unless the appeal is withdrawn, the administrative law judge shall decide the rights of the interested parties and shall notify the interested parties of the decision, setting forth the findings of fact upon which the decision is based, together with the reasons for the

decision. With respect to an appeal from a denial of redetermination, if the administrative law judge finds that there was good cause for the issuance of a redetermination, the denial shall be a redetermination affirming the determination and the appeal from the denial shall be an appeal from that affirmance. Unless an interested party would be unduly prejudiced, an administrative law judge may consolidate cases involving the same or substantially similar evidence or issues, hear the consolidated cases at the same date and time, create a single record of proceedings, and consider evidence introduced in 1 of those cases in the other cases. If the appellant fails to appear or prosecute the appeal, the administrative law judge may dismiss the proceedings or take other action considered advisable. An administrative law judge may, either upon application for rehearing by an interested party or on his or her own motion, proceed to rehear, affirm, modify, set aside, or reverse a prior decision on the basis of the evidence previously submitted in the case, or on the basis of additional evidence. The application or motion shall be made within 30 days after the date of mailing of the decision. The administrative law judge may, for good cause, reopen and review a prior decision and issue a new decision after the 30-day appeal period has expired. A request for review shall be made within 1 year after the date of mailing of the prior decision. An administrative law judge shall not participate in a case in which he or she has a direct or indirect interest.

(2) Within 30 days after the mailing of a copy of a decision of the administrative law judge or of a denial of a motion for rehearing, an interested party may file an appeal to the Michigan compensation appellate commission, and unless such an appeal is filed, the decision or denial by the administrative law judge is final.

MCL 421.34 Appeal to Michigan compensation appellate commission from findings of fact and decision or from denial of motion for rehearing or reopening.

(1) The Michigan compensation appellate commission created in Executive Reorganization Order No. 2011-6, MCL 445.2032, has full authority to handle, process, and decide appeals filed under section 33(2).

(2) An appeal to the Michigan compensation appellate commission from the findings of fact and decision of the administrative law judge or from a denial by the administrative law judge of a motion for a rehearing or reopening shall be a matter of right by an interested party. The Michigan compensation appellate commission, on the basis of evidence previously submitted and additional evidence as it

requires, shall affirm, modify, set aside, or reverse the findings of fact and decision of the administrative law judge or a denial by the administrative law judge of a motion for rehearing or reopening.

* * *

(7) The Michigan compensation appellate commission may, either upon application by an interested party for rehearing or on its own motion, proceed to rehear, affirm, modify, set aside, or reverse a prior decision on the basis of the evidence previously submitted in that case, or on the basis of additional evidence if the application or motion is made within 30 days after the date of mailing of the prior decision. The Michigan compensation appellate commission may, for good cause, reopen and review a prior decision of the Michigan compensation appellate commission and issue a new decision after the 30-day appeal period has expired, but a review shall not be made unless the request is filed with the Michigan compensation appellate commission, or review is initiated by the Michigan compensation appellate commission with notice to the interested parties, within 1 year after the date of mailing of the prior decision. Unless an interested party, within 30 days after mailing of a copy of a decision of the Michigan compensation appellate commission or of a denial of a motion for a rehearing, files an appeal from the decision or denial, or seeks judicial review as provided in section 38, the decision shall be final.

(8) The Michigan compensation appellate commission may on its own motion affirm, modify, set aside, or reverse a decision or order of an administrative law judge on the basis of the evidence previously submitted in the case; direct the taking of additional evidence; or permit a party to the decision or order to initiate further appeals before it. The Michigan compensation appellate commission shall permit a further appeal by a party interested in a decision or order of an administrative law judge or by the Michigan compensation appellate commission if its initial ruling has been overruled or modified. The Michigan compensation appellate commission may remove to itself or direct the Michigan administrative hearing system to transfer to another administrative law judge the proceedings on appeal, rehearing, or review pending before an administrative law judge. The Michigan compensation appellate commission shall promptly notify the interested parties of its findings and decisions.

* * *

MCL 421.38(1) Review by circuit court; direct appeal of order or decision; agency as party; review of decision of circuit court

> The circuit court in the county in which the claimant resides or the circuit court in the county in which the claimant's place of employment is or was located, or, if a claimant is not a party to the case, the circuit court in the county in which the employer's principal place of business in this state is located, may review questions of fact and law on the record made before the administrative law judge and the Michigan compensation appellate commission involved in a final order or decision of the Michigan compensation appellate commission, and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. Application for review shall be made within 30 days after the mailing of a copy of the order or decision by any method permissible under the rules and practices of the circuit court of this state.

MCL 421.62(a) Recovery of benefits improperly paid

> . . . Except in a case of an intentional false statement, misrepresentation, or concealment of material information, the unemployment agency shall waive recovery of an improperly paid benefit if repayment would be contrary to equity and good conscience and shall waive any interest. If the agency or an appellate authority waives collection of restitution and interest, except as provided in subdivision (ii), the waiver is prospective and does not apply to restitution and interest payments already made by the individual. As used in this subsection, "contrary to equity and good conscience" means any of the following:
>
> (i) The claimant provided incorrect wage information without the intent to misrepresent, and the employer provided either no wage information upon request or provided inaccurate wage information that resulted in the overpayment.
>
> (ii) The claimant's average net household income and household cash assets, exclusive of social welfare benefits, were, during the 6 months immediately preceding the date of the application for waiver, at or below 150% of the annual update of the poverty guidelines most recently published in the Federal Register by the United States Department of Health and Human Services under the authority of 42 USC 9902(2), and the claimant has applied for a waiver under this subsection. The unemployment agency shall not consider a new

application for a waiver from a claimant within 6 months after receiving an application for a waiver from the claimant. A waiver granted under the conditions described in this subdivision applies from the date the application is filed. If the waiver is granted, the unemployment agency shall promptly refund any restitution or interest payments made by the individual after the date of the application for waiver. As used in this subdivision:

(A) "Cash assets" means cash on hand and funds in a checking or savings account.

(B) "Dependent" means that term as defined in section 27(b)(4).4

(C) "Household" means a claimant and the claimant's dependents.

(iii) The improper payments resulted from an administrative or clerical error by the unemployment agency. A requirement to repay benefits as the result of a change in judgment at any level of administrative adjudication or court decision concerning the facts or application of law to a claim adjudication is not an administrative or clerical error for purposes of this subdivision.

* * *

MCR 2.116(C) Summary Disposition

(C) Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:

* * *

(4) The court lacks jurisdiction of the subject matter.

* * *

(8) The opposing party has failed to state a claim on which relief can be granted.

* * *

INTRODUCTION

Ten plaintiffs filed this cause of action, accusing Defendants of violating their *procedural* due process rights under the Michigan Constitution. They asserted that Defendants issued administrative decisions inconsistent with the Michigan Employment Security Act (Count I), failed to conduct sua sponte reviews to determine if restitution would be waived for all claimants (Count II), and improperly engaged in collection activity while a timely protest or appeal was pending (Count III).

Following briefing and oral argument, the lower court dismissed Count I as to all Plaintiffs except Kellie Saunders, and dismissed Count II as to all Plaintiffs. Count III remains pending before the lower court.

Now, Plaintiffs come before this Court, seeking relief based upon facts and causes of action that were not alleged or accepted before the lower court. Specifically, Plaintiffs assert that the lower court failed to consider their *substantive* due process allegations (when none were made), that the lower court failed to consider allegations of non-parties, and that the lower court failed to properly consider the pleadings. However, the lower court determined, in a light most favorable to Plaintiffs, that summary disposition based upon the pleadings was appropriate. Defendants ask this Court to ignore unalleged causes of actions and non-party statements, and let stand the decision of the lower court based upon the record made by the parties below.

COUNTER-STATEMENT OF APPLICABLE LAW, FACTS, AND PROCEEDINGS

The Michigan Employment Security Act and the federal CARES Act provide an administrative process for claimants challenging unemployment decisions.

Our Legislature gave the Unemployment Insurance Agency exclusive original jurisdiction to determine claimants' rights to receive benefits. MCL 421.32(a). The Agency must issue written decisions (called determinations or redeterminations) regarding eligibility and qualification issues. MCL 421.32, 32a and 62.

Interested parties who disagree with any determination have a multi-level appeal process available to them. If an interested party appeals, the Agency refers the matter to the Michigan Office of Administrative Hearings and Rules for a hearing before an administrative law judge. MCL 421.32a(1) and (2); MCL 421.33(1). After the administrative law judge issues a decision, an interested party may appeal to the Michigan Unemployment Insurance Appeals Commission. MCL 421.33(2); MCL 421.34. After the Appeals Commission issues a decision, an interested party may pursue judicial appeals to the circuit court, and from there to the Michigan Court of Appeals and Michigan Supreme Court. MCL 421.38(1), (4).

During the COVID-19 pandemic, the federal government passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) on March 27, 2020, which expanded unemployment benefits to individuals who may not be otherwise eligible for traditional unemployment benefits through the Pandemic Unemployment Assistance (PUA) program. 15 USC 9021. For example, this expansion allowed self-employed or part-time workers to claim PUA benefits. 15

USC 2102(a)(3)(A)(ii)(II). States had the authority to administer the PUA program but had to do so in compliance with state unemployment law. 15 USC 9021(f)(1) and 9023(b)(1). Claimants were entitled to the appeals procedures available under state unemployment law. 15 USC 9021(c)(5)(A).

Applicable unemployment law regarding waiver of restitution.

If the Agency pays an individual benefits but it is later determined by the Agency, administrative tribunal, or judicial court that the individual was not eligible or qualified to receive those benefits, the Agency must seek to recover those benefits. MCL 421.62(d). The Agency is permitted to waive the recovery of improperly paid unemployment payments if the payments were not obtained fraudulently. MCL 421.62(a). Waiver is allowed under three circumstances: (1) if an employer or claimant provides incorrect wage information, (2) if the claimant meets federal income poverty guidelines, or (3) if the payments were the result of agency error. *Id.* Agency error does not include a change in judgment at the administrative or judicial level. *Id.*

Plaintiffs filed a cause of action in the Court of Claims.

In January 2022, five plaintiffs filed this action, alleging that Defendants violated their procedural due process rights under the Michigan Constitution by: (1) issuing monetary redeterminations more than one year after the issuance of the initial monetary determination, (2) failing to conduct reviews of overpayment accounts to determine if overpayment should be waived due to "agency error," and

(3) engaging in collection activity where a timely protest or appeal had been filed. (Defendants' App'x, pp 17, 27–29; January 28, 2022 Compl, ¶¶ 117, 162–184).

In response, Defendants filed a Motion for Summary Disposition under MCR 2.116(C)(4) (lack of subject matter jurisdiction) and (C)(8) (failure to state a claim). On March 24, 2022, Plaintiffs filed their first amended complaint pursuant to MCR 2.118(A)(1) which added five plaintiffs but did not change the general allegations or counts regarding alleged violations of procedural due process. (Defendants' App'x, pp 56, 66–70; March 24, 2022 1st Am Compl, ¶¶ 174, 219–242).

In addition, Plaintiffs filed a motion for preliminary injunction, seeking to suspend collection activity for the Plaintiffs and the putative class by: (1) suspending all collection activity against claimants that were based upon a redetermination issued more than one year after a monetary determination, (2) suspending all collection activity against claimants who owe an overpayment and for whom Defendants have not determined if waiver is appropriate under the theory of "administrative error," and (3) suspending all collection activity against claimants who had not received a "final" determination regarding the merits of their claim.

On June 13, 2022, the Court of Claims issued an Opinion and Order regarding Defendants' motion for summary disposition. (Defendants' App'x, pp 105–122; June 13, 2022 Op & Order.) The court granted Defendants' summary disposition motion as to Count I (to all Plaintiffs but Kellie Saunders) and to Count II in its entirety (*Id.*, pp 112–117), but denied the requested relief as to Count III.

(*Id.*, pp 117–119.) Further, the court granted Plaintiffs' preliminary injunction motion as to Count I (as to Saunders) and Count III in its entirety (*Id.*, pp 119–122), but denied injunctive relief as to Count II. (*Id.*)

STANDARD OF REVIEW

An appellate court reviews a grant or denial of summary disposition de novo. *Travelers Inc Co v Detroit Edison Co*, 465 Mich 185, 205–206 (2001).

ARGUMENT

I. The lower court properly dismissed the procedural due process claims of all Plaintiffs but Kellie Saunders, because they failed to exhaust their administrative remedies.

A. This Court should not consider arguments not raised below, or arguments raised on behalf of people who were not parties below.

1. Plaintiffs did not allege any substantive due process claims in the lower court.

To begin, Plaintiffs assert that the lower court failed to consider their substantive due process claims. (See Pls' App for Lv to Appeal, pp 16–17, 21–23.) However, their pleadings are devoid of any such allegations. Because Plaintiffs failed to allege or argue substantive due process below, this Court should not consider these arguments. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95 (2005).

Due-process allegations can, of course, contain both procedural and substantive components. *Grimes v Van Hook-Williams*, 302 Mich App 521, 531 (2013). The purpose of substantive due process is to secure individuals from

arbitrary excises of government power or authority. *Id*. Substantive due process provides heightened protection against governmental interference with certain fundamental rights and liberty interests. *Id*. Further, in the context of governmental actions, a substantive due process violation is established only when the conduct is so arbitrary and capricious that it shocks the conscience. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197–198 (2008).

A review of the Plaintiffs' original and first amended complaint makes it clear that their due-process allegations were of a procedural, as opposed to a substantive, nature. (Defendants' App'x, pp 17, 27–29; January 28, 2022 Compl, ¶¶ 117, 162–184; and Defendants' App'x, pp 56, 66–70; March 24, 2022 1st Am Compl, ¶¶ 174, 219–242). Both pleadings cite a case in support of procedural due process – *Goldberg v Kelly*, 397 US 254 (1971). (Defs' App'x, p 17; January 28, 2022 Compl, ¶ 117; Defs' App'x, p 56; March 24, 2022 1st Am Compl, ¶ 174).

Further, both pleadings refer to the notice, process, or alleged lack thereof. (Defs' App'x, pp 27–29; January 28, 2022 Compl, ¶¶ 162–184; Defs' App'x, pp 66–70; March 24, 2022 1st Am Compl, ¶¶ 219–242). Finally, in response to Defendants' motion for summary disposition, Plaintiffs advanced arguments regarding procedural, and not substantive, due process. (Defs' App'x, pp 84, 96–97.)

Plaintiffs' pleadings below do not contain any of the following words typically associated with a substantive due process cause of action – substantive due process, arbitrary, fundamental rights, or "shocks the conscience." (Defs' App'x, pp 17, 27–29; January 28, 2022 Compl, ¶¶ 117, 162–184; Defs' App'x, pp 56, 66–70; March 24,

2022 1st Am Compl, ¶¶ 174, 219–242; Defs' App'x, pp 84, 96–97.) Yet, on appeal, Plaintiffs attempt to challenge the lower court's failure to address a cause of action that was not before it. (See Pls' App for Lv to Appeal, pp 16–17, 21–23.)

Plaintiffs have failed to cite any authority that allows them to raise new causes of action on appeal. This Court should therefore consider arguments in favor of them abandoned. *King v Oakland County Prosecutor*, 303 Mich App 222, 236 (2013). In *King*, this Court declined to be responsible for finding the authority to support a party's position. *Id*. If a party failed to cite sufficient authority, the position would be abandoned on appeal. *Id*. Thus, this Court should not consider any arguments regarding substantive due process.

2. This Court should not consider arguments made on behalf or regarding putative class members who are not parties to the litigation below.

In addition, Plaintiffs make several factual allegations in this Court regarding "putative class members" Theresa Brandt and Kelly Rama. (See Pls' App for Lv to Appeal, pp 5, 7, 10, 16, 23, 24, 26 n 2.) The lower court did not consider any allegations regarding Brandt or Rama. (Defs' App'x, pp 105–122; June 13, 2022 Op & Order.) This is because they were not named as either Plaintiffs or putative class members when the court heard oral arguments regarding Defendants' Motion to Dismiss. (Defs' App'x, pp 33–73; March 24, 2022 1st Am Compl.) Again, Plaintiffs have failed to cite any authority to support an argument that factual allegations about non-parties are relevant for purposes of an appeal regarding summary disposition. *King,* 303 Mich App at 236. Allegations regarding Brandt

and Rama were not before the lower court and should not be considered for purposes of this appeal.

B. If a claimant fails to exhaust their available administrative remedies, a court does not have jurisdiction to consider their claims.

1. The Court of Claims properly granted summary disposition as to Count I because Plaintiffs failed to exhaust their available administrative remedies.

Defendants argued that summary disposition was proper where there is a lack of subject-matter jurisdiction. MCR 2.116(C)(4). As with personal jurisdiction, the burden of establishing subject matter jurisdiction was on the plaintiffs. *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50 (2000). Summary disposition under this section is appropriate where a party has failed to exhaust their administrative remedies before filing suit. *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 157 (2004).

The lower court dismissed Count I as to all relevant Plaintiffs but Kellie Saunders because they failed to exhaust their available administrative remedies. (Defendants' App'x, pp 112–113; June 13, 2022 Op & Order.) The lower court did not dismiss Count I as to Saunders because Defendants failed to timely act on her favorable decision from an administrative law judge, even though the decision was issued after Plaintiffs filed the original complaint. (*Id.*)

Of the remaining nine Plaintiffs involved in this appeal, only four alleged that Defendants issued PUA nonmonetary redeterminations that were inconsistent with the MES Act: Dawn Davis, Joshua Eggleston, Jennifer Hillebrand, and Eleni

Zestos. (Defs' App'x, p 58; March 24, 2022 1st Am Compl, ¶ 186.) There were no allegations that Plaintiff Davis had exhausted her administrative remedies prior to the filing of the original complaint in January 2022 (Defs' App'x, p 45; January 28, 2022 Compl, ¶¶ 72–82) or that Plaintiffs Eggleston, Hillebrand, or Zestos had done so at the time of the filing of the first amended complaint in March 2022 (Defs' App'x, pp 48–51; March 24, 2022 1st Am Complaint, ¶¶ 101–120, 132–137).

2. State and federal law provide an administrative path for Plaintiffs to challenge administrative decisions.

Any right to unemployment benefits arises under the MES Act. *Peplinski v Michigan Employment Sec Comm'n*, 359 Mich 665, 668 (1960) . The Legislature created a "specific procedure to be observed in the administration of the unemployment compensation act and for a limited judicial review, [which] is exclusive of any and all other possible methods of review." *Mooney v Unemployment Compensation Comm'n*, 366 Mich 344, 355 (1953).

The Legislature gave the Agency the exclusive original jurisdiction to determine claimants' rights to receive benefits. MCL 421.32(a). The Agency must issue written decisions (called determinations or redeterminations) regarding eligibility and qualification issues. MCL 421.32, 32a and 62.

Interested parties who disagree with any determination have a multi-level appeal process available to them. If an interested party appeals, the Agency refers the matter to the Michigan Office of Administrative Hearings and Rules for a hearing before an administrative law judge. MCL 421.32a(1) and (2); MCL

421.33(1). After the administrative law judge issues a decision, an interested party may appeal to the Michigan Unemployment Insurance Appeals Commission. MCL 421.33(2); MCL 421.34. After the Appeals Commission issues a decision, an interested party may pursue judicial appeals to the circuit court, and from there to the Michigan Court of Appeals and Michigan Supreme Court. MCL 421.38(1), (4) . In addition, the CARES Act provides that claimants were entitled to the appeals procedures available under state unemployment law. 15 USC 9021(c)(5)(A).

3. Because Plaintiffs failed to exhaust their administrative remedies, the lower court properly determined that it lacked subject-matter jurisdiction to entertain their cause of action.

If the Legislature has expressed an intent to make an administrative tribunal's jurisdiction exclusive, a court cannot exercise jurisdiction. *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 50 (2000) (in a declaratory action, plaintiffs' failure to exhaust administrative remedies resulted in dismissal due to lack of subject matter jurisdiction). Our Supreme Court has stated that "administrative law dictates that courts move very cautiously when called upon to interfere with the assumption of jurisdiction by an administrative agency." *Citizen for Common Sense*, 243 Mich at 52 (citing *Judges of the 74th Judicial District v Bay Co*, 385 Mich 710, 727 (1971)).

Here, the Legislature has made clear that the remedy for claimants challenging Defendants' administrative decision is through the administrative review process and not through an original action in the Court of Claims. In fact,

the Supreme Court issued a decision last year about the Agency's authority to review decisions within the confines of the MES Act. That decision was the culmination of a process that began in the administrative arena, not an original action. See *Dep't of Licensing and Regulatory Affairs/Unemployment Ins Agency v Lucente*, 508 Mich 209 (2021).

Further, Plaintiffs were aware of the availability of favorable decisions through the administrative process. Plaintiff Saunders received a favorable decision through the administrative process. (Defs' App'x, p 107; June 13, 2022 Op & Order.) In their pleadings before the lower court, Plaintiffs acknowledged that other unnamed claimants had challenged Defendants' issuance of PUA monetary redeterminations and had received favorable decisions through the administrative process. (Defs' App'x, p 91; Pls' Response to Defs' Mot for Summary Disposition.) Thus, the available administrative process could provide Plaintiffs with adequate relief and in fact had done so multiple times.

As such, because Plaintiffs Davis, Eggleston, Hillebrand, and Zestos did not exhaust their available administrative remedies regarding PUA redeterminations and because the available administrative process could provide adequate relief, the lower court properly determined that it lacked jurisdiction to review the merits of their complaint. The decision was consistent with the law and facts and this Court should deny the application for leave to appeal.

II. The lower court properly dismissed the restitution-waiver claim (Count II) because Plaintiffs failed to state a claim upon which relief could be granted.

A. Federal and state law govern restitution waivers.

The Agency is permitted to waive improperly paid state unemployment payments if the payments were not obtained fraudulently. MCL 421.62(a). Waiver is allowed under three circumstances: (1) if an employer or claimant provides incorrect wage information, (2) if the claimant meets certain statutory poverty guidelines, or (3) if the payments were the result of agency "administrative or clerical" error. MCL 421.62(a) . Agency error does not include a change in judgment at the administrative or judicial level. MCL 421.62(a).

The federal government does not require Defendants to conduct automatic reviews of all overpayment accounts to determine if waiver is appropriate. It requires states to legislatively provide for overpayment waivers in one of two ways: a system that allows for the states to automatically review overpayment decisions and waive restitution, *or* a system where review is complete upon individualized request. (Defs' App'x, p 124; 3/11/80 UIPL No. 23-80.) UIPL 23-80 gave states the option of selecting one of the two options and recommended that the states select the second option because it was more "manageable and economical"—Michigan selected the second option. *Id.*; MCL 421.62(a).

In addition, the federal government did not mandate automatic waiver review by states. (Defs' App'x, p 129; 10/1/15 UIPL No. 01-16.) Nor does state or federal law allow for blanket or automatic waivers. MCL 421.62(a). As such, there

is no legal authority mandating that the Agency automatically review all overpayment decisions.

1. The grant or denial of a waiver does not constitute a constitutional deprivation.

In their complaint, all Plaintiffs asserted, in a conclusory manner, that they were entitled to an automatic restitution waiver due to unspecified agency error. (Defs' App'x, pp 9, 11–19; March 24, 2022 1st Am Compl, ¶¶ 43, 55, 70, 81, 90, 99, 110, 117, 129, 135.) The lower court disagreed and dismissed Count II. (Defs' App'x, pp 114–115.) The lower court determined that dismissal was proper because Plaintiffs had notice of the availability of waiver because it was in statute. (*Id.*) Further, the court found that there was no evidence that Defendants had denied any of the Plaintiffs' restitution-waiver requests that were based upon a claim of agency error. (*Id.*)

First, Plaintiffs argue that a restitution-waiver denial would result in an unconstitutional taking of their property. (See Pls' App for Lv to Appeal, pp 24–26.) The Michigan Constitution provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. A threshold question is "whether the interest allegedly infringed by the challenged government action . . . comes within the definition of 'life, liberty or property." *Dep't of Health & Human Servs v Rasmer (In re Estate of Rasmer)*, 501 Mich 18, 43 (2017), citing *Bonner v Brighton,* 495 Mich 209, 225 (2014). Even assuming a waiver is improperly denied, this does not rise to the level of a deprivation of

property. It is merely the declination of waiving a debt. While not binding, the New Mexico Court of Appeals has held that a claimant does not have a vested right in a waiver of money owed, so it cannot constitute a claim for a constitutional deprivation. *Millar v NM Dep't of Workforce Solutions*, 304 P3d 427, 432 (NM App 2013). (Defs' App'x, pp 132–140.)

Essentially, Plaintiffs are arguing that Defendants' failure to review every overpayment account to determine whether a restitution waiver should occur is an unconstitutional taking because the failure to waive debt would result in repayment. (See Pls' App for Lv to Appeal, pp 24–26.) However, Plaintiffs have no constitutional right to waiver. Defendants are required to offer a process for the waiver of restitution, which they have done under § 62(a). More importantly, none of the Plaintiffs have alleged that they sought a waiver of their restitution under any available statutory ground. (Defs' App'x, pp 8–12 and 41–51.)

Further, no due process violation has occurred. A fundamental requirement of due process in such proceedings is "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Sidun v Wayne County Treasurer,* 481 Mich 503, 509 (2008), quoting *Mullane v Central Hanover Bank & Trust Co,* 339 US 306, 314 (1950). Thus, a claim alleging a deprivation of property without due process should do more than just allege the deprivation of property. What makes a due-process claim unique—indeed, the core of a due-process claim—is that the claimant was deprived of notice of an action or proposed action, *and* an opportunity

to present evidence and be heard. Because Plaintiffs failed to allege that Defendants both failed to provide them with notice of the availability of restitution waivers *and* that they were denied the opportunity to challenge the presumed denial of waiver, no due process violation occurred.

Finally, Plaintiffs argue that something more than statutory notice was required to advise them of their right to a hardship waiver. (See Pls' App for Lv to Appeal, pp 27–28.) "The violation of applicable state statutes, or of applicable administrative rules and regulations, *ipso* facto, does not amount to a constitutional violation." *York v Detroit*, 438 Mich 744, 762 (1991). Thus, as discussed above, because Plaintiffs had notice and opportunity request a hardship waiver, and because they failed to even allege that they had attempted to do so, no due process violation occurred. The lower court properly dismissed Count II.

III. The lower court properly denied injunctive relief as to counts I and II because Plaintiffs did not meet the necessary elements to obtain injunctive relief.

Preliminary injunctions are generally considered to be equitable relief. *Mich AFSCME* Council *v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 145 (2011), citing *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 11 (2008). The purpose of a preliminary injunction is to preserve the "status quo" pending resolution of the matter. *Hammel v Speaker of the House of Representatives*, 297 Mich App 641, 647–648 (2012), citing *Mich AFSCME Council*, 293 Mich App at 145. To obtain this extraordinary form of relief, the moving party bears the burden of proving four traditional elements:

1. The likelihood that the moving party will prevail on the merits of the case;

2. Whether irreparable harm exists;

3. Whether the party seeking an injunction would be harmed more by absence of injunctive relief than the party opposing the relief; and

4. Harm to the public interest. [*Hammel*, 297 Mich App at 648.]

As explained earlier (§§ I.B. and II), Plaintiffs cannot demonstrate a likelihood of success on the merits. They have failed to exhaust their administrative remedies and have failed to establish a procedural due process violation regarding waiver.

Also, Plaintiffs cannot identify any irreparable harm. Financial hardship alone is not sufficient to establish irreparable injury. *Pontiac Fire Fighters Union Local 376 v* City *of Pontiac*, 482 Mich 1, 10 (2008). As stated, claimants have the full panoply of appellate rights to pursue their unemployment benefits (§§ I.B.2.)

The Department of Labor has provided Defendants with another year to process waivers,[1] yet Plaintiffs sought to have the Court of Claims mandate a waiver on an unripe claim and without the expertise related to the implementation of the pandemic unemployment programs. Therefore, pursuit of administrative remedies is the appropriate course of action for these Plaintiffs.

Because they failed to meet their burden of establishing equitable relief, the Court of Claims properly denied equitable relief. This Court should deny leave to appeal.

[1] In February 2022, the Department of Labor issued guidance regarding the waiver of restitution. (Defendants' App'x, pp 141–180; UIPL 20-21.) The DOL is giving states one year to complete the review. (*Id.* at 145.)

CONCLUSION AND RELIEF REQUESTED

After reviewing the pleadings and conducting a lengthy oral argument, the lower court granted in part and denied in part Defendants' motion for summary judgment. On appeal, Plaintiffs make raise new claims and rely on non-party allegations. Looking past those distractions, this Court should readily conclude that the Court of Claims properly denied Plaintiffs the relief they sought.

As such, Defendants respectfully ask this Court to deny Plaintiffs' application for leave to appeal.

Respectfully submitted,

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