STATE OF MICHIGAN
IN THE SUPREME COURT

PROGRESS MICHIGAN,

Plaintiff-Appellant,

v

ATTORNEY GENERAL BILL SCHUETTE, in his official capacity,

Defendant-Appellee.
_____/

Supreme Court Nos. 158150, 158151

Court of Appeals Nos. 340921, 340956

Court of Claims No. 17-000093-MZ

ATTORNEY GENERAL BILL SCHUETTE'S BRIEF IN OPPOSITION TO PROGRESS MICHIGAN'S APPLICATION FOR LEAVE TO APPEAL

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Chief Legal Counsel

Christina M. Grossi (P67482)
Kyla L. Barranco (P81082)
Assistant Attorneys General
Attorneys for Defendant-Appellee
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 373-1162

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COUNTER-STATEMENT OF JURISDICTION

Appellant Progress Michigan seeks leave to appeal the Court of Appeals' June 19, 2017 published per curiam opinion, which reversed the Court of Claims' denial of Appellee Attorney General Bill Schuette's motion for summary disposition. Appellee Attorney General Bill Schuette ("the Department") does not dispute that this Court has jurisdiction to consider Progress Michigan's application for leave to appeal under MCR 7.303(B)(1) and MCL 600.215(3).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. This Court may grant leave to appeal where the appellant demonstrates that the questions at issue have significant public interest. Progress Michigan misconstrues the issues below and asserts that this Court should review an issue not decided by the Court of Appeals or Court of Claims. Should this Court deny Progress Michigan's application for leave to appeal?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Court of Claims' answer: Did not answer.

   Court of Appeals' answer: Did not answer.

2. This Court may grant leave to appeal where the Court of Appeals' decision is clearly erroneous and will cause material injustice. The Court of Appeals' decision merely reaffirms basic principles of sovereign immunity and applies the plain language of MCL 600.6431. Should this Court deny Progress Michigan's application for leave to appeal?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Court of Claims' answer: Did not answer.

   Court of Appeals' answer: Did not answer.

STATUTES AND RULE INVOLVED

MCL 600.5856:

The statutes of limitations or repose are tolled in any of the following circumstances:

(a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.

(b) At the time jurisdiction over the defendant is otherwise acquired.

(c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

MCL 600.6419(1)(a):

(1) Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive. All actions initiated in the court of claims shall be filed in the court of appeals. The state administrative board is vested with discretionary authority upon the advice of the attorney general to hear, consider, determine, and allow any claim against the state in an amount less than $1,000.00. Any claim so allowed by the state administrative board shall be paid in the same manner as judgments are paid under section 6458 upon certification of the allowed claim by the secretary of the state administrative board to the clerk of the court of claims. Except as otherwise provided in this section, the court has the following power and jurisdiction:

(a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

MCL 600.6431:

(1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

(2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.

(3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

MCL 15.240(1):

(1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:

(a) Submit to the head of the public body a written appeal that specifically states the word "appeal" and identifies the reason or reasons for reversal of the denial.

(b) Commence a civil action in the circuit court, or if the decision of a state public body is at issue, the court of claims, to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

MCR 2.118(D):

> An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of the original filing of the affidavit.

INTRODUCTION

The Court of Appeals' opinion that Progress Michigan seeks leave to appeal merely applied the plain language of the Court of Claims Act and reaffirmed basic principles of sovereign immunity. In short, it reiterated that a claim filed in the Court of Claims may not be maintained against the State unless it is signed and verified as provided in MCL 600.6431(1). Despite this clear holding, Progress Michigan seeks reversal of the Court of Appeals' opinion. This Court should deny leave to appeal for two reasons.

First, Progress Michigan misconstrues the questions at issue below. In attempting to convince this Court to grant leave to appeal, it asserts that the case presents an issue of significant public interest—namely, whether "private emails used to conduct government business must be disclosed to the public under" the Freedom of Information Act (FOIA). (App, p 6.) But the Department's arguments below and the Court of Claims' and Court of Appeals' opinions focused on a narrow, unrelated procedural issue: whether courts, in interpreting a condition imposed by the Legislature in derogation of sovereign immunity, may ignore the requirement of strict compliance and allow plaintiffs to maintain deficient claims against the State. And, in any event, the Department does not dispute that private emails used to conduct official business are disclosable under the FOIA.

Second, the Court of Appeals correctly applied the plain language of MCL 600.6431 and two recent, published cases—*McCahan v Brennan*, 492 Mich 730 (2012), and *Fairley v Dep't of Corrections*, 497 Mich 290 (2015)—in determining that Progress Michigan's deficient claim, which was neither signed nor verified,

triggered MCL 600.6431(1)'s bar-to-claim language. In other words, because Progress Michigan failed to sign and verify its complaint, the Court of Claims was required to dismiss the case at its outset. To do otherwise would allow a claimant to maintain a claim against the State without satisfying the Legislature's pre-conditions to suit. For the same reason, the Court of Appeals also properly determined that Progress Michigan's deficient claim could not be cured through the relation-back doctrine or tolling. Indeed, as noted by the Court of Appeals, because Progress Michigan's deficient "complaint was invalid from its inception, there was nothing pending which could be amended" or tolled. Slip op, p 7.

For these reasons, the Court of Appeals' holding is a simple one that requires no further review. Accordingly, this Court should deny Progress Michigan's application for leave to appeal.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Progress Michigan's FOIA request

On September 27, 2016, Progress Michigan sent a FOIA request to the Department of Attorney General. (Pl's Amended Compl, ¶ 9, Ex 2.) It sought emails from 21 current and former Department employees that were "sent or received using a personal email account in the performance of any official function since November 1, 2010." (*Id.*) On October 19, 2016, the Department issued its final determination, which denied the request because, except for one email protected by the work-product privilege,[1] it did not possess records responsive to the request. (*Id.*, ¶ 10.)

Progress Michigan appealed the Department's denial under MCL 15.240(1)(a). (*Id.*, ¶ 11.) It alleged that the Department should reverse its determination because the personal emails sought were public records within the scope of the FOIA. (*Id.*, Pl's Ex 5.) But the Department never disputed that the FOIA encompasses communications transmitted via personal email accounts used in the performance of official duties. (*Id.*, Pl's Ex 3.) Rather, in upholding its denial, the Department explained that it denied the FOIA request because the records sought did not "exist within personal email accounts of the Department employees and former employees listed" in the FOIA request. (*Id.*, Pl's Ex 5.)

[1] This email chain was properly exempted from disclosure under MCL 15.243(1)(g), which provides that "[a] public body may exempt from disclosure as a public record . . . [i]nformation or records subject to the attorney-client privilege." Progress Michigan has not disputed that this record may be exempted from disclosure.

Proceedings Below

On April 11, 2017, 174 days after the final determination of the FOIA request (which occurred on October 19, 2016), Progress Michigan filed a two-count, unverified complaint against the Attorney General in his official capacity in the Court of Claims. (Pl's Compl.) It alleged that the Department violated: (1) the FOIA by refusing to disclose emails sent and received on personal email accounts; and (2) the Management and Budget Act and applicable retention and disposal schedule by destroying or failing to preserve public records. (Pl's Compl, ¶¶ 16, 22.)

In response, the Department filed a motion for summary disposition on two grounds: (1) Progress Michigan failed to comply with the Court of Claims Act's verification requirements, MCL 600.6431(1); and (2) no private cause of action exists under the Management and Budget Act. In response, Progress Michigan filed an amended complaint on May 26, 2017, 219 days after the final determination of its FOIA request. It also filed a brief in opposition to the Department's motion for summary disposition.

After receiving Progress Michigan's amended complaint, the Department filed a new motion for summary disposition premised upon three grounds. First, it argued that Progress Michigan could not cure its defective claim with an amendment to its original complaint. Therefore, the complaint was subject to dismissal based on governmental immunity pursuant to MCR 2.116(C)(7).[2] Second, the Department argued that, even if Progress Michigan could cure its failure to

[2] The Department's claim of appeal in Docket No. 340921 arose from this issue.

comply with the Court of Claims Act through an amendment to the complaint, the relation-back doctrine did not apply to the amended complaint because it did not add a claim or defense as required by the Court Rules. Consequently, Count I was time-barred by the FOIA's 180-day limitations period and subject to dismissal under MCR 2.116(C)(7). Finally, the Department reasserted that Count II failed to state a claim upon which relief could be granted because a private cause of action does not exist under the Management and Budget Act, and declaratory relief was unavailable.

On October 16, 2017, the Court of Claims issued an opinion and order that denied in part and granted in part the Department's motion for summary disposition. In regard to the Department's first argument, it held that a party may amend a deficient claim under the Court of Claims Act with an amendment to its complaint. (Ex A, 10/16/2017 Opinion and Order, p 4.) It reasoned that a party does not have "only one opportunity within the relevant time period in which to comply with the statute's notice and verification requirements." (*Id.*)

The Court of Claims also rejected the Department's second argument based on the relation-back doctrine. (*Id.*, p 8.) In doing so, it relied on the Revised Judicature Act's tolling provision, MCL 600.5856(a). (*Id.*, p 7.) Significantly, the Court of Claims did not address MCR 2.118(D)'s requirement that an amendment relates back to the date of the original complaint only when it adds a claim or defense.

In regard to Count II, the Court of Claims agreed that Progress Michigan failed to state a claim upon which relief could be granted. (*Id.*, pp 8–9.) The Court of Claims noted that the Management and Budget Act provided no private right of action and that other means of enforcement existed under the statute. (*Id.*, p 9.) Thus, it dismissed Count II with prejudice.

The Department subsequently filed a claim of appeal in regard to its first argument, see Case No. 340921, and an application for leave to appeal as to its second argument, which the Court of Appeals granted and consolidated with Case No. 340921 on December 20, 2017. See Case No. 340956.

On June 19, 2018, in a published per curiam decision, the Court of Appeals reversed the Court of Claims' partial denial of the Department's motion for summary disposition. (Ex B, 6/19/2018 Opinion.) In doing so, it held in relevant part that (1) claimants must comply with MCL 600.6431(1)'s pre-conditions to filing suit against the State and, thus, cannot remedy their deficient claims with an amended complaint, and (2) the relation-back doctrine was inapplicable because Progress Michigan's complaint was invalid from its inception and, therefore, there was nothing pending which could be amended.

Progress Michigan subsequently filed its application for leave to appeal with this Court.

STANDARDS OF REVIEW

This Court has discretion in granting leave to appeal a Court of Appeals' decision. MCR 7.303(B)(1). The grant or denial of summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). Additionally, the proper interpretation of a statute is a question of law that is reviewed de novo. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 97 (2008).

ARGUMENT

I. Progress Michigan improperly seeks leave to appeal issues not applicable to this case.

Progress Michigan seeks leave to appeal under the auspices that this case presents an issue of significant public interest. But Progress Michigan misconstrues the questions at issue below. Accordingly, this Court should deny Progress Michigan's application for leave to appeal.

Progress Michigan asserts that this Court should grant leave to appeal under MCR 7.305(B)(2), which grants this Court discretion to review an appeal where "the issue has significant public interest and the case is against . . . an officer of the state." (App, p 6.) In support of granting leave under this provision, it suggests that the relevant issue is whether "private emails used to conduct government business must be disclosed to the public under" the FOIA. (*Id.*) But contrary to Progress Michigan's assertions in its application, the issue in both the Court of Appeals and the Department's motions for summary disposition was only procedural: whether courts, in interpreting a condition imposed by the Legislature

in derogation of sovereign immunity, may ignore the requirement of strict compliance and allow plaintiffs to maintain deficient claims against the State. The Department, Court of Claims, and Court of Appeals focused solely on this procedural issue, and the Court of Appeals reached the correct result. Thus, Progress Michigan's attempt to posture its appeal as one regarding "public transparency" is unpersuasive.

Furthermore, the Department does not dispute that private emails used to conduct official business are subject to disclosure under the FOIA. To the contrary, the Department has conceded that those emails constitute public records and are disclosable. For example, in its consolidated brief below, the Department explained that it "never disputed that the FOIA encompasses communications transmitted via personal email accounts used in the performance of official duties." (Brief on Appeal, p 3.) It further explained that Progress Michigan's FOIA request was denied because the requested records did not "exist within personal email accounts of the Department employees and former employees" named in the FOIA request. (*Id.*) Accordingly, the issue that Progress Michigan seeks leave to appeal—whether personal emails used for official business are disclosable under the FOIA—is not, and has never been, at issue or disputed in this case.

For these reasons, Progress Michigan has failed to show that this case involves an issue of significant public interest. Thus, this Court should deny leave to appeal.

II. The Court of Appeals' opinion is consistent with Michigan law.

The decision below does not depart from established case law. To the contrary, the Court of Appeals' decision merely reaffirmed basic principles of sovereign immunity and applied both the plain language of MCL 600.6431 and recent decisions by this Court, which affirmed those principles of sovereign immunity. See *McCahan v Brennan*, 492 Mich 730 (2012); *Fairley v Dep't of Corrections*, 497 Mich 290 (2015). Thus, the Court of Appeals' holding is a simple one that requires no further review.

A. As held by the Court of Appeals, a claimant must strictly comply with the Court of Claims Act and cannot remedy a deficient claim with an amended complaint.

The Court of Appeals correctly concluded that *McCahan v Brennan*'s rationale controls the outcome of this case. 492 Mich 730; Slip op, p 5.

Accordingly, leave to appeal should be denied.

1. The State, as sovereign, is immune from suit unless it consents.

It is well understood that there are limitations on a litigant's ability to sue the State and its officers. *Pohutski v City of Allen Park*, 465 Mich 675, 681 (2002). In fact, "[f]rom the time of Michigan's statehood, th[e] [Michigan Supreme] Court's jurisprudence has recognized that the state, as sovereign, is immune from suit unless it consents." *Id.*; see also *Ross v Consumers Power Co*, 420 Mich 567, 598 (1984) ("Sovereign immunity exists in Michigan because the state created the courts and so is not subject to them."); *Sanilac Co v Auditor Gen*, 68 Mich 659, 665 (1888)

("The state is not liable to suit except as it authorizes a suit, and this authority can be revoked at pleasure."). Notably, "any relinquishment of sovereign immunity must be strictly interpreted." *Cty Road Ass'n of Mich v Governor*, 287 Mich App 95, 118 (2010), quoting *Manion v State Hwy Comm'r*, 303 Mich 1, 19 (1942).

In the event that the State does consent to suit, the Legislature may "place conditions or limitations" on that waiver. *McCahan*, 492 Mich at 736. And like the waiver of sovereign immunity itself, courts have recognized "that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano v United States*, 352 US 270, 276 (1957); see also *Anzaldua v Band*, 216 Mich App 561, 557 (1996) (O'Connell, J., concurring in part and dissenting in part). Thus, while limitations and conditions are not jurisdictional requirements, they are pre-conditions to maintaining a claim against the State. *Fairley*, 497 Mich at 292.

In 1939, the State, through the Legislature, consented to be sued for certain claims under certain conditions in the newly created Court of Claims. 1939 PA 135 ("PA 135"). PA 135 provided in part,

> The court of claims is hereby created . . . . The court shall have power and jurisdiction . . . [t]o hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms or agencies. [MCL 27.3548(2), (8)(1).]

But, as recognized by this Court, the Legislature's grant of jurisdiction was "narrow and limited, substituting, merely, a 'court' of claims for the superseded claims jurisdiction of the earlier boards." *Taylor v State*, 360 Mich 146, 150 (1960); see also *Okrie v State*, 306 Mich App 445, 456 (2014).

2. The Court of Claims Act sets forth conditions and limitations to suing the State and its officers.

Although the Court of Claims Act "reflects the state's waiver of sovereign immunity from suit and submission to a court's jurisdiction," it is a legislatively created court. *Okrie*, 306 Mich App at 448; *Manion*, 303 Mich at 20 (holding that the Court of Claims "is a 'legislative court' and not a 'constitutional court' "). Consequently, it "derives its powers only from the act of the Legislature and is subject to the limitations therein imposed." *Manion*, 303 Mich at 20.

Two such conditions are the notice and verification requirements of MCL 600.6431(1), which provides in part,

> No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its department, commissions, boards, institutions, arms or agencies, . . . *which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths*.[3] [Emphasis added.]

Thus, under the plain language of the Court of Claims Act, a claimant must timely file and verify a claim or notice of intention file a claim to maintain a suit against

[3] Progress Michigan maintains that these requirements do not apply to FOIA "appeals." (App, p 9.) As a preliminary matter, challenges under the FOIA are original actions, not appeals. See MCL 15.240(1)(b) (providing for a "civil action in . . . the court of claims"); MCL 15.240(4) ("The court shall determine the matter de novo. . . ."). Further, as noted by this Court and the Court of Appeals, " 'post-Court of Clams Act' legislation waiving suit immunity . . . is limited by the terms and conditions of jurisdiction established in the Court of Claims Act." *Greenfield Constr Co Inc v Mich Dep't of State Highways*, 402 Mich 172, 195–196 (1978). Thus, claimants must abide by the requirements of MCL 600.6431 when initiating FOIA actions in the Court of Claims.

the State. Notably, and in line with the separation-of-powers principle,[4] "the judiciary has no authority to restrict or amend" these conditions, *McCahan*, 492 Mich at 732, as "any relinquishment of sovereign immunity must be strictly interpreted," *Pohutski*, 465 Mich at 681.

This Court has had an opportunity to examine the strict interpretation of the Legislature's waiver of sovereign immunity on three recent occasions. First, in *Rowland v Washtenaw County Road Commission*, 477 Mich 197, 201 (2007), this Court reversed a Court of Appeals' decision that determined that the State must show prejudice before a notice provision could be enforced.[5] This Court reasoned that "[i]n reading an 'actual prejudice' requirement into the statute, th[e] Court not only usurped the Legislature's power but simultaneously made legislative amendment to make what the Legislature wanted—a notice provision with no prejudice requirement—impossible." *Id*. at 213. Consequently, it held that the courts do "not have the authority to waive the government's immunity from suit, and tax dollars should only be at risk when a plaintiff satisfies *all the prerequisites*, including a notice provision, set by the Legislature." *Id*. at 223. (Emphasis added).

Five years later, in *McCahan,* 492 Mich at 732, this Court reaffirmed *Rowland*'s holding and extended it to the Court of Claims Act, MCL 600.6431. In

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[4] See Const 1963, art 3, § 2 ("The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.").

[5] *Rowland* considered a provision of the governmental tort liability act, MCL 691.1404, which, although different from MCL 600.6431, also implicates pre-conditions to waiver of the State's sovereign immunity. 477 Mich at 202–203.

McCahan, the plaintiff failed to file a verified notice of intent against the State within six months after her claim accrued, but made numerous efforts to inform the defendant's legal office of her intent to file a claim. *Id*. at 734; see MCL 600.6431(3). This Court determined that MCL 600.6431(3) nevertheless mandated dismissal. It held: "[w]hen the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain requirements that the plaintiff fails to meet, *no saving construction* . . . is allowed. *McCahan,* 492 Mich at 746. (Emphasis added).

This Court held similarly just three years ago in *Fairley*, 497 Mich at 299–300, where it assessed whether a claim against the State may be maintained when a claimant fails to sign or verify the notice of intent under MCL 600.6431. It determined that such deficiencies "fall[ ] short of 'strict compliance,' " and thus, the claims could not proceed against the State. *Fairley*, 497 Mich at 293.

These cases are clear and straightforward. When the Legislature abrogates sovereign immunity, but places conditions on bringing suit against the State, those conditions must be strictly enforced. Anything less than strict compliance requires dismissal. See also *Mays v Snyder*, __ Mich App __, (2018) (Docket Nos. 335555, 335725, 335726) ("[A] court may not craft an exception to the statutory notice or limitations periods by recognizing viability of a substantially compliant notice, engrafting a prejudice requirement, or similarly reducing the requirements of the statute, even when constitutional claims are at issue.").

3. The Court of Appeals applied the plain language of MCL 600.6431 and existing case law in holding that a deficient claim may not be cured by an amended complaint.

The Court of Appeals properly held that the plain language of MCL 600.6431 and the principle of strict compliance requires the Court of Claims to dismiss a deficient claim at its outset. Indeed, the Court of Claims Act provides that "no claim *may be maintained* against the [S]tate" unless claimants first comply with the notice and verification requirements. MCL 600.6431(1) (emphasis added). Consequently, as Progress Michigan failed to file a signed and verified claim against the State, the Court of Claims' failure to dismiss the case at its outset contravened the Legislature's mandate—which the Court of Appeals recognized.

As a preliminary matter, the Department agrees with the Court of Claims that MCL 600.6431(1) does not limit claimants to "only one opportunity to satisfy the statute's requirements." (Ex A, p 4.) But at issue below was *how* a claimant may be afforded a subsequent opportunity to meet the statute's requirements. The Court of Appeals rightly concluded that, because strict compliance with MCL 600.6431 is a *pre-condition to bringing suit* against the State, a non-compliant claim *must* be dismissed. Slip op, p 6. That dismissal, though, may be without prejudice allowing the claimant to file its claim again within the one-year (or, if applicable, six-month) time period provided in the Court of Claims Act, so long as that refiling complies with all of the requirements of MCL 600.6431. This process provides the claimant with more than a single opportunity to satisfy the statute's

requirements while still abiding by the Legislative mandate that no suit be maintained against the State without first meeting those requirements.[6]

But, by allowing Progress Michigan to cure its deficient claim through an amendment to the pleading, the Court of Claims did what the Legislature has prohibited—allowed a deficient claim against the State to go forward, which, in effect, validated that claim. Moreover, the de facto validation of the deficient claim was even more egregious in this case because, as will be discussed in Argument II, *infra*, the amendment occurred after the underlying cause of action's statute of limitations had run. In cases where a cause of action's limitations period expires after the filing of a deficient claim, but before an amendment that "cures" the deficiency, the court's use of the relation-back doctrine is dependent on, and therefore expressly endorses, the initial, deficient filing.[7] Thus, not only does the concept of amendment run afoul of the doctrine of strict compliance but, in practice, it also creates a procedural loophole, which nullifies the intent of the statute.

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[6] This procedure is not novel. For example, if a court lacks subject-matter jurisdiction over a party's claim, it is required to dismiss the complaint. *Bowie v Arder*, 441 Mich 23, 56 (1992) ("[W]hen a court lacks subject-matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void."); see also *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 375 (2004) ("[A] court that lacks subject-matter jurisdiction cannot adjudicate the parties' claims."). That dismissal, though, is without prejudice allowing the plaintiff to re-file his complaint in the proper court.

[7] The Court of Claims indicated that it would not permit an amended complaint to relate back to the original filing if the claimant filed the amendment outside of the one-year period provided for in MCL 600.6431(1). (Ex A, p 8 n 3.) But this is inconsistent with the court's willingness to apply the relation-back doctrine to an amended complaint filed within the one-year period. In both circumstances, it is required to validate the original deficient pleading for the amendment to relate back. Thus, the distinction the Court of Claims made is without difference.

This same phenomenon was discussed and rejected by this Court in the context of medical malpractice suits. In that context, a plaintiff is required to file an affidavit of merit with his or her complaint. MCL 600.2912d(1) ("[T]he plaintiff in an action alleging medical malpractice . . . shall file with the complaint an affidavit of merit signed by a health professional . . . ."). In *Scarsella v Pollak*, 461 Mich 547, 549 (2000), this Court considered whether a complaint filed without an affidavit was sufficient to commence a malpractice lawsuit for statute of limitations purposes. It held that it was not. *Id*. In so doing, this Court held that "because the complaint without an affidavit was insufficient to commence [the] plaintiff's malpractice action, it [could] not toll the period of limitations." *Id*. at 550. Thus, it rejected the argument that an amended complaint with an affidavit of merit would relate back to the original deficient filing. *Id*. Importantly, it also noted that if it applied the relation-back doctrine "plaintiffs could routinely file their complaints without an affidavit of merit . . . and 'amend' by supplementing the filing with an affidavit at some later date." *Id*. This, it reasoned, would "effectively repeal[ ] the statutory affidavit of merit requirement." *Id*.

The Court of Appeals acknowledged that the same concern is present here. Slip op, p 6. When the Legislature waived the State's sovereign immunity, it placed unambiguous conditions on when that waiver would occur. *McCahan*, 492 Mich at 736; MCL 600.6431(1). In the event that an amendment could be used to resuscitate deficient claims, claimants would routinely be able to maintain actions against the State without first complying with the requirements of

MCL 600.6431(1) so long as they amended to file a statutorily compliant claim at some later date. This effectively repeals MCL 600.6431(1)'s requirements and improperly subverts the will of the Legislature to the will of the courts.

In enforcing the statute as written, the Court of Appeals' correctly concluded that "in the absence of the claim being verified in plaintiff's initial complaint, the claim could not be asserted and thus lacked legal validity from its inception." Slip op, p 7. Given that this holding is premised upon the plain language of MCL 600.6431(1) and published case law, this Court should deny Progress Michigan's application for leave to appeal.

B. Neither the relation-back doctrine nor tolling are applicable.

The Court of Claims disregarded the plain language of MCR 2.118(D), which provides that an amended pleading relates back to date of the original pleading only when the amendment *adds a claim or defense*. Because Progress Michigan's amendment did not add a claim or defense, the Court of Claims erroneously allowed Progress Michigan to maintain a claim that was barred by the FOIA's statute of limitations. Additionally, the Court of Claims erred by applying tolling as it contravenes a clear statutory mandate and necessarily recognizes the viability of Progress Michigan's deficient claim. The Court of Appeals recognized these errors and properly reversed the Court of Claims' denial of the Department's motion for summary disposition.

1. The relation-back doctrine applies only to added claims and defenses.

Under the Michigan Court Rules, leave to amend pleadings should be freely given when justices requires. MCR 2.118(A)(2). But an amended pleading relates back to the original pleading only when it *adds a claim or defense*. *Miller v Chapman Contracting*, 477 Mich 102, 107 (2007). The court rule provides in part,

> An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. [MCR 2.118(D).]

Consequently, an amended complaint that does not add a claim or defense cannot supersede the former pleading. See MCR 2.118(A)(4) ("*Unless otherwise indicated*, an amended pleading supersedes the former pleading.") (Emphasis added).

This is further supported by the fundamental canon of statutory construction *expressio unius est exclusio alterius*. For example, in *Miller*, 477 Mich at 107 n 1, this Court precluded the application of the relation-back doctrine to the addition of a new party. It reasoned that "it has been long understood that the expression of specific exceptions to the application of a law, as here, implies that there are no other exceptions." *Id*. In other words, because the relation-back doctrine specifically enumerates when an amended pleading may relate back to the original pleading, no additional exceptions may be read into the court rule.

And for good reason. The Legislature, not the court, is responsible for modifying statutes of limitations. *Nielsen v Barnett*, 440 Mich 1, 8–9 (1992) ("By enacting a statute of limitations, the Legislature determines the reasonable period of time given to a plaintiff to pursue a claim."); *McDougall v Schanz*, 461 Mich 15,

27 (1999) ("[T]his Court is not authorized to enact court rules that establish, abrogate, or modify substantive law.").[8] By allowing an amendment that did not add a claim or defense to relate back to Progress Michigan's original deficient pleading, the Court of Claims not only circumvented the statute of limitations applicable to the claim but, more importantly, also implicitly validated the original claim, which was insufficient to satisfy the Legislature's pre-conditions to suit in the first instance. The Court of Appeals identified this error and properly reversed the Court of Claims' determination. Slip op, p 6.

Significantly, the history of MCR 2.118(D) also supports the limited application of the relation-back doctrine and the Court of Appeals' holding. Prior to 2001, the court rule provided,

> Except to demand a trial by jury under MCR 2.508, an amendment relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. [MCR 2.118(D), amended January 1, 2001.]

The pre-2001 version of the court rule was broad and seemingly applied to both new and already existing claims. But MCR 2.118(D) was amended "effective January 1, 2001, to clarify that the relation-back doctrine pertains to the addition of claims and defenses."[9] MCR 2.118(D), Staff Comment to 2000 Amendment. Thus, the drafters

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[8] This Court has clarified that statutes of limitations "are substantive in nature." *Gladych v New Family Homes Inc*, 468 Mich 594, 600 (2003).

[9] The federal counterpart, Fed. R. Civ. P. 15(c)(1)(B), provides no such limitation. It provides that "[a]n amendment to a pleading relates back to the date of the original pleading when: . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." Given that "[t]he Michigan Court Rules are, by and large, based

of MCR 2.118(D) have made clear that the relation-back doctrine is intended to apply only to *added* claims or defenses.

The relation-back doctrine's impact on sovereign immunity is of import as well. Courts have delineated only one exception to the requirement that a party must add a claim or defense to an amended pleading for the relation-back doctrine to apply—the misnomer doctrine. See *Miller*, 477 Mich at 106 ("As a general rule . . . a misnomer of a plaintiff or defendant is amendable unless the amendment is such as to effect an entire change of parties."). But "[t]he misnomer doctrine applies only to correct inconsequential deficiencies or technicalities in the naming of parties." *Id*. And here, the limitations and conditions upon which the State has consented to be sued are not inconsequential deficiencies or technicalities. *McCahan*, 492 Mich at 736; *Soriano*, 352 US at 276. Instead, the limitations imposed by the Legislature, like jurisdictional requirements, are pre-conditions to maintaining suit against the State.

The same rationale bars the application of tolling. As noted by this Court in *McCahan*, "no judicially created saving construction is permitted to avoid a clear statutory mandate." 492 Mich at 733. More recently, the Court of Appeals explained that "a court may not craft an exception to the statutory notice or limitations period by recognizing viability of a substantially compliant notice, engrafting actual prejudice requirements, or similarly reducing the requirements of

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on the Federal Rules of Civil Procedure[,]" *North v Dep't of Mental Health*, 427 Mich 659, 670 (1986), this intentionally added difference is persuasive.

a statute." *Mays*, __ Mich at *6. To allow tolling to cure Progress Michigan's deficient claim would allow a saving construction to avoid a clear statutory mandate *and* necessarily recognize the viability of Progress Michigan's deficient claim. And, in any event, the Court of Claims erred in applying tolling in this matter because tolling applies only where there has been a previously dismissed lawsuit against the same defendant and a new lawsuit is initiated. *Terrace Land Dev Corp v Seelingson & Jordan*, 250 Mich App 452, 459 (2002) ("MCL § 600.5856 comes into play where a party files suit beyond the limitation period and seeks to toll the time that elapsed during a previously dismissed lawsuit against the same defendant.").

Progress Michigan amended its complaint in an attempt to comply with the verification requirements of MCL 600.6431. The only difference between Progress Michigan's amended and original complaint is the addition of Progress Michigan's signature and a verification by a notary public. Thus, even if Progress Michigan could cure its deficient claim with an amended complaint, the amended complaint does not relate back to the original pleading. Further, tolling cannot save Progress Michigan's deficient complaint as that would necessarily recognize the viability of the deficiency in contravention of MCL 600.6431's plain language. And, in the event that MCL 600.6431's mandate does not prevent tolling, Progress Michigan's case was not dismissed by the Court of Claims, and, thus, tolling in inapplicable.

For these reasons, Progress Michigan's amended complaint, the first filing to comply with the requirements of the Court of Claims Act, is dated May 26, 2017, and cannot be construed as relating back to the date of the original filing.

2. Progress Michigan did not file its amended complaint within 180 days of the Department's final determination.

Section 10 of the FOIA, MCL 15.240, sets forth a limitations period that requesters must abide by to challenge a public body's final determination. It states in part,

> (1) If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:
>
> (a) Appeal the denial to the head of the public body pursuant to section 10.
>
> (b) Commence a civil action in . . . the court of claims, to compel the public body's disclosure of the public records *within 180 days after a public body's final determination* to deny a request. [MCL 15.240(1) (Emphasis added).]

Accordingly, an action alleging a violation of the FOIA must be commenced in the Court of Claims within 180 days of the public body's final determination. See *Prins v Michigan State Police*, 291 Mich App 586, 590–591 (2011) (holding that "the 180-day period commences when the public body transmits the denial" of the FOIA request); slip op, p 6 n 1.[10]

[10] This is further supported by the plain language of MCL 15.235(5), which provides that "a written notice denying a request for a public record in whole or in part is a public body's final determination to deny the request or a portion of that request." Significantly, the FOIA provides for different decision makers in the denial of a FOIA request and the denial of a FOIA appeal. The "public body" determines whether to grant or deny a FOIA request. MCL 15.235(2). The "head of the public body" determines whether to uphold or reverse the "public body's" denial of the request. MCL 15.240(2). MCL 15.240(1)(b) refers to the "public body's" determination, not the decision on appeal made by the "head of a public body." Thus, the 180 day period begins to run from the date of the public body's initial written notice denying the requestor's FOIA request. MCL 15.235(2)(b).

In this case, the Department made its final determination on October 19, 2016, and transmitted the written notice of that decision on the same day. (Pl's First Amended Compl, ¶ 10; Def's 13/6/17 Mot for Summary Disp, Ex 1.) Thus, under MCL 15.240(1)(b), Progress Michigan had until April 17, 2017, to commence a civil action in the Court of Claims. It did not do so.

In particular, Progress Michigan filed an unverified complaint on April 11, 2017. In an attempt to cure its deficient claim, it filed an amended complaint on May 26, 2017—219 days after the Department's final determination. The amended complaint is identical to the original complaint in all material respects except that it was signed and verified under oath by the claimant on May 25, 2017.

The Court of Claims disregarded this similarity. In doing so, it overlooked the plain language of MCR 2.118(D), and instead relied on MCL 600.5856(a), which provides in part,

> The statutes of limitations or repose are tolled . . . :
>
> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.

But the Court of Claims failed to take into consideration the significance of the Court of Claims Act's requirements. As previously discussed, under MCL 600.6431(1), a claim must be signed and verified by the claimant to maintain a claim against the State. In *McCahan*, this Court explained that "when the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain requirements that the plaintiff fails to meet, no saving construction . . . is allowed." 492 Mich at 746. Thus, "[c]ourts may

not . . . reduce the obligation to comply fully with statutory notice requirements." *Id.* For this reason, the failure to comply with MCL 600.6431(1) renders a complaint insufficient to "commence a civil action" against the State and must result in its dismissal. See e.g., *Scarsella*, 461 Mich at 549 (holding that a complaint without an affidavit of merit was insufficient to "commence" a malpractice lawsuit and, therefore, the application of tolling was improper.)[11] Like *Scarsella*, allowing Progress Michigan to amend its complaint and applying the equitable tolling results in the judiciary contravening the Legislature's mandate.

Moreover, the case law relied upon by the Court of Claims is based on the pre-2001 version of MCR 2.118(D). See *Sanders v Perfecting Church*, 303 Mich App 1, 9 (2013); *Doyle v Hutzel Hosp*, 241 Mich App 206 (2000). As previously explained, prior to 2001, MCR 2.118(D) was much broader than the current version in that it did not explicitly limit the relation-back doctrine to amendments that added claims or defenses. See MCR 2.118(D), Staff Comment to 2000 Amendment. Upon amending the court rule in 2001, the drafters included express language "to clarify that the relation-back doctrine pertains to the addition of claims and defenses." *Id.* Thus, the holdings in *Sanders* and *Doyle* are not persuasive, and the Court of Claims' opinion was properly reversed.

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[11] Compare the situation here with *Kirkaldy v Rim*, 478 Mich 581, 585–586 (2007), where the Court determined that, in the event that a medical-malpractice plaintiff files a complaint *and* affidavit of merit, the period of limitations can be tolled "until the validity of the affidavit is successfully challenged." But that rationale does not apply here as claimants are required to *strictly* comply with MCL 600.6431 as a precondition to waiver of the State's sovereign immunity. See MCL 600.6431(1) ("No claim may be maintained . . . .").

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals correctly decided this case, and Progress Michigan has failed to show that there are significant issues that warrant review under MCR 7.305(B). Accordingly, the Department respectfully requests that this Court deny Progress Michigan's application for leave to appeal.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Chief Legal Counsel

/s/Kyla L. Barranco
Kyla L. Barranco (P81082)
Christina M. Grossi (P67482)
Assistant Attorneys General
Attorneys for Defendant-Appellee
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 373-1162

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