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STATE OF MICHIGAN
IN THE SUPREME COURT

PROGRESS MICHIGAN,

Plaintiff-Appellant,

v.

ATTORNEY GENERAL,

Defendant-Appellee,

_______________________________________/

Supreme Court No. 158150-1

Court of Appeals No. 340921, 340956

Court of Claims No. 17-000093-MZ

BRIEF ON APPEAL OF PROGRESS MICHIGAN

ORAL ARGUMENT REQUESTED

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Basis of Jurisdiction of Supreme Court

The Supreme Court has jurisdiction by leave to appeal granted March 20, 2019 pursuant to MCR 7.305(H)(3).

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Statement of Questions Involved

Pursuant to the Court's March 20, 2019 Order these questions are presented for review:

1. Whether there is a sovereign or governmental immunity defense to the failure to disclose public records pursuant to the Freedom of Information Act (FOIA), MCL 15.231 *et seq.?*

   The Court of Appeals answered "Yes."
   Appellant Progress Michigan answers, "No."

2. If so, whether that immunity is waived by FOIA?

   The Court of Appeals answered, "Yes."
   Appellant Progress Michigan answers, "Yes."

3. Whether the notice and verification requirements of the Court of Claims Act, MCL 600.6431(1), are applicable to a FOIA appeal?

   The Court of Appeals answered, "Yes."
   Appellant Progress Michigan answers, "No."

4. If so, whether the Court of Appeals erred when it held that the plaintiff's failure to follow the verification requirement in its original complaint, which was filed within one year after the FOIA claim accrued, MCL 600.6431(1), rendered the complaint "invalid from its inception" and incapable of amendment?

   The Court of Appeals so held.
   Appellant Progress Michigan answers, "Yes, the Court of Appeals erred."

5. Whether the Court of Appeals erred when it held that the verified amended complaint, also filed within the one-year period, could not "relate back" to the date of the original complaint for purposes of compliance with the 180-day limitations period of the FOIA?

   The Court of Appeals so held.
   Appellant Progress Michigan answers, "Yes, the Court of Appeals erred."

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CONCISE STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

In the course of reviewing public records disclosed by former Attorney General Bill Schuette ("Schuette") pursuant to previous FOIA requests, Progress Michigan discovered that Schuette and his staff were performing official functions using personal email accounts, i.e., email accounts not issued by the State of Michigan.

Copies of the public records received by Progress Michigan disclosing the use of personal email accounts to conduct official functions were attached to the Complaint and are found in the Appendix at pages 9a-29a. Those records reveal that, at a minimum, the following employees of Schuette used personal email accounts to perform official functions:

- Schuette, Bill (Attorney General)
- Bitely, Andrea (Director of Communications)
- Bundy, Carter (Constituent Relations Representative)
- Bursch, John (former Solicitor General)
- Hills, Gerald (Rusty) (Director of Public Affairs)
- Isaacs, Carol (former Chief Deputy Attorney General)
- Lindstrom, Aaron (Solicitor General)
- Price, Shannon (former Constituent Relations Representative)
- Schneider, Matthew (Chief Deputy Attorney General)
- Sellek, John (Director of Public Affairs)
- Starner, Dennis (Constituent Relations Representative)
- Teszlewicz, Barbara (Assistant Attorney General)
- Yearout, Joy (Director of Communications)

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Based on the discovery of this extensive usage of personal email accounts to perform official functions, on September 27, 2016 Progress Michigan sent a comprehensive FOIA request to Schuette seeking all emails sent or received by a group of twenty-one (21) individuals using a personal email account in the performance of any official function since November 1, 2010. App at 31a-32a.

On October 19, 2016 Schuette denied the request stating that, with one exception, the Department of Attorney General "does not possess records meeting your description." As to the single email it did possess, the Department claimed an exemption. App at 34a-35a.

On November 28, 2016 Progress Michigan filed an internal appeal of the denial. App at 37a. That appeal was denied, with the Department changing its rationale, claiming that "no such records exist." App at 39a-41a.

Progress Michigan timely filed an unverified two-count complaint in the Court of Claims on April 11, 2017. App at 1a. The complaint was filed within the 180-day period for appeals from denials of FOIA requests, MCL 15.240(1)(b), and within the 1-year period for filing claims under MCL 600.6431(1) of the Court of Claims Act.

Count I alleged that Schuette violated FOIA by "refus[ing] to disclose emails sent and received by defendant and his staff using personal email accounts in the course of performing official functions . . ." Count II, "Failure to Preserve State Records", alleged that if the records existed and if the Department destroyed the records, Schuette violated the Management and Budget Act.

Schuette moved to dismiss based on Progress Michigan's failure verify the complaint in compliance with MCL 600.6431(1). In addition, Schuette argued that the Court should dismiss

Count II because there was no private right of action for the claimed violation of the Management and Budget Act.

On May 26, 2017 Progress Michigan filed its First Amended Verified Complaint. The amended complaint was signed, verified, and filed "within 1 year after [the] claim ha[d] accrued," as required under MCL 600.6431(1). App at 70a. Progress Michigan responded to the motion to dismiss, arguing: 1) that it was not required to comply with MCL 600.6431(1) when filing a FOIA action; 2) that in any event its amended complaint was sufficient to satisfy the statute; and 3) that it could seek declaratory relief for the violation of the Management and Budget Act.

The Court of Claims dismissed Count II but denied the motion to dismiss Count I, the FOIA claim in Progress Michigan's First Amended Verified Complaint. App at 77a.

Schuette filed an interlocutory appeal from the portion of the Court of Claims decision refusing to dismiss the FOIA count based on governmental immunity and sought leave to appeal from the balance of that opinion. Leave to appeal was granted and the cases were consolidated on appeal. In that consolidated appeal the Court of Appeals reversed the Court of Claims and remanded for entry of summary disposition on the FOIA count. App at 87a. In its since-published decision,[1] the Court of Appeals held that Schuette had an appeal of right from the denial of his motion for summary disposition based on his claim of governmental immunity, and that Progress Michigan failed to comply with the Court of Claims Act.

An Application for Leave to Appeal was timely filed and this Court granted leave to appeal on March 20, 2019.

[1] 324 Mich App 659; 922 NW2d 654 (2018) (*per curiam*).

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Even after this litigation began Schuette continued to use his personal email account to perform official functions. In the Appendix at 94a is yet another email showing Schuette's involvement with another government agency – the federal Environmental Protection Agency – where once again his private email was used to discuss public policy. It details a discussion between EPA staff, in which Schuette is included on through his private email account, and energy policy discussions with a Washington D.C.-based publication.

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INTRODUCTION

> "It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process."
>
> \- Michigan Freedom of Information Act, MCL 15.231(2)

Desperate to avoid disclosing or explaining why hundreds, if not thousands, of emails between him and his top staff conducting government business using personal e-mail accounts have mysteriously disappeared, former Attorney General Bill Schuette unsuccessfully sought dismissal by the Court of Claims of this lawsuit seeking disclosure of those emails under FOIA. He then took an interlocutory appeal to the Court of Appeals which reversed the Court of Claims and dismissed the case.

The issue here – whether the State's top law enforcement official is permitted to conduct government business using personal email accounts and avoid public disclosure of those emails - goes to the very heart of the question of transparency and accountability of democratically elected public officials.

Neither Schuette nor his successor have disputed that personal e-mail accounts used to conduct government business are subject to FOIA.[2] Instead Schuette sought to evade

[2] Correctly so because although a Michigan court has not directly ruled on this question, courts throughout the country have uniformly held that private emails used to conduct government business must be disclosed to the public under freedom of information laws. *See, e g*, *Competitive Enterprise Institute v. Office of Science & Technology Policy,* 827 F3d 145 (DC Cir 2016); *McLeod v Parnell*, 286 P3d 509 (Alaska 2012); *Bradford v Director, Employment Security Dept*, 128 SW3d 20 (Ark App 2003); *City of Champaign v Madigan*, 992 NE2d 629 (Ill App 2013); *Barkeyville Borough v Stearns*, 35 A3d 91 (Pa Commw Ct 2012); *Adkisson v Paxton*, 459 SW3d 761 (Tx App 2015); *West v Vermillion*, 384 P3d 634 (Wash Ct App 2016).

disclosure, first by denying the FOIA request because the Department allegedly didn't possess the records, and then by seeking dismissal of this lawsuit appealing that denial.

This Court should reverse the Court of Appeals and remand this case to the Court of Claims allowing Progress Michigan to pursue its FOIA remedy.

ARGUMENT

THE COURT OF APPEALS SHOULD BE REVERSED

I. There Is No Sovereign Or Governmental Immunity Defense To The Failure To Disclose Public Records Pursuant To FOIA.

The Attorney General's arguments throughout this case have been a paean to sovereign or governmental immunity but that issue is a red herring because there is no sovereign or governmental immunity defense to the failure to disclose public records pursuant to FOIA.

The Court of Claims assumed without deciding that a governmental immunity defense is available here. The Court of Appeals held that governmental immunity existed because Progress Michigan failed to comply with the Court of Claims Act. Slip op at 4-6; App at 90a-92a.

The Court of Appeals erred because there is no sovereign or governmental immunity defense to the failure to disclose public records pursuant to FOIA.

This Court has explained the distinction between sovereign immunity and governmental immunity:

> Although the concepts of "sovereign immunity" and "governmental immunity" are related, they have distinct origins and histories:
>
> "['Sovereign'] immunity and 'governmental' immunity are not synonymous. True, they have been over the years used interchangeably in decisions, but delineation may be helpful. *Sovereign* immunity is a specific term limited in its application to the State and to the departments, commissions, boards, institutions, and instrumentalities of the State. The reason is the State is the only sovereignty in our

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system of government, except as the States delegated part of their implicit sovereignty to the Federal government.

***

"Over the years, by judicial construction, this 'sovereign' immunity has been transmogrified into 'governmental' immunity and made applicable to 'inferior' divisions of government, *i.e.,* townships, school districts, villages, cities, and counties, but with an important distinction. These subdivisions of government enjoyed the immunity only when engaged in 'governmental' and distinguished from 'proprietary' functions."

Ross v Consumers Power, 420 Mich 567, 596-97; 363 NW2d 641 (1984) (*per curiam*) (*on rehearing*) (citation omitted) (emphasis original).

When properly understood, neither form of immunity is a defense to the failure to disclose public records pursuant to FOIA.

A. Sovereign Immunity

This Court in *Ross* described the original Michigan rule of sovereign immunity:

Sovereign immunity is an ancient common-law concept that predates the statehood of Michigan by centuries. The sovereign immunity rule stated that the "sovereign" was immune from suit unless he consented to the action. Over the years, lawyers and judges have articulated two bases for this rule. The first rationale developed from the perception that the sovereign (the king) was somehow "divine" or above the law. As such, the king could commit no wrong and was, therefore, never properly sued. The second explanation was that the king was superior to the courts which he had created and vested with a portion of his power. As such, while the sovereign could do wrong, there was no entity with power to enter judgment against the sovereign. Only by the sovereign's consent (essentially, a self-inflicted judgment) could a party recover from an injury caused by the sovereign. This rule, with its dual rationale, was the common-law rule for all sovereigns in the early nineteenth century.

From statehood forward, Michigan jurisprudence recognized that the sovereign (the state) was immune from *all* suits, including suits for tortious injuries which it had caused.

. . .

Thus, the original Michigan rule held that the state was immune from all suits except to the extent that consented to be sued in its courts.

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Id at 597-98.

This immunity against all suits came to end regarding suits over access to and inspection of public records and documents as this Court (and others throughout the country) concluded that absolute sovereign immunity grounded in the divine right of kings was incompatible with democratic governance where the people are sovereign, *see* Mich Const 1963 Art 1, §1, and need information to hold their elected officials accountable. As James Madison observed:

> A popular Government without popular information, or the means of acquiring it, is but a prologue to a Farce or Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own governors, must arm themselves with the power which knowledge gives.

Letter to W.T. Barry, August 4, 1822, in 9 *Writings of James Madison* 103 (G Hunt ed 1910). As Justice Holmes wrote, the "life of the law has not been logic; it has been experience," Holmes, *The Common Law,* at 1 (1881), and the American and Michigan experience with democracy compelled absolute common law sovereign immunity to yield so their citizens could knowledgeably exercise their democratic rights.

Thus beginning in the late 19th Century this Court held that Michigan citizens had a robust common law right, grounded in English common law, to access and inspect public records and documents.

In *Burton v. Tuite,* 78 Mich 363; 44 NW 282 (1889), this Court considered a mandamus action to compel a city treasurer to allow access to and examination of public records in the treasurer's office. In the course of granting the writ, this Court recognized the common law right of access to and inspection of public records:

> I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records. They have an interest always in such records, and I know of no

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> law, written or unwritten, that provides that, before an inspection or examination of a public record is made, the citizen who wishes to make it must show some special interest in such record.

Id at 374; *see also, e g, Day v Button,* 96 Mich 600; 56 NW 3 (1893) (following *Burton*).

This Court built on its holding in *Burton* when confronted with a request for mandamus to compel an elected state officer, the Auditor General, to allow inspection of its public records. In granting the writ, this Court relied on Michigan common law first recognized in *Burton:*

> [T]he question in issue must be determined by a consideration of the general common-law principles relative to the right of citizens to inspect public documents and records. If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people. Every citizen rules. In Michigan the people elect by popular vote an auditor general. They prescribe his duties and pay his salary. He is required to keep a true account of the expenditure of all public moneys and is answerable to the people for the faithful discharge of his duties. He is their servant. His official books and records are theirs. Undoubtedly, it would be a great surprise to the citizens and taxpayers of Michigan to learn that the law denied them access to their own books for the purpose of seeing how their money was being expended and how their business was being conducted. There is no such law and never was either in this country or in England. Mr Justice MORSE was right in saying:
>
> "I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records." *Burton v. Tuite,* 78 Mich 363, 374 (7 L.R.A. 73).
>
> There is no question as to the common-law right of the people at large to inspect public documents and records. The right is based on the interest which citizens necessarily have in the matter to which the records relate.

Nowack v Auditor General, 243 Mich 200, 203-04; 219 NW 749 (1928) (emphasis added).

As *Nowack* held, Michigan's common law right of access to public information has its roots in English common law. The English common law was adopted in the Schedule, Section 1, of the very first Michigan Constitution of 1835 and the common law savings clause has been readopted in every Michigan Constitution since, most

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recently in Const 1963, art 3, § 7. [3]

If this Court recognized a sovereign immunity defense in a public records lawsuit against a State official, it would have so held in *Nowack*. But it did not because no such defense existed.

The Court of Appeals in 1968 accurately summarized the state of the Michigan common law right of access to public records:

> The fundamental rule in Michigan on the matter before us, first enunciated in the case of *Burton v Tuite*, (1889), 78 Mich 363, is that citizens have the general right of free access to, and public inspection of, public records . . . The case of *Nowack* . . . remains the definitive law of this state . . . The *Nowack* decision has "placed Michigan at the vanguard of those states holding that a citizen's accessibility to public records must be given the broadest possible effect."

Booth Newspapers v Muskegon Probate Judge, 15 Mich App 203, 205, 207; 166 NW2d 546 (1968), *lv denied*, 382 Mich 762 (1969); *see also, e g, In Re Buchanan*, 152 Mich App 706, 711-12; 394 NW2d 78 (1986) (following *Burton, Nowack,* and *Booth Newspapers* and citing additional authorities).

In 1991 this Court reaffirmed this common law principle of a citizen access to public records:

> Before the enactment of the FOIA in 1977, Michigan enjoyed a long history of allowing citizens free access to public records. *Booth Newspapers, Inc v Muskegon Probate Judge*, 15 Mich App 203; 166 NW2d 546 (1968). In *Booth*, the Court of Appeals stated:

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[3] As former Justice Taylor noted, the English common law was adopted as part of Michigan jurisprudence through the Northwest Ordinance:

"These ancient references concerning the status of the common law before Michigan's statehood are significant because in our earliest Constitution, by way of the ordinances of 1787 for the government of the Northwest Territory, we adopted what was in essence the English common law in existence on that date."

Philips v Mirac, Inc, 470 Mich 415, 426 n 10; 685 NW2d 174 (2004); *see also In re Sanderson*, 289 Mich 165, 174; 286 NW 198 (1939) ("The common law, including the English statutes of general application, made the law of the Northwest Territory by the Ordinance of 1787, continued to be the law of Michigan during the territorial period.").

The fundamental rule in Michigan on the matter before us, first enunciated the case of *Burton v. Tuite* (1889), 78 Mich 363 [44 NW 282], is that the citizens have the general right of free access to, and public inspection of, public records.

The [*Nowack v Auditor General,* 243 Mich 200; 219 NW 749 (1928)] decision has "placed Michigan at the vanguard of those states holding that a citizen's accessibility to public records must be given the broadest possible effect. *Id.* at 205, 207.

Swickard v Wayne County Medical Examiner, 438 Mich 536, 543; 475 NW2d 304 (1991).

Nowhere in this long history of Michigan cases or the Michigan common law right of access to public records has this Court or any Michigan court ever interposed a sovereign immunity defense. Conditions were sometimes placed on the right to seek a private remedy, *see, e g*, *Nowack*, *supra*, 243 Mich at 208 (plaintiff must show a "special interest" in the public records before a private suit can be brought), but the courts of Michigan have never barred a suit against a State officer seeking access to public records based on sovereign immunity.

There is no sovereign immunity defense to the failure to disclose public records.

B. Governmental Immunity

In *Mick v Kent County Sheriff's Dept (In re Estate of Bradley)*, 494 Mich 367; 835 NW2d 845 (2013), this Court explained how common law sovereign immunity against all suits was replaced by governmental immunity against tort liability by the Government Liability Tort Act of 1964:

Since Michigan became a state in 1837, Michigan jurisprudence has recognized the preexisting common-law concept of sovereign immunity, which immunizes the "sovereign" state from all suits to which the state has not consented, including suits for tortious acts by the state. This common-law concept of sovereign immunity has since been replaced in Michigan by the [Government Tort Liability Act] and is codified by MCL 691.1407(1), which limits a governmental agency's exposure to tort liability.

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> Specifically, MCL 691.1407(1) . . . broadly provides that "a governmental agency is immune from *tort liability* if the governmental agency is engaged in the exercise or discharge of a governmental function." Under the statute, *all* suits that seek to impose "tort liability" for an agency's discharge of a governmental function are barred by the GTLA, subject to several exceptions that the Legislature has expressly provided for in the GTLA and in other statutes authorizing suit against governmental agencies.

Id at 377-78 (emphasis original). This Court went on to hold that the meaning of "tort liability" in the GTLA is a "non contractual civil wrong for which a remedy may be obtained in the form of compensatory damages." *Id* at 384-85; *see also Hannay v DOT*, 497 Mich 45, 64-65; 860 NW2d 67 (2014) (following *Bradley Estate).*

FOIA actions such as this one filed under MCL 15.240(1)(b) fail to meet the GTLA definition of "tort liability" in at least two ways. Thus, FOIA actions are not based on "tort liability" from which the GTLA renders the State immune.

First, an action under MCL 15.240(1)(b) is to remedy a statutory not a civil wrong, i.e., a violation of the FOIA's statutory duty to disclose public records. Second, an action under MCL 15.240(1)(b) seeks to compel disclosure of public records – it seeks no "compensatory damages" but relief in the nature of equity. *See* MCL 15.240(1)(b) ("a civil action . . . to compel the public body's disclosure of public records"). This civil action does not sound in tort but is the successor to the mandamus remedy enforcing the common law right of access to public records. *See, e g, Burton, supra* (mandamus remedy); *Nowack, supra* (mandamus remedy).

This result is consistent with the language, structure, and purpose of the GTLA. Its title states that it addresses "injuries to property and persons." Its text repeatedly refers to "bodily injury" or "damage to property." *See, e g,* MCL 691.1402(1), 691.1402a(2), 691.1403,

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691.1405, 691.1406, 691.1408. GTLA addresses only liability for torts which caused bodily or property damage. It is not remotely applicable to a FOIA appeal.

Confirming this interpretation of the GTLA there is no case since its enactment in 1964 before this one where it was used to immunize the State from a lawsuit brought to enforce either the common law or statutory right of access to and disclosure of public records.

There is no governmental immunity defense to the failure to disclose public records.

C. The Freedom Of Information Act Followed Michigan's Legal Precedents Of Authorizing Lawsuits Against The State For Disclosure Of Public Records

As demonstrated above, the state of the law in 1976 when FOIA was enacted was that there was no sovereign or governmental immunity defense to a common law action to compel the disclosure of public records. The Legislature is presumed to be aware of the state of law. *See, e g, Walen v Department of Corrections,* 443 Mich 240, 248; 505 NW2d 519 (1993) (applying that principle in a FOIA case).

The Legislature could have erected such defenses by amending the GTLA in 1976 or since, or in the FOIA itself but it did not. Instead, the Legislature codified and simplified the public's common law right to access and inspect public records and documents in the FOIA, vesting jurisdiction over actions to enforce FOIA in the circuit courts:

> 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: . . . (b) commence an action in the circuit court, 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.

1976 PA 442, §10(1). Nothing in the FOIA in 1976 erected a sovereign or governmental immunity defense – it continued Michigan's common law history of mandatory disclosure. *See, e g, Evening News Assn v Troy*, 417 Mich 481, 494-95; 339 NW2d 421 (1983) ("[FOIA]

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was not adopted by the Legislature in a vacuum. Michigan has had an established history of requiring public agency disclosure before the act was passed.”).

In 2014 the Legislature amended §10(1)(b) to place jurisdiction over FOIA enforcement actions against state public bodies in the Court of Claims:

> (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.

2014 HB 4001 (S-2), §10(1)(b) (emphasis original), *enacted as* 2014 PA 563. Other than changing the court of jurisdiction over FOIA actions, the 2014 FOIA amendments did not create sovereign or governmental immunity defenses in FOIA actions.[4]

Thus whatever the scope of sovereign or governmental immunity to liability for damages for torts and other State government offenses, the common law right to access to public records, now codified in FOIA, has never been subject to a sovereign or governmental immunity defense.

Nowhere in English or Michigan common or statutory law – GTLA or FOIA – have the courts ever recognized a sovereign or governmental immunity defense to the disclosure of public records. The Court of Appeals fundamentally erred by allowing such a defense to be asserted in this FOIA case.

II. Assuming Arguendo That A Sovereign Or Governmental Immunity Defense Exists Here, The Freedom of Information Act Has Waived It.

Even assuming that a sovereign or governmental immunity defense exists here – and it does not – the FOIA has waived it by expressly allowing lawsuits to enforce it.

[4] The legislative history of 2014 PA 563 simply notes the change in jurisdiction. A significant change such as erecting a new sovereign or governmental immunity defense, or subjecting FOIA actions to MCL 600.6431 would have been described in the legislative history.

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The general rule on the State's ability to waive immunity from suit was set forth by this Court in *Ross, supra*:

> The State, as sovereign, is immune from suit, save as it consents to be sued, and any relinquishment of sovereign immunity [from suit] must be strictly interpreted . . .

420 Mich at 601. The FOIA expressly waives immunity by authorizing civil lawsuits over denials of FOIA requests:

> 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: . . . (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.

MCL 15.240(1)(b). The Court of Appeals correctly recognized this clear waiver of immunity, slip op. at 5; App at 91a ("§10 of the FOIA [is] consent[] to suit"), but then erred by misapplying MCL 600.6431(1) to bar this lawsuit, an error next dissected.

III. The Notice And Verification Requirements Of The Court of Claims Act In MCL 600.6431(1) Do Not Apply To FOIA Appeals.

If a sovereign or governmental immunity defense is available here and has not been waived – neither of which are true – the Attorney General makes the novel argument that an appeal under the Freedom of Information Act is still subject to the notice and verification requirements for damages claims in the Court of Claims Act, MCL 600.6431(1). The Court of Claims decision assumed without deciding that those requirements apply to a FOIA appeal. The Court of Appeals improperly applied them to dismiss this case. *See* slip op at 4-6; App at 90a-92a.

MCL 600.6431(1) does not apply in this case for at least 3 reasons.

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A. The Court Of Claims Act Only Applies If the General Tort Liability Act Applies And The GTLA Does Not Apply Here.

In *Fairley v Department of Corrections*, 497 Mich 290, 297; 871 NW2d 129 (2015) (*memo op*), this Court held that MCL 600.6431 of the Court of Claims Act

> establishes conditions precedent for avoiding the governmental immunity conferred by the GTLA, which expressly incorporates MCL 600.6431.

See also Bauserman v. Unemployment Insurance Agency, _____ Mich ____; _____ NW 3d______; 2019 Mich Lexis 609* * 9-10 (same). Thus, the Court of Claims Act's procedural requirements in MCL 600.6431(1) are inextricably linked to the GTLA. If the GTLA does not apply, MCL 600.6431(1)'s procedures do not apply either. As a demonstrated *supra*, the GTLA does not apply here because this lawsuit is not based on a claim of "tort liability," but seeks equitable relief to compel disclosure of public records. There is no need in a FOIA lawsuit to meet the "conditions precedent" in the Court of Claims Act.

B. This Case Was Filed Pursuant To FOIA, Not The Court Of Claims Act.

This case was not filed under the Court of Claims Act, but pursuant to FOIA, specifically MCL 15.240(1)(b):

> 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:
> . . .
> (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. . .disclosure. . . .

(emphasis added).

Nowhere does the plain language of this provision or the clear text of the FOIA expressly import or adopt the notice and verification provisions of the Court of Claims Act,

MCL 600.6431(1). The FOIA imposes no notice or verification requirements on the requester as a condition of appeal.

When the Legislature wants to impose notice requirements it knows how to do so expressly and clearly. *See, e g*, MCL 691.1404(1) and MCL 224.21(3) (both requiring notice of injury caused by road defects). Had the Legislature intended to impose the notice and verification requirements of MCL 600.6431(1) on FOIA appellants, it would have done so expressly such as by stating that the civil action is filed "pursuant to the Court of Claims Act," "is subject to the procedures of the Court of Claims Act," "is subject to the notice and verification requirements of the Court of Claims Act", or similar express language. But the Legislature did not. Instead, the Legislature simply required that the FOIA appeal be filed "in…the court of claims," MCL 15.240(1)(b). All the Legislature did was specify the court in which a FOIA appeal was to be filed, nothing more.

The Court of Appeals improperly read the notice and verification requirements into FOIA, usurping the Legislature's role as lawmaker. *See, e g*, *Agriculture Department v Appletree Marketing*, 485 Mich 1, 8; 779 NW2d 237 (2010) ("If the Legislature has clearly expressed its intent in the language of a statute, that statute must be enforced as written, free of any 'contrary judicial gloss'"); *McCahan v Brennan,* 492 Mich 730, 732; 822 NW2d 747 (2012) ("courts may not engraft [a] . . . component onto a statute"). In the absence of the Legislature clearly and expressly imposing notice and verification requirements on FOIA appellants, a court cannot do so. Yet that is exactly what the Court of Appeals did here.

The Legislature's decision not to impose the requirements of MCL 600.6431(1) on FOIA appellants makes sense because doing so is unnecessary, redundant, and would serve no useful purpose in the FOIA context.

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FOIA actions filed in the Court of Claims are <u>appeals</u> from adverse decisions by public bodies denying access to public records. Because those appeals seek "to compel . . . disclosure" they are in the nature of equitable relief, not an original "damages claim" under the Court of Claims Act. *See* Section I.B., *supra.*

Moreover, the purpose of MCL 600.6431(1) is to advise the State of a possible future damages claim so that it can preserve evidence. *See, e g*, *In re Estate of Fair v State Veterans Facility*, 55 Mich App 35, 39; 222 NW2d 22 (1974). Here, the Attorney General had notice of the "claim" when the original FOIA request was filed and that "evidence" (the requested emails) has either been preserved or destroyed. Thus the notice purpose of MCL 600.6431(1), even if applicable, has already been fulfilled or thwarted, and imposing it when a FOIA appeal is filed serves no useful purpose.

The Court of Appeals wrongfully imposed Court of Claims Act notice and verification requirements of MCL 600.6431(1) on this FOIA lawsuit where the Legislature refused to do so.

C. <u>By Its Own Terms MCL 600.6431(1) Does Not Apply To A FOIA Appeal.</u>

The Court of Appeals decision acknowledged that the "FOIA statute was not at issue," slip op at 5; App at 91a, in this Court's decision in *McCahan v Brennan*, *supra*, which involved tort liability for personal injuries. Nonetheless the Court of Appeals proceeded to apply *McCahan* to this FOIA case because "we view *McCahan's* rationale as controlling." *Id*

In so doing the Court of Appeals ignored the history and purpose of the Court of Claims Act which is to provide procedures for redress of tort injuries and damages. *See Ross, supra*, 420 Mich at 599-600. In accordance with this purpose, the text of MCL 600.6431 applies only to damages claims against the State:

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> (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.
>
> . . .
>
> (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.

(emphasis added).

A FOIA appeal is not a claim for "damages" – it is an action seeking disclosure of public records. *McCahan* does not control in this case and its rationale is inapplicable because it was a damages case. The Court of Appeals ignored the plain text of MCL 600.6431 by imposing its requirements on a FOIA lawsuit.[5]

D. The Court of Appeals' Rationale For Applying MCL 600.6431(1) To FOIA Appeals Is Flawed.

The Court of Appeals held in a single sentence that FOIA's waiver of immunity is "limited by the terms and conditions . . . established in the Court of Claim Act," citing *Greenfield Construction Co v Michigan Department of Highways,* 402 Mich 172, 195-96; 261 NW2d 718 (1978). Slip op at 5; App at 91a.

[5] There is a fourth reason why MCL 600.6431(1) does not apply, but the Court need not reach it because there are alternative grounds. The public's right to know implemented through FOIA has a constitutional dimension. *See, e g, Citizens United v. FEC*, 558 US 310, 343; 130 S Ct 876; 175 LEd 2d 753 (2010) ("First Amendment seeks to foster" the "dissemination of information"); MCL 15.231(2) ("The people shall be informed so that they may fully participate in the democratic process"). As such, the application of notice and verification requirements to bar the exercise of FOIA rights raises constitutional concerns. *Compare, e g, Bauserman, supra,* 2019 Mich Lexis 609 *, *24-28 (McCormack, CJ, concurring) (discussing whether MCL 600.6431 can be constitutionally applied to a constitutional due process claim). The question of the constitutionality of applying MCL 600.6431(1) to a FOIA appeal can be avoided based on the alternative reasons why it does not apply.

In doing so, the Court of Appeals completely ignored 1) this Court's precedents on the scope of the GTLA, *e g, Bradley Estate* and *Hannay, supra,* under which a FOIA lawsuit does not fit the GTLA definition of "tort liability"; 2) the text of the FOIA; and 3) the text of MCL 600.6431 which plainly only applies to damages claims against the State which a FOIA lawsuit is not. *See* Sections I B and III A – C, *supra*.

In addition to these fatal defects in its one-sentence conclusion, *Greenfield* is factually distinguishable and inapposite in several ways. First, it concerned whether a court had jurisdiction over a contractor's claim for compensation against a state agency and neither the jurisdiction of Court of Claims nor compensation are at issue here. Second, it was a decision by an equally divided Court. It is well-established that a decision by an equally divided Court does not create a binding precedent. *See, e g, UPGWA v. Department of State*, 422 Mich 432, 439 & n 5; 373 NW2d 713 (1985) (citing authorities). Not only was this Court equally divided but the cited statement was adhered to by only 3 Justices. Third, the case upon which *Greenfield* relied, *Hirych v State Fair Commission*, 376 Mich 384, 390; 136 NW2d 910 (1965), addressed solely the question of the jurisdiction of the Court of Claims for damages claims against the State, which is not at issue here.

For all these reasons the Court of Appeals' 1-sentence conclusory rationale for applying MCL 600.6431(1) in this case is fatally flawed.

IV. The Court Of Appeals Disregarded The Plain Language of MCL 600.6431(1), Which Allows A Plaintiff To Maintain A Claim If It Is Verified Within One Year.

Having made several fundamental errors regarding governmental immunity, the Court of Appeals compounded those errors with its misinterpretation of MCL 600.6431(1) when it erroneously analogized to medical malpractice claims to hold that an unverified complaint

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cannot be "maintained" under the Court of Claims Act and therefore was "invalid from its inception" and a "nullity." Slip op at 6-7; App at 92a-93a.

MCL 600.6431(1) requires that a written, signed, and verified complaint be filed within a year of the claim's accrual. While disputing that MCL 600.6431(1) applied, Progress Michigan complied with this requirement in its Amended Complaint and therefore had a valid complaint. Its FOIA request was denied on October 19, 2016, it filed an unverified complaint in the Court of Claims on April 11, 2017, and it filed an amended verified complaint on May 26, 2017. *See, e g*, *Arnold v Department of Transportation*, 235 Mich App 341; 597 NW2d 261 (1999) (court has jurisdiction over an unverified complaint); *Gilliland Construction Co v State Highway Department*, 4 Mich App 618, 620-21; 145 NW2d 384 (1966) (amended complaint met statutory requirements); *Anthonsen v State Highway Commissioner*, 4 Mich App 345, 349-50; 144 NW2d 807 (1966) (same).

The Court of Appeals' labored attempt to analogize MCL 600.6431(1) to the medical malpractice statute, MCL 600.2912d(1), fails because that statute and MCL 600.6431(1) are written very differently. They are not analogous at all.

MCL 600.6431(1) simply states that a verified claim must be filed within one year in order to "maintain" a claim. The courts have held that MCL 600.6431 creates a "window within which to file a claim or notice of intent to file a claim." *Rusha v Department of Corrections*, 307 Mich App 300, 306; 859 NW2d 735 (2014). Progress Michigan amended its complaint to verify its claim within that window, as the Court of Claims correctly held here, *see* App at 80a (citing *Rusha*). In contrast MCL 600.2912d(1) of the medical malpractice statute creates no such "window." Instead, it expressly requires that an affidavit of merit "shall [be]

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file[d] with the complaint," and the failure to do so renders the complaint itself void and incapable of amendment. *See Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000).

Indeed, it is the plain language of MCL 600.6431(1), in contrast to the medical malpractice statute, which provides that a claim must be verified in order to be "maintained." As the Court of Appeals recognized, to "maintain" is to "continue something." Thus, while MCL 600.6431(1) creates a "window" within which verified claims can be filed so that they may be "maintained," there is no "window" at all in MCL 600.2912d(1), which speaks of what must be required in order to commence a civil action, rather than to maintain it. The statutes are not analogous but discordant, and the Court of Appeals wrongly applied the medical malpractice statute as interpreted in *Scarsella* to the Court of Claims Act.

As a consequence of conflating the verification requirement of Court of Claims Act and the affidavit requirement of the medical malpractice statute, the Court of Appeals concluded that Progress Michigan's complaint was a "nullity" and thus could not be amended. However, only a medical malpractice complaint filed without an affidavit is a "nullity" because the applicable statute requires that the affidavit be filed with the complaint. Since the Court of Claims Act contains no such requirement, but merely requires that a claim be verified within one year, Progress Michigan's original complaint was not a "nullity" and it could be amended just as it was.[6]

[6] *Scarsella* has been criticized. *See, e g, Castro v Goulet*, 501 Mich 884, 884-90; 901 NW2d 614 (2017) (Viviano, J, concurring); *Kirkaldy v Rim*, 478 Mich 581, 586-88; 734 NW2d 201 (2007) (*memo op*) (Cavanagh and Kelly, JJ, concurring). Whatever the validity of its holding, it was misapplied here by the Court of Appeals.

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V. The Court Of Appeals Erred In Refusing To Allow The First Amended Verified Complaint To "Relate Back" To The Filing Of The Original Complaint.

The Court of Appeals exacerbated its misinterpretation of "maintaining" under MCL 600.6431(1) by refusing to allow the amended verified complaint to "relate back" under MCR 2.118 to the original complaint timely filed under the 180-day requirement of FOIA. *See* slip op at 6-7; App at 92a-93a.

This holding is contrary to statute and case law. The Court of Claims' decision on this issue was straightforward, correct, and illustrates the error of the Court of Appeals in ignoring prior case law and governing statutes:

> THE LIMITATIONS PERIOD DOES NOT BAR THE FOIA CLAIM
>
> As an alternative, defendant argues that, even in assuming plaintiff could amend its complaint, the FOIA claim must be dismissed because it's untimely under the period of limitations applicable to FOIA actions. The FOIA sets forth a 180-period for commencing an action to compel disclosure of public records. MCL 15.240(1)(b); *Prins v Mich State Police*, 291 Mich App 586, 587-588; 805 NW2d 619 (2011). The 180-day limitations period set forth in MCL 15.240(1)b) begins to run when the public body sends out and circulates the denial of the request. *Prins*, 291 Mich App at 591. Here, there is no dispute that plaintiff's original complaint was filed within the 180-day period. There also does not appear to be any dispute that the amended complaint was filed outside the [FOIA] limitations period. The issue before the Court is whether the original complaint tolled the limitations period and whether the amended complaint relates back to the original, timely complaint. The Court finds that it does and that the 180-day limitations period does not require dismissal.
>
> MCL 600.5856(a) provides that the statute of limitations is tolled "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." MCL 600.5856(a). Moreover, "[t]he filing of the original complaint will toll the running of the period of limitations pertaining to the claims reflected in the amended complaint . . .if it is found that the amended pleading relates back to the conduct, transaction, or occurrence set forth in the original pleading[.]" *Sanders v Perfecting Church*, 303 Mich App 1, 9; 840 NW2d 401 (2013) (citations omitted). Stated differently, "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." *Doyle v Hutzel Hosp*, 241 Mich App 206, 212; 615 NW2d 759 (2000) (citation and quotation marks omitted). As articulated in *Doyle*:

> The chief importance of the relation-back rule is to determine whether or not the statute of limitations has been satisfied. In broad terms, if the original complaint was timely, it satisfied the statute of limitations even if it was defective and even if the amendment that cured the defect was not made until after the running of the statute. [Id. at 212 n2, quoting Dean & Longhofer, 1 Michigan Court Rules Practice (4th ed), § 2118.11, p. 561.]
>
> Here, the amended complaint asserts a claim arising out of the same conduct, transaction, or occurrence set forth in the original complaint. Accordingly, the amended complaint "relates back" to the original complaint. *See Sanders*, 303 Mich App at 9; *Doyle*, 241 Mich App at 212. And because the original complaint was timely, the amended complaint is timely as well. To this end, the Court finds a case on which defendant relies, *Miller v Chapman Contracting*, 477 Mich 102,107; 477 NW2d 462 (2007), to be distinguishable and not dispositive in this case. At issue in *Miller* was an amendment sought to add a new party, which is a situation not pertinent to the instant case.

App at 82a-84a. The Court of Claims had it right.

Moreover, there is an alternative basis to reverse the Court of Appeals here as well - MCR 2.118(A)(4) which states that "[u]nless otherwise indicated, an amended pleading supersedes the former pleading." "Supersedes" means, according to the dictionaries, "replace," "take the place of," "take the position of," etc. *See, e g*, American Heritage Dictionary ("supersede: to take the place of; replace"); Merriam-Webster Dictionary ("supersede: to take the place or position of"); Cambridge Dictionary ("supersede: to replace"). Because Progress Michigan gave no "indication otherwise," its First Amended Verified Complaint simply superseded or took the place of its original timely filed complaint under MCR 2.118(A)(4). Therefore there is no need to apply the "relation back" doctrine of MCR 2.118(D) or any other such doctrine because the statute of limitations is not implicated here at all, as it was tolled by the filing of the original complaint pursuant to MCL 600.5856(a). The First Amended Verified Complaint simply "replaces" or "takes the place of" the timely filed original Complaint.

The Court of Appeals decision never even mentioned, let alone considered, this alternative basis to uphold the Court of Claims.

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For all these reasons, the Court of Appeals decision holding the amended FOIA complaint untimely is wrong and should be reversed.

CONCLUSION AND RELIEF SOUGHT

The Court should reverse the Court of Appeals and remand this matter to the Court of Claims for further proceedings.

Respectfully submitted,

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