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

# REPLY BRIEF ON APPEAL OF PROGRESS MICHIGAN

ORAL ARGUMENT REQUESTED

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## TABLE OF CONTENTS

Index of Authorities……iii

Introduction……...1

Argument……...2

THE COURT OF APPEALS SHOULD BE REVERSED……...2

I. The Attorney General Admits That Governmental Immunity is Not at Issue Here Meaning That the Court of Appeals Lacked Jurisdiction Over This Interlocutory Appeal……2

II. There is No Sovereign Immunity Defense to the Freedom of Information Act……4

A. The Sovereign Immunity "Suit/Liability" Distinction is No Defense to This FOIA Lawsuit……..4

1. This Argument Was Not Raised Before or Decided by the Court of Appeals……...5

2. Even if Considered by This Court The Argument is Meritless……5

b. FOIA's Consent to Suit is Not Conditional on Compliance With MCL 600.6431(1) of the Court of Claims Act……8

B. The Original Complaint was Valid and the First Amended Verified Complaint Related Back to the Filing of the Original Complaint……11

Conclusion and Relief Sought……12

## INDEX OF AUTHORITIES

### CASES

*Anzaldua v Band*, 457 Mich 530; 578 NW2d 306 (1998)……7

*Bauserman v Unemployment Insurance Agency,*_____ Mich _____; ____ NW3d_____; 2019 Mich Lexis 609* ……..…....9

*Booth Newspapers v University of Michigan Board of Regents,* 444 Mich 211; 507 NW2d 422 (1993)…….……..5

*Bush v Shabahang,* 484 Mich 156; 722 NW2d 272 (2009)……..11, 12

*Fairley v Department of Corrections,* 497 Mich 290; 871 NW2d 129 (2015)…….2, 9

*Greenfield Construction Co, Inc v Michigan Department of Highways*, 402 Mich 172; 261 NW2d 718 (1978)……..10, 11

*Hamed v Wayne* County, 490 Mich 1; 803 NW2d 237 (2011)…….6

*Hirych v State Fair Commission*, 376 Mich 384; 136 NW2d 910 (1965)……..11

*In Re Estate of Fair v State Veterans Facility*, 55 Mich App 35; 222 NW2d 22 (1974)….....10

*McAuley v GMC*, 457 Mich 513; 578 NW2d 282 (1998)…….....10

*Mick v Kent County Sheriff's Dept (In re Estate of Bradley)*, 494 Mich 367; 835 NW2d 845 (2013)……5, 6

*Mitchell v Forsyth*, 472 US 511; 105 S Ct 2806; 86 LEd2d 411 (1985)……..4

*Nowack v Auditor General*, 243 Mich 200; 219 NW2d 749 (1928)……6

*Ross v Consumers Power,* 420 Mich 567; 363 NW2d 641 (1984) (*per curiam*)…….....3

*Walen v Department of Corrections,* 443 Mich 240; 505 NW2d 519 (1993)……8

*Wigfall v City of Detroit*, __ Mich __;___ NW3d ___ (Nos 156793 and 157097) (July 16, 2019)……10

## LAWS

MCL 15.240(1)(b)……7, 9

MCL 15.240(6)……...10

MCL 15.240(7)……...10

MCL 224.21(3)……7

MCL 600.2301……..11, 12

MCL 600.6419(1)(a)……8

MCL 600.6431……*passim*

MCL 691.1404(1)……7

MCL 691.1407(1)……5

## COURT RULES

MCR 2.11(F)(3)……4

MCR 2.116(C)(7)……..3

MCR 2.116(D)(3)……4

MCR 7.202(6)(a)(v)……..2, 3, 4

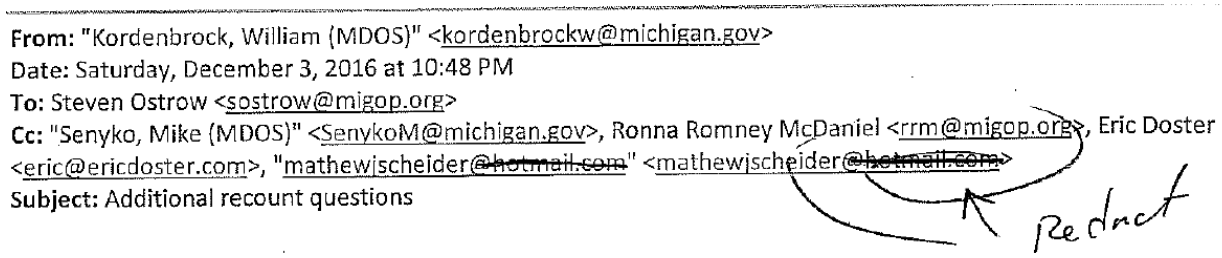
MCR 7.203(A)(1)…….....2

466 Mich xcii (2002)……..4

## MICHIGAN CONSTITUTION

Article 3, § 7……..6

## INTRODUCTION


From: "Kordenbrock, William (MDOS)" <kordenbrockw@michigan.gov>
Date: Saturday, December 3, 2016 at 10:48 PM
To: Steven Ostrow <sostrow@migop.org>
Cc: "Senyko, Mike (MDOS)" <SenykoM@michigan.gov>, Ronna Romney McDaniel <rrm@migop.org>, Eric Doster <eric@ericdoster.com>, "mathewjscheider@hotmail.com" <mathewjscheider@hotmail.com>
Subject: Additional recount questions
Redact

This email header [1] illustrates why the Attorney General has been fighting so desperately – resorting to every procedural trick and fallacious defense – to avoid the disclosure of the personal emails sought in this FOIA lawsuit. In 2016, the Attorney General claimed that emails such as this didn't exist, *see* App at 40a, triggering this lawsuit. That claim is clearly untrue.

Why was then–Chief Deputy Attorney General Matthew Schneider using his private email account to secretly communicate about the 2016 Presidential recount with Republican Party officials, one of their lawyers, and 2 senior political appointees in the Secretary of State's office? Why were there efforts to redact his private email? What is going on here? What is being hidden?

The people of Michigan are entitled to the answers to these questions but they will never know if the Attorney General's continued stonewalling of this FOIA request is countenanced by this Court.

[1] This is a picture of the header of an email lawfully provided to Progress Michigan by a source outside the Attorney General's office. Progress Michigan has made no changes to it.

## ARGUMENT

## THE COURT OF APPEALS SHOULD BE REVERSED

### I. THE ATTORNEY GENERAL ADMITS THAT GOVERNMENTAL IMMUNITY IS NOT AT ISSUE HERE MEANING THAT THE COURT OF APPEALS LACKED JURISDICTION OVER THIS INTERLOCUTORY APPEAL

The Court of Appeals' jurisdiction in this interlocutory appeal rested on a single thin reed, MCR 7.203(A)(1) and 7.202(6)(a)(v), which together permit the interlocutory appeal of right of "an order denying governmental immunity to a government party."

That thin reed has now collapsed. The Attorney General has conceded that "[t]he State does not have a governmental immunity defense to the FOIA," Brief at 7, and that a "governmental immunity defense to the alleged failure to disclose public records pursuant to FOIA does not exist" in this case, *id* at 8. This long-overdue concession is correct because as this Court has held "MCL 600.6431 does not 'confer government immunity.'" *Fairley v Department of Corrections,* 497 Mich 290, 297; 871 NW2d 129 (2015) (*memo op).*

The Attorney General claims that "[t]hroughout this litigation, the Department has never contended that it is subject to governmental immunity." Brief at 8. That claim is false. Nearly 2 years ago, the Attorney General's Claim of Appeal stated that this case involved a denial of governmental immunity:

CLAIM OF APPEAL

> Defendant-Appellant Attorney General Bill Schuette, by and through his attorneys, pursuant to MCR 7.203(A)(1) and MCR 2.709(E)(6), claims an appeal from the Opinion and Order denying, in part, Defendant's Motion for Summary Disposition entered on October 16, 2017, in the Court of Claims by the Honorable Cynthia D. Stephens. *Pursuant to MCR 7.202(6)(a)(v), the October 16, 2017, Opinion and Order is a final order because it is an order denying governmental immunity to a governmental official under MCR 2.116(C)(7).*

November 2, 2017 Claim of Appeal (emphasis added); Supplemental Appendix at 1a. The Attorney General reiterated that governmental immunity claim in the Application for Leave to Appeal to the Court of Appeals on related issues:

> Appellant Bill Schuette (hereinafter "Department") files an application for leave to appeal from the Court of Claims' opinion and Order dated October 16, 2017, denying Defendant's motion for summary disposition based on a statute of limitations under MCR 2.116(C)(7). *The Department has also filed a claim of appeal from the same opinion and order based on the Court's denial of the Department's claim of governmental immunity under MCR 2.116(C)(7). See Case No. 340921.*

November 6, 2017 Application for Leave to Appeal; Supplemental App at 4a.

Based on this wrongful claim of jurisdiction the Court of Appeals took jurisdiction in this case and its opinion focused *solely* on governmental immunity. It conducted no "sovereign immunity" analysis. The phrase "sovereign immunity" nowhere appears in the opinion. *See* App at 87a-93a. In other words, but for this erroneous claim of governmental immunity by the Attorney General, this case wouldn't be before this Court.

Seeking to now excuse the false basis for claiming an appeal of right the Attorney General asserts *in a footnote* that although sovereign and governmental immunity are distinct "the concept of governmental immunity used as a term of art . . . also include[s] sovereign immunity." Brief at 8 n 3.

The Attorney General cannot have it both ways. If sovereign and governmental immunity are distinct as this Court has held for at least 35 years, *see Ross v Consumers Power,* 420 Mich 567, 596-97; 363 NW2d 641 (1984) (*per curiam)* (*on rehearing)*, and as the Attorney General now concedes, that distinction cannot be blurred in order for the Attorney General to wrongly obtain appellate jurisdiction. If MCR 7.202(6)(a)(v) was intended to apply to more

than a defense of "governmental immunity" it would have used different words such as "governmental and sovereign immunity."

For example, MCR 2.116(C)(7) sets forth "immunity granted by law" as a basis for summary disposition, a broader more inclusive phrase which includes all forms of immunity. Indeed, the text of MCR 2.116 distinguishes between "immunity granted by law," *see id* (C)(7), and "governmental immunity," *see id* (D)(3), further demonstrating that they have distinctive meanings in the Court Rules. *See also* MCR 2.111(F)(3)(a) ("immunity granted by law" an affirmative defense). Neither the phrase "immunity by law" nor "sovereign immunity" are used in MCR 7.202(6)(a)(v) which is restricted to the narrower "governmental immunity. [2]

The Court of Appeals lacked jurisdiction over this interlocutory appeal which the Attorney General now admits involves only sovereign immunity. On this basis alone should its decision be reversed and this matter remanded to the Court of Claims for further proceedings.

## II. THERE IS NO SOVERIGN IMMUNITY DEFENSE TO THE FREEDOM OF INFORMATION ACT

### A. The Sovereign Immunity "Suit/Liability" Distinction Is No Defense to This FOIA Lawsuit.

The Attorney General attempts to use the distinction between sovereign immunity from suit and sovereign immunity from liability to uphold the Court of Appeals decision despite the fact that the Court of Appeals addressed neither. (Brief at 7, 9-16) Conceding that there is no sovereign immunity from liability here (Brief at 13-14), the Attorney General asserts that there is sovereign immunity from suit unless the conditions of MCL 600.6431(1) are met.

[2] This conclusion is reinforced by the statements of the Justices when these rules were adopted in 2002. It's clear from those statements that these rules were intended to apply to tort-type damages claims – there is no mention whatsoever of their application to claims of sovereign immunity, as here. *See* 466 Mich at xcii-xcv (Cavanagh, Kelly, and Weaver, JJ, dissenting from adoption) (Taylor, J, concurring in adoption). The Staff Comment on the rule confirms this by citing *Mitchell v Forsyth*, 472 US 511; 105 S Ct 2806; 86 LEd2d 411 (1985), in support of the rule. *Mitchell* involved the scope and appealability of a constitutional damages claim against a federal official. *See id.*

### 1. This Argument Was Not Raised Before or Decided By The Court Of Appeals.

The Attorney General's Court of Appeals' Briefs and Brief in Opposition to the Application for Leave to Appeal used the phrase "sovereign immunity" several times but never raised the distinction now asserted between "immunity from suit" and "immunity from liability," and never argued that immunity from suit barred Progress Michigan's lawsuit. Because that was never argued, the Court of Appeals opinion failed to address it. *See* App at 87a-93a.

For these reasons, this argument should not be considered by the Court. *See, e g, Booth Newspapers v University of Michigan Board of Regents,* 444 Mich 211, 234 & n 23; 507 NW2d 422 (1993) ("[t]his Court has repeatedly declined to consider arguments not presented at a lower level . . .").

### 2. Even If Considered By This Court The Argument is Meritless.

Not only has the Attorney General never previously asserted this distinction or defense in this case, but it is meritless for several reasons.

First, this Court has recognized that common law sovereign immunity *no longer exists in Michigan,* having been replaced by the Government Tort Liability Act which the Attorney General now concedes doesn't apply here:

> 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 [Governmental Tort Liability Act]* and is codified by MCL 691.1407(1), which limits a governmental agency's exposure to tort liability.

*Mick v Kent County Sheriff's Dept (In re Estate of Bradley)*, 494 Mich 367, 377; 835 NW2d 845 (2013) (emphasis added). Thus, there is no sovereign immunity to be waived here nor any condition to be placed on its waiver.

Second, the Attorney General's recitation of the history of immunity from suit (Brief at 9-12) fails to account for the leading public records access case, *Nowack v Auditor General*, 243 Mich 200; 219 NW2d 749 (1928), in which this Court granted a writ of mandamus to compel a state elected officer, the Auditor General, to allow inspection of public records. This Court recognized no sovereign immunity defense to a public records suit in *Nowack* or since, notwithstanding the enactment of the Court of Claims Act in 1939. The Attorney General not only fails to cite or address *Nowack*, but cites no case of a sovereign immunity defense to a public records/FOIA lawsuit at all because there are none.

There is a very simple explanation which reconciles *Nowack* and its progeny with common law sovereign immunity: common law sovereign immunity *never applied* to its sister common law right of public access to public records. They existed side by side.

Moreover, the common law right of public access to public records has been protected by Article 3, § 7 of the Michigan Constitution:

> The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

This Court has long held that a legislative change, amendment, or repeal of the common law "must be explicit." *Hamed v Wayne* County, 490 Mich 1, 22 & n 57; 803 NW2d 237 (2011). Neither the Court of Claims Act of 1939 nor any of its subsequent incarnations ever explicitly "changed, amended or repealed" the common law right of public access to public records.

Third, even if a FOIA action requires sovereign consent to suit – and it does not – the Attorney General ignores the holding of this Court in *Anzaldua v Band*, 457 Mich 530; 578 NW2d 306 (1998). In *Anzaldua* this Court held that the Legislature waives sovereign immunity from suit when it consents to the State or any of its officials being sued in state court. *See id* at 552-53. The FOIA provides such consent in 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). The plain language of this provision and the clear text of the FOIA impose no conditions on this consent to suit. For example, they do not expressly import or adopt the notice and verification provisions of the Court of Claims Act.

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) in FOIA lawsuits, it would have done so expressly such as by stating that a 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 FOIA cases be filed "in . . the court of claims," MCL 15.240(1)(b). All the Legislature did when amending MCL 15.240 (1)(b) was change the court which had *jurisdiction* of a FOIA lawsuit, nothing more.

FOIA was *not* enacted or amended to erect new barriers to access to the court such as sovereign immunity or pre-conditions to filing suit but to continue the common law right of access which was never subject to sovereign immunity. *See Walen v Department of Corrections,* 443 Mich 240, 253; 505 NW2d 519 (1993) (Riley, J, concurring in part).

To like effect is MCL 600.6419(1)(a):

> [T]he court of claims has the following power and jurisdiction:
>
> (a) To hear and determine any claim demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delitco, 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.

All this provision does is vest *jurisdiction* over statutory claims such as FOIA in the Court of Claims. It imposes no conditions on that jurisdiction and creates no sovereign immunity defense.

The Attorney General reads far more into the mere changing of jurisdiction for FOIA lawsuits from the Circuit Court to the Court of Claims than the language of the statutes can bear. That language attaches no conditions to the State's consent to FOIA suits in the Court of Claims.

### B. FOIA's Consent to Suit Is Not Conditional on Compliance With MCL 600.6431(1) of the Court of Claims Act.

Based on the faulty premise that sovereign consent to a FOIA suit is conditional, the Attorney General argues that compliance with MCL 600.6431(1) is the condition. (Brief at 10, 15-21) In so doing she persists in trying to fit a square peg into a round hole – MCL 600.6431(1) is simply inapplicable to FOIA lawsuits based on its text and purpose.

First, MCL 600.6431 of the Court of Claims Act simply does not apply. Not only does FOIA §10(1)(b), MCL 15.240(1)(b), not expressly incorporate it as detailed *supra*, but in *Fairley, supra*, this Court held that MCL 600.6431:

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

497 Mich at 297*; see also Bauserman v Unemployment Insurance Agency,* ___ Mich ___; ___ NW3d ___; 2019 Mich Lexis 609* *9-10 (same). Thus, the Court of Claims Act's procedural requirements in MCL 600.6431(1) are mechanisms to implement the GTLA, not FOIA. The GTLA does not apply here. Thus there is no need in this FOIA lawsuit to meet the "conditions precedent" in the MCL 600.6431(1) for avoiding GTLA.

Second, the Attorney General ignores the text of MCL 600.6431(1) which plainly applies only to *damages* claims:

> 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.

(emphasis added); *see also* MCL 600.6431(3) (notice requirement applies to damages claims). The Attorney General omits the crucial emphasized language when quoting the statute at page 19 of its Brief. Applying MCL 600.6431(1) solely to damages claims make sense because it is designed to implement GTLA.

A FOIA complaint is not a claim for "damages" – it is an action seeking disclosure of public records.[3] The Court of Appeals ignored the plain text of MCL 600.6431(1) by imposing its requirements on a FOIA lawsuit and the Attorney General continues to ignore its text as well.

Next, the purpose of MCL 600.6431(1) is to give the State notice of a claim. *See, e g, In Re Estate of Fair v State Veterans Facility*, 55 Mich App 35, 39; 222 NW2d 22 (1974). In this FOIA lawsuit the Attorney General already had notice of the claim based on the original FOIA request. Imposing a notice requirement as a pre-condition of a FOIA suit on penalty of dismissal is nothing more than procedural game-playing which this Court has rejected. *See Wigfall v City of Detroit*, __ Mich __;___ NW3d ___ (Nos 156793 and 157097) (July 16, 2019).

Finally, the Attorney General's repeated reliance on *Greenfield Construction Co, Inc v Michigan Department of Highways*, 402 Mich 172; 261 NW2d 718 (1978) (Brief at 10, 13, 15), is misplaced.

Not only is *Greenfield Construction* not binding because it was decided by an equally divided Court but it was a damages cases against the State. Thus all its discussion as to sovereign immunity is simply inapplicable here. It was construing the Court of Claims Act, which relates solely to damages claims, and which as explained *supra* did not extinguish the

[3] The Attorney General asserts (Brief at 21 n 12) that a FOIA claim is a damages claim, citing MCL 15.240(7). However, MCL 15.240(7) and (6) must be read together in light of this Court's decisions. When read together with this Court's admonition that compensatory damages are "limited by the amount of the loss" and "an award of attorney fees is typically compensatory in nature," *McAuley v GMC*, 457 Mich 513, 520; 578 NW2d 282 (1998), it's clear that the "compensatory damages" reference in MCL 15.240(7) is a reference to the award of attorneys' fees in MCL 15.240(6). That is so because the only "damage" or "loss" incurred by a plaintiff in a FOIA suit is the cost of litigation, e g, attorneys' fees.

common law right of public access to public records or impose a sovereign immunity defense to such lawsuits.

Therefore, FOIA is not the type of "post-Court of Claims Act legislation waiving suit immunity" (Brief at 15, *quoting Greenfield Construction)* contemplated by *Greenfield Construction.* The only cited case upon which that statement is based related to a damages claim against the state. *See* 402 Mich at 196, *citing Hirych v State Fair Commission*, 376 Mich 384; 136 NW2d 910 (1965).

There is no conditional sovereign immunity from suit defense to a FOIA action.

## III. The Original Complaint Was Valid and the First Amended Verified Complaint Related Back to the Filing of the Original Complaint

In addition to the reasons set forth in the opening Brief as to why the Attorney General is wrong on these issues, MCL 600.2301 provides an additional basis to reverse the Court of Appeals and uphold the Court of Claims' original decision:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

In *Bush v Shabahang,* 484 Mich 156; 722 NW2d 272 (2009), this Court established a 2-pronged test for the application of MCL 600.2301. *Id* at 177. Both are satisfied here.

In *Bush* this Court held that defects at the early stage of a proceeding are to be expected and do not affect the "substantial rights of the parties." *Id* at 177-78. The same is true here. The Attorney General had ample notice that Progress Michigan sought the emails at issue and this

lawsuit was no surprise. The alleged "defect" – the lack of a verified complaint – was quickly corrected at no harm to any party.

This Court also held in *Bush* that the "furtherance of justice" prong was satisfied when a party made a "good faith attempt to comply" with procedural requirements. *Id* at 178. That occurred in this case as well. Progress Michigan promptly complied with MCL 600.6431(1) – without prejudice to its opposition to its application – when the issue was raised.

For all these reasons and those provided in the opening Brief the Court of Appeals decision holding the amended FOIA complaint untimely should be reversed.

## CONCLUSION AND RELIEF SOUGHT

For all these additional reasons, 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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Dated: July 26, 2019