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Sunshine on a Winter Day: Michigan Supreme Court Hears Oral Argument on Open Government Sunshine Law

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On January 8, 2020, the Michigan Supreme Court heard oral argument on *Progress Michigan v. Attorney General*, Supreme Court Docket No. 158150-1, a case filed by a government watchdog organization in pursuit of transparency in government. The case involves allegations that former Attorney General Bill Schuette and his staff performed official functions using personal email accounts, i.e., email accounts not issued by the State of Michigan. The case largely involves a procedural battle concerning claims filed under the Freedom of Information Act, MCL 15.240, and whether the same are subject to the notice and verification requirements of the Court of Claims Act, MCL 600.6431.

In *Progress Michigan*, upon reviewing public records received through Freedom of Information Act (FOIA) requests, Plaintiff allegedly learned that former Attorney General Bill Schuette and his staff were performing official functions using personal email accounts. As a result, on September 27, 2016, Plaintiff issued a FOIA request to the Office of Attorney General seeking all emails sent or received by staff members using personal email accounts in the performance of official functions from November 1, 2010 onward. Defendant denied the request, stating that no such documents existed, except for a single email, which was subject to attorney-client privilege. A series of departmental appeals followed and the subject lawsuit ultimately ensued.

On April 11, 2017, Plaintiff filed its initial complaint against the State in the Court of Claims. Plaintiff's complaint alleged (1) violation of the Freedom of Information Act; and (2) failure to preserve state records under the Management and Budget Act, MCL 18.1101. In May 2017, Defendant moved for summary disposition on the basis that the complaint filed was unsigned and unverified, and as such, in violation of the Court of Claims Act, MCL 600.6431(1). Section 1 of the Court of Claims Act allots parties one year to

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submit a signed and verified claim against the State. Verification involves the inclusion of specific language swearing to the truth of the pleadings filed.

On May 26, 2017, Plaintiff filed an amended complaint, which was signed and verified. Defendant again moved for summary disposition on the basis that the complaint was time-barred and did not “relate back” to the original complaint as required by MCR 2.118(D). In addition, Defendant further argued that, even if Plaintiff could amend its complaint to comply with the time requirements in the Court of Claims Act, it would nevertheless be barred by the FOIA statute’s limitations period. Indeed, the FOIA provides for a 180 day limitations period. The Court of Claims denied Defendant’s motion, finding that the amended complaint related back to the original complaint, preserving the claims asserted. Defendant appealed.

Upon review of the procedural issues presented in the Court of Claims, the Michigan Court of Appeals reversed the decision, finding that the lawsuit was time barred under both the Court of Claims Act and the Freedom of Information Act. The Court looked to the plain language of the Court of Claims Act, which states that “no claim may be maintained” unless particular provisions are satisfied, such as the filing of a verified complaint. The Court of Appeals reasoned that, since the complaint was invalid from its inception, there was nothing pending that could be amended. Therefore, any attempt by Plaintiff to amend its complaint to cure its defects was ineffectual. Accordingly, the Court of Claims, therefore, erred by holding that the court rules permitted Plaintiff to amend its complaint, and further erred in finding that the amended complaint related back to the date of the original complaint. The case was reversed and remanded for entry of summary disposition in favor of Defendant. Plaintiff appealed to the Michigan Supreme Court.

On January 8, 2020, the Michigan Supreme Court held oral argument on the following issues:

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.?
2. If so, whether that immunity is waived by FOIA?
3. Whether the notice and verification requirements of the Court of Claims Act, MCL 600.6431(1), are applicable to a FOIA appeal?
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?
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 parties briefed the above issues and presented for oral argument before the Michigan Supreme Court on January 8, 2020. Each party received multiple questions from the Justices relating to sovereign immunity, verifications of complaints under the Court of Claims Act, the timing

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requirements under the Freedom of Information Act, and the hypothetical implications of a ruling overturning the Court of Appeals.

Plaintiff's oral argument centered on the verification requirements under the Court of Claims Act and whether it applied to FOIA lawsuits. Plaintiff asserted that the Court of Claims Act's notice and verification requirements do not apply to FOIA suits. The Court of Claims Act is intended to provide procedures for redress of tort injuries and damages. In contrast, a FOIA suit is not a claim for "damages;" it is an action seeking disclosure of public records. Therefore, FOIA claims are not subject to the notice and verification requirements of the Act. Justice Clement challenged this contention, asking why the legislature would require FOIA claims against state entities to be filed in the Court of Claims, removing same from the jurisdiction of the Circuit Court, if there was no intention for provisions to apply to all pending cases. Justice Viviano and Justice Markman's questions also focused on the verification requirement, challenging Plaintiff's position that the complaint did not need to be verified upon filing. Justice Viviano stated that a ruling allowing a complaint to be verified at any time, as would be the result of adopting the Plaintiff's reasoning, would set a dangerous precedent.

Justice Markman also questioned Plaintiff about the "relation back doctrine" under MCR 2.118(D) as the same only applies to claims or defenses. He asked counsel whether a FOIA request is a "claim or defense." Plaintiff argued that the court rule, on its face, is not a bar to claims. Instead, it merely clarifies that, if a complaint needs to be amended, the amendments must "relate back" to the issues and controversies in the initial complaint. Justice Markman also questioned whether there was even a live controversy for the Court to decide as the documents at issue can be turned over at any time. Plaintiff argued that the state has shown no intention of producing the documents in the last several years, so a live controversy exists.

At the outset of its argument, Defendant conceded that personal email accounts used for official business are subject to FOIA. It further conceded that the State has an obligation to be responsive to FOIA requests. Defendant argued that the issue before the court is "how and when a state may be sued in the Court of Claims." Defendant's argument largely focused on the procedural defects of Plaintiff's complaint and its failure to comply with the notice and verification requirement of the Court of Claims Act.

Defendant further argued that, in general, sovereign immunity bars claims against the State unless expressly waived by statute. Although the FOIA act waives sovereign immunity, Plaintiff's failure to comply with the statute negates the waiver of sovereign immunity. As such, sovereign immunity is still in effect given the procedural defects in the case, and as such, the State is not under an obligation to release the requested documents. Justice Bernstein pressed Defendant on why the documents are not being turned over, asking what harm doing so would cause. Defendant argued that, as an initial matter, the documents sought may not even exist. Even if the documents sought did exist, the State is under no obligation to produce them. Voluntary production of the documents would undermine longstanding principles of sovereign immunity.

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Although there is no indication as to when the Michigan Supreme Court will issue an opinion on this case, the Justices' session ends in July 2020. Butzel Long will promptly report on the Court's ruling once released. Stay tuned!

Oral argument of *Progress Michigan v. Attorney General* can be watched at: <https://www.youtube.com/watch?v=ymIVxEM4ozA&app=desktop>

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