RECEIVED by MSC 8/17/2020 10:58:10 AM

STATE OF MICHIGAN
IN THE SUPREME COURT

NORMAN CHAMPINE,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.
/

Supreme Court No. 161683

Court of Appeals No. 347398

Court of Claims No. 18-000028-MZ

MICHIGAN DEPARTMENT OF TRANSPORTATION'S BRIEF IN OPPOSITION TO CHAMPINE'S APPLICATION FOR LEAVE TO APPEAL

B. Eric Restuccia
Deputy Solicitor General

Philip L. Bladen (P56443)
Assistant Attorney General
Attorneys for MDOT
Transportation Division
Van Wagoner Building
425 W. Ottawa Street
Lansing, MI 48913
(517) 335-1656

Dated: August 17, 2020

RECEIVED by MSC 8/17/2020 10:58:10 AM

TABLE OF CONTENTS

Page

Index of Authorities ii

Counter-Statement of Jurisdiction iv

Counter-Statement of Question Presented v

Statute Involved vi

Introduction 1

Counter-Statement of Facts and Proceedings 3

Standard of Review 9

Issue Preservation 9

Argument 9

I. The Court of Appeals correctly affirmed the Court of Claims' grant of summary disposition to MDOT where Champine did not file a notice as a precondition for lifting MDOT's immunity from tort lawsuits under the highway exception under MCL 691.1404. 9

A. Compliance with MCL 691.1404's notice requirement is a precondition to lifting the State's inherent governmental immunity from tort lawsuits. 10

B. Champine did not file the required notice in the Court of Claims. 13

C. Champine's complaint cannot satisfy MCL 691.1404's notice requirement. 16

D. Dismissal was the appropriate remedy for Champine's failure to comply with MCL 691.1404. 18

Conclusion and Relief Requested 22

RECEIVED by MSC 8/17/2020 10:58:10 AM

INDEX OF AUTHORITIES

Page

Cases

Atkins v Suburban Mobility Auth for Regional Transp, 492 Mich 707 (2012) 11

Burise v Pontiac, 282 Mich App 646 (2009) 19

Coblentz v Novi, 475 Mich 558 (2006) 9

Fairley v Dep't of Corrections, 497 Mich 790 (2015) 11

Goodhue v Dep't of Transp, 319 Mich App 526 (2017) 13, 15, 16, 18

Mack v Detroit, 467 Mich 186 (2002) 9, 11

McCahan v Brennan, 492 Mich 730 (2012) 14, 15

McLean v Dearborn, 302 Mich App 68 (2013) 20

Perkovic v Zurich American Ins Co, 500 Mich 44 (2017) 15

Plunkett v Dep't of Transp, 286 Mich App 168 (2009) 18, 20

Pohutski v Allen Park, 465 Mich 675 (2002) 10

Reed v State, 324 Mich App 449 (2018) 13, 16

Robinson v Detroit, 462 Mich 439 (2000) 11

Rowland v Washtenaw Co Rd Comm, 477 Mich 197 (2007) ..... *passim*

Russell v Detroit, 321 Mich App 628 (2017) 20

Sanford v Mich, ____ Mich ____
(Opinion of the Court, decided July 23, 2020) 10

Statutes

MCL 500.3145 15

MCL 600.215 iv

MCL 600.2912b 17

MCL 600.6431 ..... vi, 12, 14, 15

MCL 691.1401 10

MCL 691.1402 ..... 11, 21

MCL 691.1404 ..... *passim*

MCL 691.1407 ..... 10, 11

Other Authorities

Merriam-Webster's Collegiate Dictionary (11th ed) 17

Rules

MCR 2.101(B) 17

MCR 2.110(B)(1) 17

MCR 2.110(B)(2) 17

MCR 2.110(B)(5) 6

MCR 7.303(B)(1) iv

MCR 7.305(B)(1) 1

MCR 7.305(B)(2) 1

MCR 7.305(B)(3) 1

MCR 7.305(B)(5) 2

RECEIVED by MSC 8/17/2020 10:58:10 AM

RECEIVED by MSC 8/17/2020 10:58:10 AM

COUNTER-STATEMENT OF JURISDICTION

Plaintiff-Appellant Norman Champine seeks leave to appeal the Michigan Court of Appeals' decision that affirmed the Court of Claims' order granting Defendant-Appellee Michigan Department of Transportation's (MDOT's) motion for summary disposition predicated on governmental immunity.

This Court has jurisdiction under MCR 7.303(B)(1) and MCL 600.215(3). MDOT respectfully requests that this Court deny Champine's application.

RECEIVED by MSC 8/17/2020 10:58:10 AM

COUNTER-STATEMENT OF QUESTION PRESENTED

1. As a pre-condition to lifting the State's governmental immunity from tort lawsuits, MCL 691.1404 requires that a pre-suit notice be filed in the Court of Claims within 120 days of the accident. Champine filed his tort lawsuit against the State within 120 days of the accident, without ever filing the required notice. Was Champine's claim properly dismissed by the Court of Claims?

Champine's Answer:	No.
MDOT's Answer:	Yes.
Court of Claims' Answer:	Yes.
Court of Appeals' Answer:	Yes

RECEIVED by MSC 8/17/2020 10:58:10 AM

STATUTE INVOLVED

MCL 691.1404:

(1) *As a condition to any recovery* for injuries sustained by reason of any defective highway, *the injured person*, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) *shall serve a notice on the governmental agency* of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant.

(2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. *In case of the state, such notice shall be filed in triplicate with the clerk of the court of claims. Filing of such notice shall constitute compliance with section 6431 of Act No. 236 of the Public Acts of 1961, being section 600.6431 of the Compiled Laws of 1948, requiring the filing of notice of intention to file a claim against the state.* If required by the legislative body or chief administrative officer of the responsible governmental agency, the claimant shall appear to testify, if he is physically able to do so, and shall produce his witnesses before the legislative body, a committee thereof, or the chief administrative officer, or his deputy, or a legal officer of the governmental agency as directed by the legislative body or chief administrative officer of the responsible governmental agency, for examination under oath as to the claim, the amount thereof, and the extent of the injury.

(3) If the injured person is under the age of 18 years at the time the injury occurred, he shall serve the notice required by subsection (1) not more than 180 days from the time the injury occurred, which notice may be filed by a parent, attorney, next friend or legally appointed guardian. If the injured person is physically or mentally incapable of giving notice, he shall serve the notice required by subsection (1) not more than 180 days after the termination of the disability. In all civil actions in which the physical or mental capability of the person is in dispute, that issue shall be determined by the trier of the facts. The provisions of this subsection shall apply to all charter provisions, statutes and ordinances which require written notices to counties or municipal corporations. [Emphasis added.]

RECEIVED by MSC 8/17/2020 10:58:10 AM

INTRODUCTION

In this case, the Court of Appeals answered a straightforward question of statutory interpretation. Specifically, it addressed whether a *notice* of a "defective highway" claim, of which service on the State is mandatory "as a condition to any recovery" under MCL 691.1404(1), can be fulfilled by filing the claim itself. The Court of Appeals correctly concluded that it could not.

That decision was entirely consistent with this Court's precedents concerning the applicable statutory notice provisions. As the Court of Appeals correctly held, "the opening clause of MCL 691.1404(1) establishes that notice is a condition precedent to recovering damages." In other words, a suit for damages cannot be pursued *unless* the required notice lifting the State's governmental immunity is provided first.

Champine did not file a notice in the Court of Claims before filing his lawsuit. And, as the Court of Appeals recognized, his complaint cannot substitute as the required notice, for that would be inconsistent with both MCL 691.1404(1)'s plain language and its substantive requirements. Therefore, the Court of Appeals properly affirmed the grant of summary disposition to MDOT.

Accordingly, this Court should deny Champine's application to review the Court of Appeals' decision for several reasons:

- Champine does not challenge the validity of a legislative act. MCR 7.305(B)(1). In fact, the opposite is true. The Court of Appeals applied the plain language of MCL 691.1404's notice requirement.
- Champine does not implicate the public interest or legal principles of major significance to the State's jurisprudence. MCR 7.305(B)(2), (3). The Court of

Appeals' opinion applies well-established precedents, as well as the plain language of the statute involved.

- Champine does not identify a conflict between the Court of Appeals' decision and an opinion of this Court or of the Court of Appeals. MCR 7.305(B)(5). To the contrary, Champine seeks to expand the precedents beyond their current scope and improperly interpret MCL 691.1404 broadly and in a manner that contradicts its plain language and intent.

- Finally, the Court of Appeals' decision is not clearly erroneous and will not cause Champine a material injustice. MCR 7.305(B)(5). A reversal of the Court of Appeals' decision would, however, create needless uncertainty in Michigan law by undermining the State's legislatively granted entitlement to fair notice of a highway-defect claim and render MCL 691.1404 moot.

RECEIVED by MSC 8/17/2020 10:58:10 AM

RECEIVED by MSC 8/17/2020 10:58:10 AM

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The accident and investigation

On December 17, 2017, at around 1:00 p.m., Champine left his home in Eastpointe, Michigan, to visit his friend. (Appellant App, Ex D, pp 46-48.)[1] Champine's plan was to take I-94 to westbound I-696 and then exit onto Woodward Avenue. This was a route that Champine traveled an average of three times per month. (Appellant App, Ex D, pp 46-48, 50-51.) Champine recalls entering westbound I-696 from I-94 and traveling just past the Hoover Road exit signs. (Appellant App, Ex D, pp 57-58.) Champine claims that his next recollection is being on the exit ramp from westbound I-696 to Mound Road. (Appellant App, Ex D, pp 60-61.) At that point, Champine had traveled several miles on I-696 since entering from the I-94 interchange. (Appellant App, Ex F, p 38.)

Champine alleges that at some point while traveling on westbound I-696, he suffered a significant injury to his face. But he has no recollection of how it occurred. After suffering the injury, Champine somehow ended up at a gas station on Mound Road, about a quarter mile from the exit from westbound I-696. (Appellant App, Ex D, pp 61-62.) There, Champine noted that his car had a hole in its windshield, the steering wheel was bent nearly in half, and he had a chunk of concrete in his lap. (Appellant App, Ex D, pp 62-64, 68-69.)

[1] Champine was deposed on August 3, 2018, more than 120 days after the December 17, 2017 accident.

RECEIVED by MSC 8/17/2020 10:58:10 AM

The Warren Police Department investigated westbound I-696 the same day and could not determine from where the concrete chunk might have originated, except speculating that it *might* have come from somewhere on the roadway. (Appellant App, Ex F, pp 21-22, 49-50.) But a detective also could not rule out that the concrete came from one of the approach roads to the overpasses spanning I-696, including Mound Road, which was badly deteriorated at the time. (Appellant App, Ex F, pp 50-53.)

MDOT's region maintenance engineer, Marlon Spinks, was told about the accident by the Warren Police Department. Spinks asked for the location but was only told about the stretch of I-696 on which Champine had traveled. MDOT sent out a patch crew that performed routine patching on the stretch of I-696, but the crew also could not determine where the concrete object might have come from on that road. (Appellant App, Ex H, pp 59-60, 62.)

Westbound I-696

At the time of the December 17, 2017 accident, westbound I-696 was already scheduled by MDOT to undergo major reconstruction in 2018, which had been in the planning stages for several years. (Appellant App, Ex F, p 46; Ex H, pp 87-89.) When asked about the number of "potholes" on the highway in their depositions, both Warren Police Officer Taylor and Detective Chisolm stated that a photograph depicting a section of westbound I-696 (in Champine's application at p 4) was consistent with what they saw on the entire stretch. (Appellant App, Ex E, pp 25-26; Ex F, pp 25-26.) According to Officer Taylor, there were "absolutely" parts of the

RECEIVED by MSC 8/17/2020 10:58:10 AM

roadway that were patched with asphalt. (Appellant App, Ex E, pp 25-26.) Detective Chisolm also testified that while there were some holes, "there was certainly patching that had been done over the course of time. . . ." (Appellant App, Ex F, p 20.) Spinks was also shown the photo in question. He stated that "from what I can see here, there was some that had been routinely maintained. And we do that in the winter by cold patch." (Appellant App, Ex H, p 16.)

Court filings after the accident

Champine filed his complaint in the Court of Claims on February 6, 2018.[2] (Appellee Appendix, pp 115, 118.) The complaint alleged that Champine was "operating a motor vehicle in a westerly direction on I-696 between Gratiot and Mound when a 10" x 8" x 5" jagged chunk of concrete from the roadbed weighing approximately 20 pounds became dislodged and was projected like into the air and through the windshield of Plaintiff's vehicle." (Appellee Appendix, p 118.) That description of the location of the alleged defect in the highway is the most precise in the entire complaint: somewhere on westbound I-696 between Gratiot and Mound Roads.

MDOT filed its answer and affirmative defenses with the Court of Claims on March 29, 2018. (Appellee Appendix, pp 115, 122, 130.) Paragraph 9 of MDOT's affirmative defenses asserted that Champine failed to give "proper statutory notice of his claim in accordance with MCL 691.1404 . . . including, but not limited to, the

[2] Champine mailed other documents, which he now characterizes as notices, to MDOT directly, but he did not file them with the Court of Claims.

RECEIVED by MSC 8/17/2020 10:58:10 AM

failure to specify the 'exact location' of the specific defect he asserts is the cause of his accident." (Appellee Appendix, ¶ 9, p 131.) MDOT demanded a reply in accordance with MCR 2.110(B)(5). (Appellee Appendix, pp 129, 132.) MDOT then served its first set of discovery requests, including a request to admit, on March 30, 2018. (Appellee Appendix, pp 115, 138-175.) Champine replied to both MDOT's answer and affirmative defenses and its request to admit on April 11, 2018. (Appellee Appendix, pp 115, 134-137.) Neither of Champine's replies provided any additional detail regarding the "exact location" of the alleged highway defect.

After some discovery, MDOT moved for summary disposition on October 11, 2018. It argued that Champine did not comply with MCL 691.1404(1)'s notice requirement because he did not file the required notice before filing his complaint. MDOT also argued that neither the complaint nor any other materials filed by Champine before the 120-day deadline (April 16, 2018) specified the exact location of the defect.

The Court of Claims granted summary disposition to MDOT

The Court of Claims granted MDOT's motion for summary disposition on December 12, 2018. (Appellant App, Ex L.) It concluded first that a complaint cannot be the required notice under MCL 691.1404. (Appellant App, Ex L, pp 5-7). More specifically, it reasoned that "allowing a complaint to serve as notice could effectively render the notice requirements meaningless" because the statute requires that notice be given " '[a]s a *condition*' to any recovery under the highway exception." (Appellant App, Ex L, p 7.) Thus, "adopting plaintiff's construction of

RECEIVED by MSC 8/17/2020 10:58:10 AM

the statute would," according to the court, "allow this condition to be satisfied by the mere filing of a complaint." *Id*. The Court of Claims elaborated that allowing the complaint to serve as the notice "would effectively render meaningless – or at least optional – the express statutory requirement of giving notice 'as a condition to any recovery.' " *Id*.

The Court of Claims further concluded that, even if the complaint could serve as the statutory notice, neither Champine's complaint nor any of the other documents he filed with the Court of Claims before the April 16, 2018 deadline met MCL 691.1404(1)'s requirement to "specify the exact location" of the defect. (Appellant App, Ex L, pp 7-10.)

The Court of Claims denied Champine's motion for reconsideration

Following the Court of Claims' decision, Champine moved for reconsideration on January 2, 2019. (Appellee Appendix, p 117.) Champine argued that MCL 691.1404 does not require that the notice be filed before the complaint and asserted that the notice can take any form as long as it contains the required information. Champine also conceded that he did not file a notice specifying the "exact location" of the defect, but he asserted that he was excused from doing so because MDOT investigated the claim when it occurred, and because the roadway's numerous potholes made it impossible to determine which one caused Champine's injury. The Court of Claims denied Champine's motion on January 9, 2019. It was not persuaded that it had committed a "palpable error by which the court and the

RECEIVED by MSC 8/17/2020 10:58:10 AM

parties have been misled." (Appellee Appendix, p 176.) Champine then filed an appeal of right with the Court of Appeals.

The Court of Appeals affirmed

The Court of Appeals, in a 2-1 decision, affirmed the Court of Claims, concluding that a notice must be filed before a complaint, and therefore the complaint could not be considered the notice under MCL 691.1404. It did not address the Court of Claims' alternative holding that the complaint, if considered a notice, did not specify the "exact location" of the defect.

The Court of Appeals concurred with the Court of Claims that MCL 691.1404 makes filing a notice with the Court of Claims a necessary precondition to recover damages against the State. (Appellant App, Ex N, p 4). The court also rejected Champine's "attempt to distinguish the notice required to 'recover[]' damages from the notice to commence a suit" because, in part, "the only purpose for plaintiff to have brought his complaint was to recover damages for his injuries." (Appellant App, Ex N, p .4.) The Court of Appeals also reasoned that the complaint could not be an "acceptable form of notice" for purposes of MCL 691.1404 because of "the different ways that notice can be served" on the State. (Appellant App, Ex N, p 4.)

The dissent, on the other hand, concluded that MCL 691.1404 did not require filing a notice before the complaint, and that any failure of Champine to specify the "exact location" of the defect was excused. It concluded that the multiplicity of potholes on the road surface made it impossible to determine which one was the source of the concrete.

This application followed.

RECEIVED by MSC 8/17/2020 10:58:10 AM

STANDARD OF REVIEW

This Court reviews de novo questions of statutory interpretation. It reviews rulings on motions for summary disposition using the de novo standard as well. *Coblentz v Novi*, 475 Mich 558, 567 (2006).

ISSUE PRESERVATION

Champine preserved this issue in his response to MDOT's summary disposition motion in the Court of Claims, and in his claim of appeal and appellate briefs in the Court of Appeals.

ARGUMENT

I. The Court of Appeals correctly affirmed the Court of Claims' grant of summary disposition to MDOT where Champine did not file a notice as a precondition for lifting MDOT's immunity from tort lawsuits under the highway exception under MCL 691.1404.

A complaint cannot serve as a highway-defect notice because the notice is itself a *precondition for lifting the State's governmental immunity from suit*. In short, a tort lawsuit against the State cannot commence unless governmental immunity does not apply. See *Mack v Detroit*, 467 Mich 186, 201 (2002). Unless MCL 691.1404's notice provision is satisfied, governmental immunity for defective highway conditions *still applies*, and a tort lawsuit cannot proceed.

The Court of Appeals recognized this. It held that "[t]he opening clause of MCL 691.1404(1) establishes that notice is a condition precedent to recovering damages," and that this clause refers to the "requirements to bring a suit, and not merely to recover damages from an alleged injury." (Appellant App, Ex N, p 4.)

RECEIVED by MSC 8/17/2020 10:58:10 AM

Because the Court of Appeals correctly applied the statute's plain language and this Court's precedents interpreting that language, Champine's application for leave should be denied.[3]

A. Compliance with MCL 691.1404's notice requirement is a precondition to lifting the State's inherent governmental immunity from tort lawsuits.

The right to sue the State in tort for defective highways is one of legislative grace. "From the time of Michigan's statehood, this Court's jurisprudence has recognized that the state, as sovereign, is immune from suit unless it consents. . . ." *Sanford v Mich*, ____ Mich ____ (Opinion of the Court, decided July 23, 2020, p 4), quoting *Pohutski v Allen Park*, 465 Mich 675, 681 (2002).

When the Legislature enacted certain exceptions to the State's inherent tort immunity in the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq*., the State consented to be sued in tort in those limited circumstances. But, in enacting those exceptions, the Legislature also explicitly made the State's immunity from tort liability the default, stating:

> Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. [MCL 691.1407.]

[3] Champine also challenges the Court of Claims' secondary holding that he did not identify the "exact location" of the defect. Because the Court of Appeals did not address that alternate holding, and because Champine's failure to file a notice is dispositive, the Court need not consider this issue in denying the application.

RECEIVED by MSC 8/17/2020 10:58:10 AM

Indeed, "governmental immunity . . . is a characteristic of government," and it is therefore the "responsibility of the party seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions . . . ." *Fairley v Dep't of Corrections*, 497 Mich 790, 798 (2015), quoting *Mack*, 467 Mich at 198. The statutory exception to governmental immunity relevant to this case is the highway exception, MCL 691.1402. It states in pertinent part:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. [MCL 691.1402(1).]

This statutory exception must be interpreted under the principle that "the grant of immunity in MCL 691.1407(1) . . . is broad," and "the statutory exceptions thereto are to be narrowly construed." *Robinson v Detroit*, 462 Mich 439, 455 (2000).

Additionally, "because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed." *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707, 714 (2012). Thus, "[s]tatutory notice provisions are a common means by which the government regulates the conditions under which a person may sue governmental entities." *Id.* In the case of the highway exception, the Legislature enacted such a notice provision. In pertinent part, the highway-defect notice provision mandates that:

> (1) *As a condition to any recovery for injuries* sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of

RECEIVED by MSC 8/17/2020 10:58:10 AM

> the occurrence of the injury and the defect. The Notice shall specify the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant.
>
> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. *In case of the state, such notice shall be filed in triplicate with the clerk of the court of claims*. Filing of such notice shall constitute compliance with section 6431 of Act No. 236 of the Public Acts of 1961, being section 600.6431 of the Compiled Laws of 1948, requiring the filing of notice of intention to file a claim against the state. [MCL 691.1404(1)-(2) (emphasis added).]

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), this Court confirmed that this notice was mandatory, reasoning that "inasmuch as the Legislature is not even required to provide a defective highway exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits." *Rowland*, 477 Mich at 212. As a consequence, if the conditions imposed by MCL 691.1404 are not strictly adhered to, a highway-defect claim cannot survive. Again, *Rowland* made this clear:

> *MCL 691.1404 is straightforward, clear, unambiguous, and* ***not constitutionally suspect****.* Accordingly, we conclude that it must be enforced as written. . . . Thus, the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is *actually suffered.* [*Rowland*, 477 Mich at 219 (emphasis added).]

Taken together, MCL 691.1404(1) and (2) establish the primary conditions that must be met before a highway-defect suit can be brought. They establish a

RECEIVED by MSC 8/17/2020 10:58:10 AM

time limit (within 120 days of the occurrence) and the information that a notice must contain (the names of known witnesses, specification of the injuries suffered, and a description of the "exact location" and nature of the defect). MCL 691.1404(1). They also establish that, in the case of the State, such notice must be filed with the Court of Claims. MCL 691.1404(2). Champine's complaint was properly dismissed because he did not meet these conditions.

B. Champine did not file the required notice in the Court of Claims.

Under the GTLA's plain terms, a highway-defect notice against the State must be timely filed with the Court of Claims, and the failure to do so requires dismissal of the action. See MCL 691.1404(2) ("In case of the state, such notice shall be filed in triplicate with the clerk of the court of claims."). See also *Goodhue v Dep't of Transp*, 319 Mich App 526, 534–535 (2017); *Reed v State*, 324 Mich App 449, 455–456 (2018). Indeed, even the dissent below acknowledged that "because defendant [MDOT] is a state entity notice to the Court of Claims was required." (Appellant App, Ex N, Shapiro, J., dissenting, p 2, n 1.)

Here, Champine did not file the required notice. In his application, Champine *admits* he did not file with the Court of Claims any of the letters he now identifies as "notices." (Appellant App, pp 9–11.) To avoid the consequences of this failure, Champine first asserts the well-worn assertion that filing the notice in the Court of Claims was not necessary because MDOT had *actual* notice of the claim; it acknowledged receipt of the letters it was sent, and it was apprised of the accident

RECEIVED by MSC 8/17/2020 10:58:10 AM

(by the Warren Police Department) the day it occurred. But the Court of Appeals summarily dispatched this argument by correctly discerning that Champine's argument against the filing requirement was really an assertion that MDOT was not prejudiced by his failure to comply with it. Citing this Court's opinion in *Rowland*, the Court of Appeals held that "a showing of prejudice is not required." (Appellant App, Ex N, p 5.)

Champine's argument also runs afoul of this Court's holding in *McCahan v Brennan*, 492 Mich 730, 732 (2012). The facts in *McCahan* parallel what Champine tried to do. Like Champine, McCahan did not file a notice of intent to file a claim with the clerk of the Court of Claims within the time period specified by the statute. But McCahan and her counsel undertook numerous efforts to inform the defendant university's legal office of her intent to seek recovery against the university. The counsel sent a letter to the university's legal office, the plaintiff and her counsel met with and provided available documentation regarding the accident to the university's senior claims representative within the statutory notice deadline, and the plaintiff continued to provide further information thereafter. *Id.* at 734. Nevertheless, this Court concluded that McCahan's claim must be dismissed because she did not timely file her notice *with the Court of Claims*, holding:

> [P]laintiff's failure to file the required notice in the Court of Claims bars her action regardless of whether the university was otherwise put on notice of plaintiff's apparent intent to pursue a claim. The reasoning of *Rowland* is directly on point and thus controls this matter. [*Id.* at 743.]

McCahan interpreted MCL 600.6431, the general notice provision in the Court of Claims Act. But *McCahan*'s rule was applied indirectly to highway-defect

RECEIVED by MSC 8/17/2020 10:58:10 AM

notices under MCL 691.1404 by *Goodhue,* 319 Mich App at 535. And understandably so, considering that MCL 691.1404 contains language similar to MCL 600.6431's requirement that notices against the State be filed with the Court of Claims. MCL 691.1404(2) explicitly states that "[i]n case of the state, such notice shall be filed in triplicate with the clerk of the court of claims." *Id*. See also *Goodhue*, 319 Mich App at 535. Thus, failing to file a highway-defect notice with the Court of Claims requires dismissal.

That should end the matter. But Champine next argues that the perceived *purpose* of the notice provision—i.e., allowing a governmental agency to investigate the claim while "the matter is still fresh, conditions unchanged, and witnesses thereto and to the accident within reach"—takes precedence over the statute's plain *text* and over this Court's black-letter pronouncements in *Rowland* and *McCahan*. (Appellant App, p 15, citing *Rowland*, 477 Mich at 211.)[4] But with respect to statutory notice provisions, this Court has warned that "reliance on the *perceived purpose* of the notice requirement . . . runs counter to the rule of statutory construction directing [courts] to discern legislative intent from plain statutory language." *Perkovic v Zurich American Ins Co*, 500 Mich 44, 53 (2017), interpreting MCL 500.3145 (emphasis added). The Court of Appeals did not subordinate the plain text of MCL 691.1404 to any perceived purpose of the notice provision.

[4] Neither Champine's alleged "notices," nor his complaint, meets this perceived purpose. None of these documents specified the "exact location" of the defective condition that allegedly caused Champine's injuries. Instead, he identified a miles-long stretch of I-696. MDOT could not adequately investigate or remedy any potential defect as a result. (Appellant App, Ex H, pp 59–60, 62.)

RECEIVED by MSC 8/17/2020 10:58:10 AM

Rather, it faithfully applied that text, as it was required to do by this Court's decision in *Rowland*. As a result, the Court of Appeals properly affirmed the Court of Claims' grant of summary disposition to MDOT.

C. Champine's complaint cannot satisfy MCL 691.1404's notice requirement.

Champine next argues that his complaint can service as the notice required under MCL 691.1404. But a complaint cannot serve as a highway-defect notice because the notice is itself a precondition for lifting the State's governmental immunity from suit. The Legislature straightforwardly stated that:

> (1) *As a condition to any recovery for injuries* sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) *shall serve a notice on the governmental agency* of the occurrence of the injury and the defect. [MCL 691.1404(1) (emphasis added).]

So, "[r]ecovery for injuries" is *conditioned* upon filing a compliant notice with the Court of Claims. See *Goodhue*, 319 Mich App at 534–535; *Reed*, 324 Mich App at 455–456. This makes sense because this Court held that MCL 691.1404's language and provisions are "straightforward, clear, unambiguous, and not constitutionally suspect[,]" and they "must be enforced as written." *Rowland*, 477 Mich at 219.

Based on MCL 691.1404's plain language, the Court of Appeals concluded that "the filing of the notice and the filing of the complaint" are necessarily "separate events." (Appellant App, Ex N, p 5.) And this makes sense because a complaint serves a different purpose than does a pre-suit notice. For one, a

RECEIVED by MSC 8/17/2020 10:58:10 AM

complaint need not list known witnesses nor specify the "exact" location of a defect. See MCR 2.110(B)(1), (2). More importantly, filing a complaint initiates a lawsuit. See MCR 2.101(B) ("A civil action is commenced by filing a complaint with a court.").

With this in mind, the Court of Claims interpreted the word "notice" to mean a " 'warning or intimation of something,' or an 'announcement of a party's intention. . . .' " (Appellant App, Ex L, p 6, citing *Merriam-Webster's Collegiate Dictionary* (11th ed).) Consequently, the Court of Claims also articulated a logical conclusion: "[N]otice is not the taking of the act so announced, but merely an announcement that the party intends to take an act." (Appellant App, Ex L, p 6.) Put another way, the complaint cannot be considered the *notice of the claim*. The lawsuit *is* the "claim." It therefore cannot be the "notice" of *itself*.

Moreover, because this case involves a precondition to lifting governmental immunity, MCL 691.1404's notice provision cannot be analogized to the medical-malpractice notice provision in MCL 600.2912b. The Court of Appeals below is correct that the two provisions are "distinguishable" and that MCL 600.2912b is "unique to medical malpractice claims brought against a health professional." (Appellant App, Ex N, p 5.) But immunity from lawsuits is not the default position of medical professionals. So, the Legislature had to specify that the notice period in that statute was required to be met *before* filing the complaint. To sue the State, however, you cannot do so *unless* immunity is affirmatively lifted first. And governmental immunity is not lifted unless you first comply with the Legislature's

RECEIVED by MSC 8/17/2020 10:58:10 AM

preconditions, including notice requirement. See, e.g., *Plunkett v Dep't of Transp*, 286 Mich App 168, 176 (2009) ("To bring a claim under the highway exception to governmental immunity, an injured person must timely notify the governmental agency having jurisdiction over the roadway of the occurrence of the injury, the injury sustained, 'the exact location and nature of the defect. . . .' ").

Further, Champine improperly cites *Goodhue* for the proposition that the complaint can serve as the notice for purposes of MCL 691.1404. But *Goodhue* plainly did *not* hold that a complaint can serve as the notice. As the Court of Appeals recognized, the *Goodhue* panel expressly declined to decide that issue because it was "not relevant to the dispositive question" involved in that case. (Appellant App, Ex N, p 5, citing *Goodhue*, 319 Mich App at 535 n 4.)

Filing a complaint before—or in substitution of—the notice puts the cart before the horse. Therefore, the Court of Appeals rightly concluded that Champine's complaint, despite being filed with the Court of Claims, could not serve as the notice required by MCL 691.1404. Because the Court of Appeals properly sustained summary disposition in favor of MDOT, this Court should deny Champine's application for leave.

D. Dismissal was the appropriate remedy for Champine's failure to comply with MCL 691.1404.

Finally, Champine argues that his failure to comply with MCL 691.1404 should result in a bar to recovery, rather than a dismissal of his complaint. Because

RECEIVED by MSC 8/17/2020 10:58:10 AM

that is a distinction without a difference in a highway-defect tort exception case, the Court of Appeals correctly rejected that argument.

Champine starts by drawing an illusory distinction between the right to "commence[]" an action, and the "right to recover" for any injuries suffered. Champine argues that "had the Legislature intended a Plaintiff to file a notice as *a condition of commencing an action* as *opposed to as a condition of recovery*, the Legislature could have done so." (Application, p 15.) But the Legislature *did* do so. As the Court of Appeals explained, courts have "previously interpreted the relevant language as referring to the notice requirements to bring a suit, and not merely to recover damages from an alleged injury." (Appellant App, Ex N, p 4.) "Accordingly, *before bringing suit*, a claimant must provide, within 120 days from the time of injury, notice to the governmental agency that (1) specifies the exact location and nature of the defect, (2) identifies the injuries sustained, and (3) provides the names of any known witnesses." (Appellant App, Ex N, p 3, quoting *Burise v Pontiac*, 282 Mich App 646, 653 (2009)).

Both Champine, and Judge Shapiro in his dissent, argued that the Court of Appeals improperly relied upon what they regard as dicta: *Burise's* prefatory statement "[a]ccordingly, before bringing suit. . . ." (Application, p 16; Appellant App, Ex N, Shapiro, J., dissenting, p 2.) But these arguments are misplaced.

Burise is not the singular repository of this notion. That failure to comply with MCL 691.1404's provisions warrants *dismissal of the action*, not merely a preclusion on recovering damages, is well-trod territory. See, e.g., *Rowland*, 477

RECEIVED by MSC 8/17/2020 10:58:10 AM

Mich at 200–201 ("Plaintiff, having served her notice 140 days after her fall, acknowledges that she did not serve a notice on the road commission within 120 days of her accident. Given that the plain language of the statute *requires such notice as a condition for recovery* for injuries sustained because of a defective highway, one merely reading the statute might assume that plaintiff's complaint *would have been dismissed*.") (Emphasis added.) See also *Plunkett*, 286 Mich App at 176 ("*To bring a claim* under the highway exception to governmental immunity, an injured person *must timely notify the governmental agency* having jurisdiction over the roadway of the occurrence of the injury, the injury sustained, 'the exact location and nature of the defect,' and the names of known witnesses.") (emphasis added); *McLean v Dearborn*, 302 Mich App 68, 74 (2013) ("Failure to provide adequate notice under this statute *is fatal to a plaintiff's claim* against a government agency.") (emphasis added), accord *Russell v Detroit*, 321 Mich App 628, 633 (2017).

Neither Champine, nor the Court of Appeals' dissent, cites a single case since *Rowland* that interpreted MCL 691.1404 to mean that a failure to comply with the highway-defect notice provision merely prohibits recovery, rather than mandates dismissal of the action. Granting leave here and permitting Champine's interpretation to prevail would upend more than a decade of published caselaw. And the Court of Appeals recognized that such a distinction is hollow; it reasoned that "the only purpose for plaintiff to have brought his complaint was to recover damages for his injuries." (Appellant App, Ex N, p 4.) Indeed, the express language

of the highway exception itself only lifts governmental immunity to allow claimants to recover *damages*. See MCL 691.1402(1) ("A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may *recover the damages suffered by him or her*. . . .") (Emphasis added.)

In summary, the State has inherent governmental immunity from tort lawsuits. A plaintiff can, therefore, only sue the State if the Legislature provides an exception to that immunity. And the Legislature can impose "rational notice limits" as a precondition for lifting that immunity. *Rowland*, 477 Mich at 212. Here, the Legislature carved out an exception to the State's immunity for highway defects. But it also imposed a precondition to waiving that immunity: A claimant must file a notice pursuant to MCL 691.1404. If he does not, he cannot maintain his action because the State's immunity has not been lifted. Champine did not. Therefore, dismissal of Champine's lawsuit was appropriate. This Court should deny leave to appeal.

RECEIVED by MSC 8/17/2020 10:58:10 AM

RECEIVED by MSC 8/17/2020 10:58:10 AM

CONCLUSION AND RELIEF REQUESTED

Champine never timely filed a notice with the Court of Claims. And his complaint cannot serve as that notice because filing the notice is a "condition precedent" to lifting the State's governmental immunity.

For these reasons, the Court of Appeals correctly affirmed the grant of summary disposition to MDOT. Accordingly, this Court should deny Champine's application for leave.

Respectfully submitted,

B. Eric Restuccia
Deputy Solicitor General

/s/Philip L. Bladen (P56443)
Assistant Attorney General
Attorneys for MDOT
Transportation Division
Van Wagoner Building
425 West Ottawa Street
Lansing, MI 48913
(517) 335-1656

Dated: August 17, 2020