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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

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLEE MICHIGAN DEPARTMENT OF TRANSPORTATION

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STATEMENT OF QUESTION PRESENTED

As a condition to recovering damages based on a defective highway, MCL 691.1404 requires a person to file a detailed pre-suit notice with a government agency within 120 days of the injury. Norman Champine filed a complaint within that timeframe, but he never filed the notice required under MCL 691.1404. Does Champine's complaint constitute compliance with MCL 691.1404's notice provision immunity?

Appellant's answer:	Yes.
Appellee's answer:	No.
Trial court's answer:	No.
Court of Appeals' answer:	No.

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INTRODUCTION

This Court requested supplemental briefing on Champine's application for leave to address "whether the appellant's timely filed complaint against the state constituted compliance with the notice requirement of MCL 691.1404." The simple answer to the Court's question is "no." MCL 691.1404's notice requirement is a condition imposed by the Legislature that must be satisfied before the State's immunity from tort lawsuits can be lifted. A highway-defect tort lawsuit against the State cannot be commenced unless this notice is first provided.

Interpretating MCL 691.1404's notice requirement as interchangeable with a complaint ignores its text, the century-old understanding of our courts, and, frankly, common sense. The word "notice" as used in the statute is not ambiguous. A notice's purpose is to serve as an advanced warning to the government of the nature of a tort claim against it, so that the government can investigate and prepare for a potential lawsuit. Champine's position also undermines the Legislature's uniform system of tort liability for state and local governments by substituting a two-tier system in which local governments get the benefit of advanced notices of potential lawsuits, but the State does not.

Moreover, there is no apparent backlog of highway-exception plaintiffs who have misread MCL 691.1404's clear command and filed a lawsuit instead of the required notice. Hence, there is no evidence of confusion on this point for the Court to clarify. Rather, this case involves a single plaintiff who did not file notice of his

claim in the Court of Claims before filing his lawsuit, contrary to what the statute plainly required. This Court should deny Champine's application for leave.

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COUNTERSTATEMENT OF FACTS

MDOT relies upon, and adopts by reference, its counterstatement of facts as presented in its Brief in Opposition to the Application for Leave to Appeal.

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ARGUMENT

I. Filing a pre-suit notice under MCL 691.1404 is a condition precedent to lifting governmental immunity that serves different purposes than does the filing of a complaint.

The plain language of MCL 691.1404(1) states that *"[a]s 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."* *Id.* (emphasis added). This language, and the remaining text of MCL 691.1404, make clear that advanced notice of a potential lawsuit must be provided to the government, on penalty of dismissal. *Rowland v Washtenaw Co Rd Comm,* 477 Mich 197, 201–202 (2007) ("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.)

A complaint cannot constitute the notice required by MCL 691.1404 because the Legislature made the notice a condition precedent to lifting governmental immunity. "[I]nasmuch 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. See also *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707, 714 (2012) ("[B]ecause the government may voluntarily subject itself to

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liability, it may also place conditions or limitations on the liability imposed.").

Indeed, "[s]tatutory notice provisions are a common means by which the government regulates the conditions under which a person may sue governmental entities." *Id.* The text is clear that a complaint and notice are distinct filings that serve different functions, which is further supported by both the related tolling provision in MCL 691.1404(3) and the fact that MCL 600.6431 states that either a claim or the notice itself may be filed within the notice period, in contrast to MCL 691.1404. A contrary view would muddle the clerk's obligations for service for notices as against complaints in MCL 600.6431(3), and it would defeat the pre-suit investigative powers granted under MCL 691.1404(2).

Champine asks this Court to ignore this clear statutory requirement and impermissibly engage in judicial legislating. But the Court should not accept the invitation. "[U]nder the division of powers found in the Constitution," this Court long ago explained, its duty is "not to enact, but to expound, the law; not to legislate, but to construe legislation, to apply the law as . . . we find it, and to maintain its integrity as it has been written by a co-ordinate branch of the state government." *Cooke v Holland Furnace Co,* 200 Mich 192, 195 (1918). See also *Nawrocki v Macomb Co Rd Comm,* 463 Mich 143, 150–151 (2000) ("[W]e refuse to impose upon the people of this state our individual determinations of proper public policy, relating to the availability of lawsuits arising from injuries on the public highways. Rather, we seek to faithfully construe and apply those stated public policy choices made by the Legislature when it drafted the statutory language of the highway

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exception."). And this is true even if, in some cases, an injured party may not be able to obtain a remedy:

> If the law as written works hardships in a special class of cases, the remedy lies with the branch of the government charged with the duty of enacting laws. If one does not protect himself and his rights under the law as written, it is his misfortune, and this court should not by judicial legislation, for the purpose of relieving that misfortune, write into the statute a provision that the Legislature has not seen fit to enact." [*Cooke,* 200 Mich at 196.]

This Court should not accept Champine's invitation to second-guess the Legislature's policy choices just because he has worked a hardship on himself by not following the clear requirement to file his notice in the Court of Claims before initiating this lawsuit. This Court has no discretion other than to apply the law where its requirements are clear.

Moreover, as explained below, a pre-suit notice under MCL 691.1404 and a complaint serve different purposes and should not be conflated as a single requirement.

A. A "notice" gives advanced warning of some impending or possible action.

The Legislature required highway-defect claimants to notify the government of their claim before filing suit. If it intended that a claimant file a lawsuit in lieu of a notice, the Legislature would have said so in clear language. But it did not. "[S]ound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence." *People v Gardner*, 482 Mich 41, 58–59 (2008), quoting *Donajkowski v Alpena Power Co*, 460 Mich 243, 258 (1999).

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Determining MCL 691.1404's intent thus begins with the word that the Legislature used: "notice." See MCL 8.3a ("All words and phrases shall be construed and understood according to the common and approved usage of the language . . ."). This Court recently recognized the common-language definition of "notice." A "notice" is "information, [a] warning, or [an] announcement of something impending; notification . . . ." *Crooked Creek, LLC v Cass Co Treasurer*, ___ Mich ___, n 24 (2021) (Docket No. 159856), quoting *Random House Webster's College Dictionary* (1999). It can also be "a written or printed statement conveying such information or warning." *Id.* This is consistent with the definition of "notice" that the Court of Claims adopted when it granted summary disposition to MDOT. "Notice," the Court of Claims held, was a "'warning or intimation of something,' or an 'announcement of a party's intention[.]'" (Appellant App, p 194a, citing *Merriam-Webster's Collegiate Dictionary* (11th ed).) Accordingly, the Court of Claims concluded that "notice is not the taking of the act so announced, but merely an announcement that the party intends to take an act." (Appellant App, p 194a.)

Applying this definition, the "notice" required by MCL 691.1404 is merely an advanced warning to the government that a highway-defect lawsuit may be filed. Logically, then, a highway-defect lawsuit cannot be the "notice" of itself. Moreover, the notice requirement serves specific purposes. As this Court noted in *McCahan v Brennan,* 492 Mich 730 (2012):

> [N]otice provisions are enacted by the Legislature in order to provide the state with the opportunity to investigate and evaluate claims, to reduce the uncertainty of the extent of future demands, or even to force the claimant to an early choice regarding how to proceed. Provisions

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> requiring notice to a particular entity, like the Court of Claims in this case, further ensure that notice will be provided to the *proper* governmental entity, thereby protecting plaintiffs and defendants alike from having the wrong component of government notified. [*Id.* at 744.]

The importance of forcing a claimant "into an early choice regarding how to proceed" is well-illustrated by *Ridgeway v Escanaba*, 154 Mich 68 (1908). There, this Court addressed the question of whether a pre-suit notice submitted to the city for a sidewalk-defect claim that described one injury required dismissal of a subsequent lawsuit where the claimant asserted an entirely different injury. *Id.* at 69. This Court upheld a directed verdict for the city because the description of the injury in the notice was materially different from the injuries alleged in the lawsuit. *Id.* at 72–73. In other words, the plaintiff was forced to commit to a specific set of injuries in his pre-suit notice, and his case was dismissed because that notice of injuries did not materially match the allegations in his lawsuit.

If the State's first notice of the nature of a claimant's injuries comes in the form of a lawsuit, this important purpose of a pre-suit notice is nullified for the State. There would be no pre-suit notice to hold a claimant to in any subsequent litigation. This was not the Legislature's intention when it imposed a notice precondition to lifting the State's governmental immunity. As this Court recognized in *Ridgeway*:

> [T]he legislature intended to give to defendants in such cases some protection against unjust raids upon their treasuries by unscrupulous prosecution of trumped-up, exaggerated, and stale claims, by requiring a claimant to *give definite information* to the city or village against whom it is asserted, at a time when the matter is fresh, conditions unchanged, and witnesses thereto and to the accident within reach. It is a just law, necessary to the protection of the taxpayer, who bears the burden of unjust judgments. It requires only ordinary knowledge and

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> diligence on the part of the injured and his counsel, *and there is no reason for relieving them from the requirements of this statute that would not be applicable to any other statute of limitation.* [*Ridgeway*, 154 Mich at 72–73 (emphasis added).]

Also, the remaining two subsections of MCL 691.1404, which establish a notice-tolling period (MCL 691.1404(3)), and authorize a government agency to engage in pre-suit discovery (MCL 691.1404(2)), are consistent with that intention.

B. Providing a pre-suit notice gives full effect to MCL 691.1404(3)'s tolling provision.

MCL 691.1404 also provides that an injured claimant who "is physically or mentally incapable of giving notice" can toll the 120-day notice period. MCL 691.1404(3). A notice is still required, but the claimant can serve that notice "not more than 180 days after the termination of the disability." *Id.*

Subsections (1) and (3) of MCL 691.1404 must be read together. "[T]o discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v Lansing*, 486 Mich 1, 15 (2010). Further, "any attempt to segregate any portion or exclude any portion [of a statute] from consideration is almost certain to distort the legislative intent." *Id.* at 16, quoting *2A Singer & Singer, Statutes and Statutory Construction (7th ed)*, § 47.2, p 282.

Reading the two provisions together as part of one statutory scheme, it becomes obvious that the Legislature intended that the notice must precede the lawsuit. If filing the lawsuit could satisfy the notice requirement under subsection

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(1), there would be no need to toll the notice period. A claimant could simply file the suit.

Additionally, Champine's reading of the statute would create confusion regarding how subsection (3) must be applied. If a complaint could serve as the notice under subsection (1), the tolling provision under subsection (3) would arguably become a back-door highway-defect statute-of-limitations tolling period. This would be possible because courts cannot simply read subsection (3) out of the statute. It must still apply. So, courts would be confronted with deciding whether to apply the tolling provision to a complaint filed in the place of the notice. As such, claimants could invoke subsection (3) and argue that their right to file a complaint could extend beyond MCL 691.1411(2)'s two-year statute of limitations because of a mental or physical disability. But this reading of the statute would be contrary to the Legislature's intent under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq.*, to establish a firm two-year limitations period for bringing highway-defect causes of action.

Subsection (3) permits tolling of the *notice period* under MCL 691.1404(1) if the claimant is a minor or disabled. MCL 691.1404(3). There is also a *statute of limitations* tolling provision in the Revised Judicature Act (RJA), MCL 600.101 *et seq.*, in the event of minority or disability. MCL 600.5851. But the Legislature explicitly excluded the two-year limitations period for highway-defect notices from the RJA's reach. MCL 600.5851, by its terms, applies to periods of limitations if the minor or person suffering from a disability is "entitled to make an entry or bring an

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action *under this act . . . .*" MCL 600.5856(1) (emphasis added). This language makes MCL 600.5856 generally applicable to all statutes of limitations for civil actions because all such actions must be filed "under" the RJA. See *Klida v Braman*, 278 Mich App 60, 74 (2008) ("We conclude that a reasonable construction of the phrase 'under this act' contained within the minority tolling provision, MCL 600.5851(1), that best accomplishes the statute's purpose is that all civil actions are brought 'under' the RJA . . . .").

But MCL 691.1411 makes clear that the Legislature deliberately exempted the statute-of-limitations period for highway-defect claims under the GTLA from the RJA's tolling provision. That statute, which is the GTLA's limitations provision, first states that "[e]very claim against any governmental agency shall be subject to the *general law* respecting limitations of actions *except as otherwise provided in this section*." MCL 691.1411(1) (emphasis added). The statute then provides that "[t]he period of limitations for claims *arising under section 2 of this act* shall be 2 years." MCL 691.1411(2) (emphasis added). Finally, MCL 691.1411 concludes that "[t]he period of limitations for all claims against the state, *except those arising under section 2 of this act*, shall be governed by chapter 64 of Act No. 236 of the Public Acts of 1961." MCL 691.1411(3).

Because all civil actions are technically brought under the RJA, see *Klida*, 278 Mich App at 74, any tolling provision under the RJA is necessarily part of the "*general* law respecting limitations of actions," from which the GTLA's two-year statute of limitations for highway-defect claims is excepted. At the very least, then,

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allowing a complaint to serve as the notice would invite litigation as to whether, or how, the tolling provision under subsection (3) applies. The more logical and natural reading of MCL 691.1404(3), therefore, is that notices and complaints are two separate things. If a notice must precede the complaint, then there is no confusion.

The interplay between the notice tolling provision of MCL 691.1404(3) and the firm two-year statute of limitations for highway-defect cases also explains why permitting a claimant to file his highway-defect lawsuit immediately after filing his notice was a deliberate public policy choice by the Legislature. This can be illustrated by the following example. Assume the Legislature adopted a mandatory post-notice waiting period to file a highway-defect suit of 90 days. If a claimant's mental or physical disability terminates less than 90 days from the running of the statute of limitations, the claimant would be barred from filing suit despite any tolling of the notice period under MCL 691.1404(3). By allowing a claimant to file the complaint immediately after filing notice, the Legislature gives a disabled claimant the full benefit of the notice-tolling provision.

Champine sees this as evidence that the Legislature did not intend for a notice to precede the filing of a lawsuit. (Appellant Supp Br at 23-24.) But this is instead strong textual evidence that the Legislature intended for notices to precede lawsuits. Rather than represent a flaw in the statutory scheme, it works as it should. In other words, it is "a feature, not a bug." *Omnicare, Inc v Laborers Dist Council Constr Indus Pension Fund*, 575 US 175, 194 (2015).

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The Legislature made a deliberate policy choice *not* to toll the statute of limitations period upon the filing of a notice, and it instead gave highway-defect claimants the benefit of a notice-tolling period. This Court should "faithfully construe and apply those stated public policy choices made by the Legislature." *Nawrocki*, 463 Mich at 150–151.

C. As the more specific statute, MCL 691.1404's requirements take precedence over those in MCL 600.6431, and the language of MCL 600.6431 only confirms the fact that a complaint cannot replace the duty to provide notice under MCL 691.1404.

When it asked the parties to address whether a complaint filed within the 120-day notice period under MCL 691.1404 satisfies that provision, this Court also questioned the effect, if any, that the more general governmental notice provision under MCL 600.6431 has on this question. *Champine v Dep't of Transp*, ___ Mich ___; 957 NW2d 815 (2021). The answer is that the provisions of MCL 691.1404 are self-contained and control over any contrary provisions in MCL 600.6431. And, if anything, the different language in both statutes strongly suggests that Champine is incorrect: lawsuits in the form of a complaint cannot also satisfy the notice requirement under MCL 691.1404.

To start, it is a well understood rule of statutory construction that "specific provisions . . . prevail over any arguable inconsistency with the more general rule[.]" *Miller v Allstate Ins Co,* 481 Mich. 601, 613 (2008), quoting *Jones v Enertel, Inc,* 467 Mich 266, 271 (2002). And "to determine which provision is truly more specific and, hence, controlling, we consider which provision applies to the more narrow realm of

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circumstances, and which to the more broad realm." *Id.* at 613. MCL 600.6431 is clearly the broader statute. In particular, it encompasses a broad range of potential claims against the government, not just personal-injury claims arising from injuries on highways. It establishes a general one-year period to file a notice of the claim or the claim itself. See MCL 600.6431(1). It then creates a shorter six-month period for claims for personal injury and property damage. See MCL 600.6431(3).

MCL 691.1404, by contrast, is much narrower in its focus. It applies only to "injuries sustained by reason of any defective highway[.]" MCL 691.1404(1). Consequently, the more specific requirements of MCL 691.1404 prevail over any contradictory provisions in MCL 600.6431.

MCL 691.1404 differs from MCL 600.6431 in several other ways. As an initial point, its notice period is 120 days, which is much shorter than those provided in MCL 600.6431. Additionally, MCL 691.1404 requires that highway-defect claimants provide "notice of the occurrence of the injury and the defect" and "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." MCL 691.1404(1). In contrast, MCL 600.6431 is much less specific. It requires that the notice contain:

> (a) A statement of the time when and the place where the claim arose.
>
> (b) A detailed statement of the nature of the claim and of the items of damage alleged or claimed to have been sustained.
>
> (c) A designation of any department, commission, board, institution, arm, or agency of the state involved in connection with the claim.
>
> (d) A signature and verification by the claimant before an officer authorized to administer oaths. [MCL 600.6431(2)(a)-(d)].

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Notably, no witnesses need be named, nor is there a requirement to specify the injuries sustained or the exact location and nature of the cause of the injury.

MCL 691.1404 does state that the "[f]iling of such notice shall constitute compliance with . . . section 600.6431[.]" MCL 691.1404(2). But "this language merely provides that compliance with MCL 691.1404 shall be treated as compliance with MCL 600.6431, irrespective of the fact that MCL 600.6431's enumerated requirements may not have been satisfied. As noted by the Court of Appeals, nothing in the language of MCL 691.1404(2) shows that it actually incorporates any of MCL 600.6431's requirements." *Goodhue v Dep't of Transp*, 319 Mich App 526, 536 (2017).

1. Treating a complaint as a notice would create confusion as to the Court of Claims Clerk's duties on receipt.

And while the provisions of MCL 691.1404 take precedence over the more general notice provision in MCL 600.6431, the latter statute imposes a duty on the Clerk of the Court of Claims. When the Clerk receives a notice, the Clerk is required to transmit a copy of the notice to "the attorney general and to each of the departments, commissions, boards, institutions, arms, or agencies of this state designated in the claim or notice." MCL 600.6431(3).

This provision further confirms that the Legislature did not intend that a lawsuit in the form of a complaint could serve as a notice under MCL 691.1404. If such a complaint is filed with the Court of Claims, that would initiate a lawsuit. See MCL 600.1901 ("A civil action is commenced by filing a complaint with a

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court.") See also MCR 2.202(B). But the Clerk of the Court also has a statutory duty to distribute copies of any governmental tort notices to the appropriate State department and the Attorney General. MCL 600.6431(3). The Clerk, therefore, may not know whether to distribute the complaint in accordance with subsection (3) or to issue a summons. See MCR 2.102(A) ("On the filing of a complaint, the court clerk shall issue a summons . . . ."). And if the Clerk distributes the complaint to the Attorney General and the relevant State department, doing so could create confusion as to whether this was service of civil process on the State defendant. See MCR 2.105(G)(8). While it is doubtful that the Legislature intended for highway-defect plaintiffs to commandeer the Clerk of the Court of Claims to serve their lawsuits on the State, this is exactly the type of legal confusion this Court should avoid creating.

2. MCL 600.6431 expressly permits the filing of a notice *or* the lawsuit, in contrast to MCL 691.1404, which refers only to a notice.

Finally, MCL 600.6431 permits what MCL 691.1404 does not. Section 6431 permits either the notice, *or the claim itself*, to be filed within the notice period. In the context of actions in the Court of Claims, a "claim" is synonymous with a cause of action, or the lawsuit. The general statute of limitations for actions in the Court of Claims states that "[e]very *claim against the state*, cognizable by the court of claims, shall be forever barred unless *the claim is filed with the clerk* of the court . . . within 3 years after the claim first accrues." MCL 600.6452 (emphasis added). *See also Bauserman v Unemployment Ins Agency*, 503 Mich 169, 181 (2019)

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(acknowledging that the plaintiffs' claims were barred under MCL 600.6431(3) "*unless they filed their complaint* or notice of intent to sue 'within 6 months following the happening of the event giving rise to the cause of action.'") (emphasis added).

MCL 600.6431 states that "[n]o 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 . . . ." MCL 600.6431(1) (emphasis added). In subsection (3), that statute further provides, "[i]n all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a *notice of intention to file a claim* or the *claim itself* within 6 months following the happening of the event giving rise to the cause of action." MCL 600.6431(3) (emphasis added).

By contrast, MCL 691.1404 states only that a "notice" must be filed, or a claimant cannot recover for her injuries. MCL 691.1404(1). It does not permit the "claim" (i.e., the cause of action or lawsuit) to be filed in lieu of the notice. Had the Legislature intended to permit a highway-defect claimant to file his lawsuit in lieu of a notice of his claim, it would have added language to MCL 691.1404 that mirrored MCL 600.6431. Because MCL 691.1404 contains no such language, this provides yet another independent confirmation that the notice under MCL 691.1404 cannot be the complaint or the lawsuit. "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another

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statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc,* 442 Mich 201, 210 (1993).

D. Providing a pre-suit notice gives full effect to the pre-suit investigative powers granted under MCL 691.1404(2).

Another textual indication that the Legislature intended for the notice to precede the lawsuit is found in MCL 691.1404(2). There, the Legislature gave the government certain investigatory powers after it is served with a notice of claim. The government can require a claimant's witnesses to testify under oath about the "claim, the amount thereof, and the extent of the injury." MCL 691.1404(2).

There would be no need for this investigative power if a claimant could simply file a complaint in lieu of a notice. Once a civil action is commenced, the parties have the full powers of civil discovery at their disposal. Indeed, under the current court rules, both parties to a civil lawsuit must serve the other party with extensive initial disclosures of their claims, defenses and legal arguments; and they must produce or identify relevant evidence in the case. See MCR 2.301; MCR 2.302.

Thus, MCL 691.1404's investigatory tools would be rendered moot by general civil discovery. More troubling, allowing a complaint to serve as the notice required by MCL 691.1404 would immediately subject the State to the unnecessary expense of litigation. Governmental immunity "protects the state not only from liability, but also from the great public expense of having to contest a trial" and it "relieves the government of the expense of discovery and trial in many cases." *Odom v Wayne Co,* 482 Mich 459, 478–479 (2008). Allowing a complaint to serve as the notice

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required by MCL 691.1404 would divest the State of the opportunity to administratively investigate and resolve claims.

In rebuttal, Champine reiterates his argument that MDOT was not prejudiced by his failure to file a notice in the Court of Claims because the perceived *purpose* of the notice provision—i.e., allowing a governmental agency opportunity to investigate the claim while "the matter is still fresh, conditions unchanged, and witnesses thereto and to the accident within reach"—was met. (Appellant Supp Br at 22, citing *Rowland*, 477 Mich at 211.) But that is not true. Neither Champine's letters to MDOT, nor his complaint, met these perceived purposes. None of these documents specified the "exact location" of the defective condition that allegedly caused Champine's injuries. Instead, Champine identified a miles-long stretch of I-696. MDOT could not adequately investigate or remedy any potential defect as a result. (Appellant App, p 124a-125a.) Likewise, a complaint does not require a plaintiff to provide witness names or other information that MCL 691.1404 requires.

But even if Champine's complaint and letters had contained sufficient information to allow for an investigation, MDOT is not required to show that it was prejudiced by his failure to file a proper notice. As this Court in *Rowland* made clear that statute applies as written irrespective of the issue of prejudice:

> *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

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> 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).]

E. Michigan courts have long regarded governmental tort notices as necessary preconditions to filing a lawsuit.

That a lawsuit in the form of a complaint can be a governmental tort "notice" not only contradicts the common-sense definition of what a notice is, and the statutory text and scheme of the Legislature under MCL 691.1404, but it also upends the long-held understanding by Michigan courts of how governmental tort notices are intended to function.

Over a century ago, this Court, interpreting a local tort notice ordinance, understood that the primary purpose of such a tort notice is to alert the government that "*suit against it for damages was contemplated*[.]" *Barkley v Highland Park*, 199 Mich 549, 553 (1917) (emphasis added). This understanding was reiterated 25 years later, in *Braun v Wayne County*, 303 Mich 454 (1942). As in *Barkley*, this Court in *Braun* interpreted a predecessor highway-defect-notice statute applicable to counties that was substantially similar to MCL 691.1404. The statute at issue, 1 Comp Laws of 1929, § 3996, stated in pertinent part:

> That no county, subject to any liability under this section, shall be liable for damages sustained by any person upon any county road, either to his person or property, by reason of any defective county road, bridge or culvert under the jurisdiction of the board of county road commissioners, unless such person shall serve or cause to be served within sixty (60) days after such injury shall have occurred, *a* ***notice*** *in writing upon the county clerk or deputy county clerk of such county,* which notice shall set forth substantially the time when and place where such injury took place, the manner in which it occurred, and the extent of such injuries as far as the same has become known, the names of the witnesses to said accident, if any, and that the person

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> receiving such injury intends to hold such county liable for such damages as may have been sustained by him. [*Id.* (emphasis added).]

This Court explained that under this provision, "[suit] could have been brought against the county *provided that the county clerk or deputy county clerk was served within 60 days after the accident with the notice required by the statute.*" *Braun*, 303 Mich at 458 (emphasis added). Almost seven decades later in *Rowland*, this Court articulated the same understanding:

> 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.* [*Rowland*, 477 Mich at 200–201 (emphasis added).]

In *Burise v Pontiac*, 282 Mich App 646 (2009), the Court of Appeals applied the same common-sense understanding of a governmental notice provision. *Burise* held:

> 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. [*Id.* at 653 (emphasis added).]

Champine argues that *Burise*'s statement that notice must be filed before filing suit is dicta. Alternatively, he asserts that this Court should overrule *Burise* on that question if it is not. (Appellant Supp Br at 28-29.) But when the *Burise* panel logically stated that a notice must be filed "before bringing suit," this was not a novel concept. It was the latest in a decades-long procession of courts that saw governmental tort notices as a precondition to filing a lawsuit. It is Champine, by

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contrast, who wants to upend this century-old understanding of how governmental tort notices function and the Legislature's declared public policy.

II. Allowing a complaint filed in the Court of Claims to satisfy MCL 691.1404's notice requirement would create a distinction between claims against the State and those against local governments.

If Champine's construction of MCL 691.1404 prevails, it would violate the Legislature's intention to create a unified system of governmental tort liability when it passed the GTLA. See *Ross v Consumers Power Co*, 420 Mich 567, 614 (1984) (The GTLA "was intended to provide uniform liability and immunity to both state and local governmental agencies."). It would give local governments the full benefits of a pre-suit notice *but deny them to the State.*

MCL 691.1404(2) requires that the notice against the State be filed in the Court of Claims. As this Court explained regarding the similar notice requirement under MCL 600.6431, this is a procedural safeguard to assure the notice goes to the appropriate State department:

> By naming the Clerk of the Court of Claims as the agent for the receipt of verified notice of potential claims, the Legislature has established a clear procedure that eliminates any ambiguity about whether an attempted notice is effective. A claimant who complies with MCL 600.6431 need not worry about whether a notice was properly received and processed by the correct governmental entity. By the same token, state entities can be secure knowing that only timely, verified claims in notices filed with the Court of Claims can give rise to potential liability, that the proper entity as well as the Attorney General will be notified, and that only such claims need to be investigated in anticipation of potential litigation. [*McCahan*, 492 Mich at 744.]

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Any subsequent highway defect tort *lawsuit* must also be filed in the Court of Claims, but for a different reason: the Court of Claims has exclusive subject-matter jurisdiction over such suits. MCL 600.6419(1)(a). See also MCL 691.1410(1).

But the required procedure for serving local governments with the required notice is different. Under MCL 691.1404, certain county or local government officials must be served with the notice directly. See MCL 691.1404(2); MCR 2.105(G)(2); *Wigfall v Detroit*, 504 Mich 330, 333 (2019). Any subsequent lawsuit against a county or a city would have to be filed in the appropriate circuit court. See MCL 691.1410(1) and MCL 600.1615. Nothing in MCL 691.1404 requires, or even contemplates, that a claimant would file a pre-suit notice against a local government with the court system.

Champine wants to turn a procedural difference in how state and local governments are to be notified of potential highway-defect lawsuits into a complete nullification of the State's right to receive a pre-suit notice. A highway-defect claimant injured on a state highway would be permitted to *completely avoid filing a pre-suit notice against the State* because he could file his lawsuit instead. But a claimant injured on a county or local road must still meet the pre-suit notice requirement. This imbalanced, two-tiered system was plainly not the intent of MCL 691.1404.

One troublesome result of adopting Champine's construction of the statute would be that the State—but not local governments—would be deprived of the benefit of the pre-suit investigative powers given to the government by the

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Legislature under MCL 691.1404(2) because claimants would be able to file their lawsuits without first filing a notice. See Section I.D, *supra*. It is hard to fathom why the Legislature would permit a highway-defect claimant to completely avoid the notice precondition for lifting the State's governmental immunity in this oblique manner. The Legislature "does not, one might say, hide elephants in mouseholes." *People v Arnold*, 502 Mich 438, 480 (2018), quoting *Whitman v American Trucking Ass'n*, 531 US 457, 468 (2001).

III. Champine's counterarguments provide no basis for disregarding MCL 691.1404's legislative mandate.

The arguments that Champine advances under MCL 600.2912b (medical-malpractice notice) and under MCL 600.2301 (disregarding notice errors) are also unavailing.

A. The medical-malpractice notice provision in MCL 600.2912b is not analogous to MCL 691.1404 because it is a part of a different statutory scheme and does not implicate governmental immunity.

Contrary to Champine's argument, the mandatory post-notice waiting period before commencing an action under the medical-malpractice statute, MCL 600.2912b, is not analogous to the pre-suit notice requirement under MCL 691.1404. The medical-malpractice statute is an entirely different statutory scheme. It is designed to "promot[e] settlement without the need for formal litigation, reduc[e] the cost of medical malpractice litigation, and provid[e] compensation for meritorious medical malpractice claims that would otherwise be

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precluded from recovery because of litigation costs[.]" *Bush v Shabahang*, 484 Mich 156, 174 (2009), quoting Senate Legislative Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403–4406, March 22, 1993.

When addressing a similar attempt to analogize the notice verification requirement in MCL 600.2912d with the Court of Claims Act's verification requirement in MCL 600.6431, this Court rejected that premise. See *Progress Michigan v Attorney General*, 506 Mich 74 (2020). This Court first noted the obvious—that "the complaint at issue here does not allege a claim of medical malpractice." *Id.* at 96. This Court then identified other problems with the analogy, including that "the language of the medical malpractice and verification statutes are not identical." *Id.* at 97.

This is also true for MCL 691.1404 and MCL 600.2912b. Exploring the linguistic differences demonstrates why the two provisions are not analogous. The most obvious difference is that, unlike MCL 691.1404, the notice required under MCL 600.2912b triggers obligations by the notified party, such as allowing the claimant access to medical records pertaining to the claim. MCL 600.2912b(5). Next, MCL 600.2912b(5) gives the notified medical professional the right to respond to the claim before a suit commences. MCL 600.2912b(7). Thus, the waiting period allows the notified medical professional sufficient time to seek out legal counsel and perform an internal records investigation. Finally, the medical-malpractice statute is designed explicitly to give the parties time to settle the case. Under subsection 9, if a notified medical professional communicates before the waiting period has run

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that he or she do not intend to settle the claim, the claimant can then file the lawsuit. MCL 600.2912b(9).

None of these provisions are contained in MCL 691.1404. In particular, the Legislature made a policy choice to allow the tolling of the notice period under MCL 691.1404(3) rather than impose a mandatory waiting period. See Section I.B, *supra*. This Court should honor that policy choice. See *Nawrocki*, 463 Mich at 150–151.

Lastly, Champine attempts to distinguish the conditioning of "recovery" under MCL 691.1404 on a compliant notice from the conditioning of "commenc[ing] an action" under MCL 600.2912b to suggest that the Legislature did not intend for highway-defect notices to precede the lawsuit. (Appellant's Supp Br at 23.) But that is a distinction without a difference in a highway-defect case. Highway defect claimants can only seek *damages*—not any other relief—under the highway exception. 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). Thus, this illusory argument does not support Champine's position.

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B. MCL 600.2301 only allows a court to amend any process or pleading when an action is pending or proceeding in that court.

Champine asserts for the first time on appeal that this Court should apply MCL 600.2301 to "disregard" any errors or defects in his notice because MDOT's substantial rights would not be affected by such an amendment. (Appellant's Supp Br at 26–27.) But this argument fails because that provision: (1) only permits the *amendment* of a timely-filed pre-suit notice; (2) the notice required by MCL 691.1404 is not merely a procedural prerequisite to filing a lawsuit; it is a mandatory condition that must be met before lifting the State's governmental immunity from suit; and (3) MDOT's substantial rights to governmental immunity and notification of the claim's details *would be* substantially impaired.

MCL 600.2301 provides:

> 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. [*Id.*]

To be sure, this provision has been applied to reform certain notices or other filings when they are a *procedural* prerequisite to the filing of a lawsuit. See *Bush*, 484 Mich at 176–177 ("Since an NOI [under MCL 600.2912b] must be given before a medical malpractice claim can be filed, the service of an NOI is a part of a medical malpractice 'proceeding.' As a result, § 2301 applies to the NOI 'process.'"). See also *Fildew v Stockard*, 256 Mich 494, 498–499 (1932) (permitting an amendment to an

affidavit for a writ of garnishment whose filing was a prerequisite to the commencement of that action).

But MCL 600.2301 does have limits. It is *inapplicable* if there is *no document to amend.* Champine never filed a timely notice with the Court of Claims, so there are no defects to fix. MCL 600.2301 can only be invoked to reform the defective *contents* of a pre-suit notice. *Driver v Naini,* 490 Mich 239, 252–253 (2011). It is also *inapplicable* if "there was no action or proceeding pending against" a defendant, such as when a medical-malpractice complaint is *prematurely filed* before the mandatory waiting period has run. *Id* at 254. Indeed, "'[a]n action is not pending if it cannot be commenced,' and '[b]y its plain language, MCL 600.2301 only applies to actions or proceedings that are *pending.*'" *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 84 (2015), quoting *Driver*, 490 Mich at 254.

MCL 691.1404 is not merely a procedural first step in pursuing a particular cause of action. It is an *unavoidable condition* that must be met to *lift the state's immunity from suit. McCahan*, 492 Mich at 746; *Rowland,* 477 Mich at 212; *Atkins,* 492 Mich at 714. As such, courts necessarily *lack any jurisdiction* or power to "fix" a defective notice filed under MCL 691.1404 because the State's immunity waiver is conditioned on the filing of a compliant notice. *Manion v State,* 303 Mich 1, 20 (1942) ("The terms of the State's consent to be sued in any court *define that court's jurisdiction to entertain the suit.*") (emphasis added). And even if the Court had the ability to act under MCL 600.2301, it is limited to errors "which do not affect the

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substantial rights of the parties." *Id.* It is difficult to conceive a right more substantial than the State's entitlement to immunity.

If a complaint is considered a notice under MCL 691.1404, another unintended result would be that the limitation period for supplying the information required in the notice would become illusory. As this Court explained in *Progress Michigan*, once a lawsuit is commenced in the Court of Claims, the rules of the forum prevail, and the Michigan Court Rules govern. *Progress Michigan*, 506 Mich at 94–95. See also MCL 600.6422. The Michigan Court Rules state that amendments to the pleadings should be "freely given" by the court unless doing so would be futile. MCR 2.118(2). A plaintiff could therefore liberally amend his "notice" to address any deficiencies, *even if the amendment would otherwise be untimely* under MCL 691.1404. That liberal amendment standard is at odds with *Ridgeway*'s affirmation that the Legislature can require "definite information" close in time to an injury as a precondition of waiving governmental immunity.

Champine's unpreserved invocation of MCL 600.2301 therefore fails on three levels. First, there can be no "defect" in the content of his notice to correct because he never filed a notice in the first place. Second, no "action or proceeding [was] pending" because the condition to lifting the State's immunity from suit was not met. *Driver*, 490 Mich at 252–254; accord *Tyra*, 498 Mich at 90–92. And third, reforming the notice would affect the State's substantial rights to governmental immunity and to timely information about the claim.

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CONCLUSION AND RELIEF REQUESTED

According to the plain language of MCL 691.1404, highway-defect notices are mandatory preconditions to lifting the State's immunity from lawsuits. A claimant cannot recover if this notice is not filed with the Court of Claims. The notice also serves as a warning that a lawsuit may commence, so a lawsuit cannot logically serve as the notice of itself. Moreover, if a complaint or lawsuit is permitted to serve as that notice, it would create a bifurcated system whereby the State, but not local governments, would be deprived of: (1) advanced notice of potential lawsuits; (2) the ability to force a claimant to commit to a specific set of facts early on; and (3) the ability to investigate claims before being burdened with civil discovery. Finally, a complaint cannot serve as the notice because it would second-guess the Legislature's desire to have a firm statutory cutoff for highway-defect lawsuits. For all of these reasons, Champine's application should be denied.

Respectfully submitted,

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