STATE OF MICHIGAN

COURT OF APPEALS

COMPOSITE INNOVATION GROUP, LLC, and ATOMIC COMPOSITES, LLC, Plaintiffs-Appellants,	UNPUBLISHED September 23, 2021
v MICHIGAN STATE UNIVERSITY and RICHARD CHYLLA, Defendants-Appellees,	No. 353480 Court of Claims LC No. 19-000101-MK

Before: CAVANAGH, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

In this appeal involving the Court of Claims act (COCA), MCL 600.6401 *et seq*., and the government tort liability act (GTLA), MCL 691.1401 *et seq.*, plaintiffs Composite Innovation Group, LLC, (CIG) and Atomic Composites, LLC, (Atomic) appeal as of right the order of the Court of Claims granting summary disposition in favor of defendant Richard Chylla, pursuant to MCR 2.116(C)(7). Plaintiffs also challenge the court's earlier order granting summary disposition in favor of defendant Michigan State University (MSU), pursuant to MCR 2.116(C)(7). On appeal, plaintiffs contend that the court erred by dismissing their claims against MSU on the grounds that plaintiffs failed to comply with the verification and notice requirements MCL 600.6431(1) and by dismissing their claims against Chylla on governmental immunity grounds.

Pursuant to our Supreme Court's decision in *Progress Mich v Attorney General*, 506 Mich 74, 98-99; 954 NW2d 475 (2020) (*Progress II*), holding that the failure to verify a complaint has no bearing on whether a plaintiff has satisfied the statutory notice period stated in MCL 600.6431(1), we reverse the Court of Claims' order granting summary disposition in favor of MSU and remand for further proceedings. However, because the court correctly ruled that governmental immunity applies to plaintiffs' claims against Chylla, we affirm the order granting summary disposition of plaintiffs' claims against him.

I. BACKGROUND

In June 2011, MSU entered into an agreement with the United States Army Research Laboratory (ARL) to research and develop composite materials for use in high performance air and ground vehicles employed in hazardous environments. This research led to the development of composite materials employing nanoparticles to divert energy caused by impact.

In July 2013, MSU and CIG entered into an exclusive licensing agreement (ELA), signed by Chylla on behalf of MSU, that stated that MSU "holds certain patent rights that it desires to have perfected and exploited for commercial purposes" and that CIG "wishes to obtain the exclusive right to exploit such patent rights commercially." The agreement defined "patent rights" as "(a) all of the University's rights in the patents and patent applications listed on Schedule 1 and (b) all of the University's rights in in all divisions, continuations, reissues, renewals, re-examinations, foreign counterparts, substitutions, or extensions thereof." Schedule 1 of the agreement did not identify any patent application serial numbers or patent grant numbers, but merely listed an MSU reference number. The agreement detailed the licensing fees and royalty payments to be paid by CIG, required MSU to prepare, prosecute, and maintain the patent applications and patent rights, and required CIG to reimburse MSU for all patent costs.

In 2014, CIG formed Atomic and, in November of that year, Atomic and MSU entered into a services agreement under which Atomic paid MSU to perform tests on a composite material. In December 2016, MSU and CIG executed a First Amendment to Exclusive License Agreement (First Amendment), signed by Chylla, as Executive Director of MSU Technologies, and Edmund J. Swain, as founder of CIG and CEO of Atomic. This amendment replaced several deadlines of the original agreement and acknowledged Atomic as a sublicensee.

On April 5, 2018, MSU sent a notice of default to CIG, stating that CIG had failed to meet several obligations under the ELA and the First Amendment. According to MSU, CIG had failed to make a payment due in 2017 and had submitted a deficient business plan. On May 2, 2018, Chylla and CIG founder Edmund Swain met to discuss the default notice and agreed to extend the period of time for CIG to cure the default to June 29, 2018. MSU terminated the ELA on that date.

On June 28, 2019, plaintiffs filed a complaint in the Court of Claims. The complaint, a lengthy and convoluted recitation of alleged facts supporting plaintiffs' claims, included allegations regarding the Bayh-Dole Act, 35 USC 200 *et seq.*,[1] and defendants' alleged failure to comply with various provisions of the act. The plaintiffs alleged fraudulent misrepresentation against both defendants (Count I), fraud in the inducement against both defendants (Count II), breach of the ELA by MSU (Count III), breach of the services agreement (Count IV), "tortious interference" (Count V), and unjust enrichment (Count VI).

[1] "The Bayh-Dole Act, also known as the University and Small Business Patent Procedures Act, 35 USC 200-211, provides universities, small businesses, and non-profit organizations with intellectual property control over their inventions arising from federal government-funded research." *Univ of Pittsburgh v Townsend*, 542 F3d 513, 521 (CA 6, 2008).

In lieu of answering the complaint, on August 13, 2019, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations and immunity granted by law), and MCR 2.116(C)(8) (failure to state a claim on which relief can be granted). Defendants asserted that the entire complaint must be dismissed because it was not verified as required by the COCA and the one-year notice period prescribed in MCL 600.6431(1) is strictly enforced, citing *Fairley v Dep't of Corrections*, 497 Mich 290; 871 NW2d 129 (2015), and *Progress Mich v Attorney General*, 324 Mich App 659; 922 NW2d 654 (2018) (*Progress I*), rev'd 506 Mich 74 (2020). Noting that defendants had not filed a written claim or notice of intent to file a claim before filing their complaint, defendants asserted that plaintiffs' claims accrued no later than June 29, 2018, the date that MSU terminated the ELA. Thus, they argued, because the unverified complaint was filed on June 28, 2019, one day before expiration of the one-year notice period of MCL 600.6431, the defect could not be cured and each of the claims against MSU must be dismissed. Defendants also asserted that plaintiffs alleged Chylla misrepresented facts while negotiating the ELA and during discussions leading to the termination of the ELA, but did not allege that he was acting outside the scope of his employment with MSU, and therefore, the claims against Chylla must also be dismissed pursuant to MCR 2.116(C)(7). Defendants also sought summary disposition on the fraudulent misrepresentation, fraud in the inducement, and tortious interference claims based on governmental immunity and sought dismissal of the breach of contract and tortious interference claims pursuant to MCR 2.116(C)(8). Defendants supported their motion with a declaration of Chylla that was not notarized, explaining his responsibilities as Executive Director of MSU Technologies and denying any communication with plaintiffs before May 2018.

On August 27, 2019, plaintiffs filed a verified amended complaint, adding specific factual allegations in avoidance of defendants' assertions of governmental immunity and failure to comply with the notice requirement of MCL 600.6431. Plaintiffs alleged that MSU and Chylla were not engaged in governmental functions or, to the extent that they were engaged in governmental functions, these were proprietary functions not protected by governmental immunity. In response to defendants' claims that they failed to comply with the notice requirement of MCL 600.6431(1), plaintiffs alleged that MSU, Chylla, and others fraudulently concealed the existence of plaintiffs' claims by terminating the ELA and by providing false or incomplete information to plaintiffs, even in response to direct inquiries from plaintiffs. Plaintiffs deleted the count alleging breach of the services agreement, but added counts alleging silent fraud, negligent misrepresentation, and innocent misrepresentation.

That same day, plaintiffs also filed a response to defendants' motion for summary disposition. Plaintiffs contended that the amended complaint was filed within the one-year period stated in MCL 600.6431(1), citing MCL 600.5855, which provides that when the existence of a claim is fraudulently concealed, an action may be commenced within two years of the time the plaintiff discovers, or should have discovered, the existence of the claim. Plaintiffs asserted that they did not discover the existence of their claims until they received Freedom of Information Act (FOIA), 5 USC 551 *et seq*., responses from the Department of the Army and the ARL between August 30, 2018 and April 25, 2019. Thus, plaintiffs contended, the August 27, 2019 verified amended complaint was filed within the one-year period of MCL 600.6431.

Citing MCL 691.1407(1), plaintiffs asserted that governmental actors are immune from tort liability only when engaged in the exercise or discharge of a governmental function and that

in this case "there is no dispute that MSU technologies was functioning as a market player committed to generating revenue through a private agreement with a private party, rather than performing a governmental function." Plaintiffs also asserted that, pursuant to MCL 691.1413, governmental immunity does not apply in this case because defendants were engaged in a proprietary function. Moreover, plaintiffs argued, Chylla is not immune from tort liability as an officer of a governmental agency because he was not engaged in a governmental function and he acted in an intentionally fraudulent manner; thus, he failed to satisfy the three criteria set forth in MCL 691.1407(2). Finally, plaintiffs asserted that they had alleged sufficient facts to support their claim for tortious interference, noting that Michigan courts have held that unethical and fraudulent conduct may support such a claim.

Before the first motion was decided, defendants filed a second motion for summary disposition, once again asserting that each of plaintiffs' claims should be dismissed for failure to file a verified notice or claim within one year of accrual, pursuant to MCL 600.6431(1), again citing *Fairley* and *Progress I*. They repeated their contention that plaintiffs' claims accrued no later than the termination of the ELA on June 29, 2018, and that plaintiffs' failure to file a verified claim before June 29, 2019 required dismissal of their claims pursuant to MCR 2.116(C)(7).

Addressing plaintiffs' contention that the one-year notice period was tolled pursuant to MCL 600.5855, defendants contended that MCL 600.6431 is not a statute of limitations and, therefore, is not subject to tolling. Defendants recognized that this Court had recently held that claims against the state may be tolled if actively concealed, citing *Mays v Snyder*, 323 Mich App 1; 916 NW2d 227 (2018) (*Mays I*), aff'd sub nom *Mays v Governor of Mich*, 506 Mich 157; 954 NW2d 139 (2020), but asserted that *Mays I* was wrongly decided and likely to be reversed by the Supreme Court. Moreover, defendants contended, plaintiffs were unable to establish fraudulent concealment in this case because the ELA did not list any patents or patent applications to be licensed and defendants complied with all federal disclosure requirements.

Defendants also repeated their argument that the claims against Chylla should be dismissed because he was immune from liability for intentional torts, citing *Odom v Wayne Co*, 482 Mich 459; 760 NW2d 217 (2008). Defendants contended that because Chylla was acting within the scope of his employment as Executive Director of MSU Technologies, gross negligence is the only exception to government-employee immunity, and plaintiffs' allegations did not establish gross negligence.

Defendants again argued that all of plaintiffs' tort claims should be dismissed pursuant to the GTLA. Defendants contended that MSU was performing a governmental function and that the proprietary function exception stated in MCL 691.1413 did not apply because the exception only applies to actions to recover for bodily injury or property damage. Moreover, defendants asserted, the activities conducted by MSU Technologies did not satisfy the definition of a proprietary function because (1) MSU Technologies is supported by taxes and fees, and (2) MSU Technologies is not primarily operated for pecuniary profit; thus, both MSU and Chylla were immune from tort liability. Defendants supported this assertion with a second unnotarized declaration of Chylla, recounting his involvement with plaintiffs and the ELA, describing the operation of MSU Technologies, and explaining the ownership of patent rights identified in the ELA. Defendants also attached e-mail correspondence indicating that Swain had accused defendants of fraudulent conduct on June 1 and June 11, 2018.

In response, plaintiffs contended that the verified amended complaint filed on August 27, 2019 was timely filed pursuant to MCL 600.5855, which provides an exception to the general accrual statute in cases in which a claim is fraudulently concealed, citing *Mays I*. After recounting various examples of fraudulent conduct alleged in their amended complaint, plaintiffs again asserted that defendants had fraudulently concealed their claims and plaintiffs did not discover the claims until they received a disclosure from the federal government on April 25, 2019.

Addressing defendants' claims of governmental immunity, plaintiffs repeated their contention that defendants were not engaged in a government function. They asserted that MSU's actions satisfied the statutory definition of a proprietary function and, pursuant to MCL 691.1413, MSU was not immune from liability. Responding to defendants' contention that the exception did not apply in this case, plaintiffs argued that the alleged harm to CIG's business, exclusive license rights, and contract rights qualified as property damage; noted that Chylla's statement regarding revenue generated by MSU Technologies supported application of the proprietary function exception; and asserted that Chylla's claim that MSU Technologies was supported by taxes and fees required further review. Finally, plaintiffs disputed Chylla's claim to immunity from liability for intentional torts, asserting that he acted in an intentionally fraudulent manner in the execution of the ELA and in concealing plaintiffs' claims.

In their reply brief, defendants cited *Fairley* as controlling precedent regarding application of MCL 600.6431. Acknowledging the pending appeal of *Mays I* in the Supreme Court, defendants urged the court to apply a strict construction of the notice requirement pending a decision by the Supreme Court. In any event, defendants contended, plaintiffs' claims could not be tolled later than June 11, 2018, when Swain e-mailed accusations of fraud by defendants.

On October 22, 2019, the court issued an opinion and order granting summary disposition on plaintiffs' claims against MSU. Citing this Court's opinion in *Progress I*, the court explained that MCL 600.6431 applies to all claims brought in the Court of Claims; compliance with the statute is a prerequisite to an action against the state; a complaint that fails to comply with MCL 600.6431(1) is invalid from its inception; and noncompliance cannot be cured by amendment. The court held that it was "compelled by binding caselaw to dismiss plaintiffs' claims against defendant MSU pursuant to MCR 2.116(C)(7)."

Although the court resolved plaintiffs' claims against MSU on the ground that plaintiffs had failed to comply with MCL 600.6431(1), the court addressed plaintiffs' claim that the one-year notice period was tolled by defendants' fraudulent concealment of plaintiffs' claims. Citing *Mays I*, the court explained that pursuant to MCL 600.5855, "the notice period does not begin to run until a litigant discovers, or should have discovered, the existence of the claim." However, the court concluded, because the June 2018 e-mails accused defendants of the same fraudulent conduct alleged in the amended complaint, plaintiffs knew or should have known of a possible cause of action in June 2018. Thus, even if the original complaint could have been amended, because the verified complaint was filed more than one year later, the fraudulent-concealment exception would not apply in this case. Because the court dismissed the claims against MSU pursuant to MCL 600.6431(1), it did not address MSU's claim to governmental immunity.

Turning to the claims against Chylla, the Court of Claims cited *Pike v Northern Mich Univ*, 327 Mich App 683; 935 NW2d 86 (2019), and ruled that plaintiffs' claims against Chylla were not

subject to the notice requirement and could not be dismissed for failing to comply with MCL 600.6431(1). The court dismissed plaintiffs' negligent misrepresentation claim pursuant to MCL 691.1407(2)(c), explaining that plaintiffs had failed to plead gross negligence. However, addressing the intentional tort claims against Chylla, the court found that Chylla had failed to prove entitlement to immunity and denied summary disposition, without prejudice to revisiting the issue at a later time. The court subsequently denied plaintiffs' motion for reconsideration, stating that plaintiffs had failed to demonstrate a palpable error and that dismissal was required under *Progress I*.[2]

After the dismissal of plaintiffs' claims against MSU, Chylla filed an answer to plaintiffs' amended complaint. Chylla denied making any untruthful or fraudulent statements in connection with the ELA, denied that MSU Technologies was engaged in a proprietary function, and denied any failure to comply with the requirements of federal law, asserting that MSU at all times retained title to the invention that was the subject of the ELA. Chylla also denied plaintiffs' claims of fraudulent misrepresentation, fraud in the inducement, silent fraud, and innocent misrepresentation.

Chylla then filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (8), requesting dismissal of plaintiffs' four remaining claims. As in the previous two motions for summary disposition, Chylla attached a "supplemental" declaration, not notarized, as an exhibit. In addition, he sought dismissal of Count V on the ground that a claim of innocent misrepresentation requires privity of contract and Chylla was not a party to the contracts between MSU and plaintiffs. On January 23, 2020, the Court of Claims issued an opinion and order granting summary disposition on plaintiffs' Count V (innocent misrepresentation), but denying the motion as to the remaining three counts. The court noted that Chylla's motion relied on his supplemental declaration, which was not notarized and explained that an affidavit lacking notarization is invalid and need not be considered by the court. Moreover, the court found no evidence on the record that could be considered to determine whether Chylla's actions were discretionary or ministerial. The court ruled that Chylla had failed to meet his burden as the moving party. Thus, the court denied the motion under MCR 2.116(C)(7). However, the court granted the motion to dismiss plaintiffs' innocent misrepresentation claim, finding that the amended complaint did not allege that defendant was a party to the ELA and the lack of privity was fatal to plaintiffs' innocent misrepresentation claim.

Chylla filed a fourth motion for summary disposition on February 12, 2020, seeking dismissal of the remaining Counts I through III of the amended complaint on governmental immunity grounds, pursuant to MCR 2.116(C)(7). Taking his cue from the court's previous opinion and order, Chylla supported this motion with a notarized affidavit.

Chylla first asserted that his actions were taken in the course of his employment and within the scope of his authority. Citing to his affidavit, he observed that plaintiffs did not allege that he

[2] On December 26, 2019, plaintiffs filed an application for leave to appeal and a motion for preemptory reversal with this Court. On May 5, 2020, this Court entered an order denying both the application and the motion for peremptory reversal. *Composite Innovation Group LLC v Mich State Univ*, unpublished order of the Court of Appeals, entered May 5, 2020 (Docket No. 352020).

was acting outside the course of his employment and asserted that, as a government employee acting within the scope of employment, he was immune from liability for intentional torts under *Odom*, 482 Mich at 461-462.

Examining the good-faith factor of the *Odom* test, Chylla explained that the proper analysis is a subjective one, from the perspective of the defendant. Again, citing his affidavit, he contended that he was helpful, accurate, and truthful in his communications with plaintiffs, and argued that while plaintiffs alleged that MSU did not act in good faith, the amended complaint contains no allegations that he, as an individual, intended harm or acted with malice. Asserting that the allegations in the amended complaint were refuted by his undisputed testimony and that plaintiffs' correspondence with the ARL did not reveal any information rebutting his affidavit, Chylla argued that his affidavit was sufficient to support a finding that plaintiffs had failed to establish a genuine issue of material fact. Addressing the third factor of the *Odom* test, Chylla relied on the description of his employment responsibilities stated in his affidavit to argue that all of the events described in the amended complaint required his personal deliberation and judgment and his actions were, therefore, discretionary acts immune from tort liability.

Responding to this latest motion, plaintiffs contended that Chylla's affidavit was contradicted by the verified allegations in the amended complaint and the documentary evidence submitted. Regarding Chylla's claim to have acted in good faith, plaintiffs rebutted Chylla's assertion that he never corresponded with plaintiffs before April 5, 2018, by noting that Chylla signed a confidential disclosure agreement with CIG in January 2013 and the ELA later that year, that these documents contained the same misrepresentations upon which CIG based its claims, and that Chylla's signature constituted an endorsement of those misrepresentations. They also argued that the documents obtained from the ARL contradicted Chylla's claim that he made a timely election of title and that his October 2018 memo requesting an extension for an election of title contradicted his affidavit and demonstrated that, after termination of the ELA, he was attempting to conceal these alleged misrepresentations. Plaintiffs concluded that this created at least a question of fact regarding Chylla's good faith and that questions of intent should not be decided in a motion for summary disposition.

Plaintiffs also disputed Chylla's claim that his actions were discretionary, citing *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 634-635; 363 NW2d 641 (1984), as support for their assertion that the execution of a discretionary act is ministerial in nature. Thus, they asserted, Chylla's actions in signing the ELA, ensuring the truthfulness of the ELA, securing patent rights, and executing the First Amendment were ministerial acts, and Chylla's motion should be denied.

The court granted summary disposition of plaintiffs' remaining claims on April 3, 2020. The court examined Chylla's affidavit and plaintiffs' documentary evidence regarding MSU's compliance with federal law before noting that plaintiffs failed to present any documentary evidence establishing that MSU lacked title to the invention. The court analyzed the evidence under the *Odom* test, first noting that plaintiffs did not dispute that Chylla acted within the course and scope of his employment. The court then found that plaintiffs were unable to raise a question of fact regarding Chylla's alleged bad faith regarding the ELA and the First Amendment, observing that (1) a memo written in 2018, upon which plaintiffs relied, was insufficient to show Chylla's intent in 2013 and 2016; (2) the ELA did not make any representations regarding MSU's future

compliance with federal law; and (3) the ELA expressly stated that the patent rights may be subject to the interests of the federal government. Thus, the court found, the claim that "Chylla acted in bad faith by inducing them to enter into the ELA is simply without merit."

The court also found that plaintiffs failed to establish a question of fact regarding alleged bad faith in 2018, noting that the only evidence presented by plaintiffs on this issue was an October 2018 request for an extension to elect title which, the court held, did not demonstrate that MSU lacked title to the invention. Finding that plaintiffs relied on speculation, the court held that they failed to present any evidence that Chylla acted with malice.

Addressing the final element of the *Odom* test, the court determined that Chylla's actions were discretionary. Citing to Chylla's description of his decision-making processes, the court explained that deciding to enter into the ELA and First Amendment, choosing contract language, and engaging with plaintiffs regarding the alleged breaches involved "deliberation, decision-making, and judgment." The court concluded that immunity applied to Chylla and granted summary disposition pursuant to MCR 2.116(C)(7).

II. STANDARDS OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). "De novo review means that we review the legal issue independently, without required deference to the courts below." *Wright v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019). The Court of Claims granted summary disposition for both defendants pursuant to MCR 2.116(C)(7). A court reviewing a motion for summary disposition under MCR 2.116(C)(7) must consider "the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence." *McLean v City of Dearborn*, 302 Mich App 68, 72-73; 836 NW2d 916 (2013). Documentary evidence must be viewed in a light most favorable to the nonmoving party. *Moraccini v City of Sterling Hts*, 296 Mich App 387, 391; 822 NW2d 799 (2012). Plaintiffs' challenge to the order granting summary disposition also requires interpretation of the COCA, which is a statutory question subject to de novo review. *Progress II*, 506 Mich at 85-86.

III. DISCUSSION

A. MAYS V SNYDER

Plaintiffs first contend that the Court of Claims erred by failing to apply and follow this Court's opinion in *Mays I*. Because the Court of Claims clearly recognized and applied the holding of *Mays I*, but held that plaintiffs failed to prove fraudulent concealment, we disagree.

The GTLA codifies exceptions to governmental immunity from tort liability and mandates that claims against the state[3] must be brought pursuant to the COCA. MCL 691.1410(1). Section

[3] The GTLA defines "state" to include "a public university or college of this state." MCL 691.1401.

6431 of the COCA establishes "conditions precedent to pursuing a claim against the state." *Fairley*, 497 Mich at 292. Subsection 6431(1) provides:

> Except as otherwise provided in this section, a claim may not be maintained against this state unless the claimant, within 1 year after the 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 this state or any of its departments, commissions, boards, institutions, arms, or agencies. [MCL 600.6431(1)[4].]

The claim must include "[a] signature and verification by the claimant before an officer authorized to administer oaths." MCL 600.6431(2)(d). In cases involving property damage or personal injury, a claim or notice of claim must be filed "within 6 months after the event that gives rise to the claim." MCL 600.6431(4).

In *Rusha v Dep't of Corrections*, 307 Mich App 300, 310-312; 859 NW2d 735 (2014), this Court held that the notice requirement is a procedural rule akin to a statute of limitations, and should be treated no differently. In *Fairley*, 497 Mich at 292, the Court concluded that a notice of claim that is not signed and verified before an officer authorized to administer oaths is defective and provides "a complete defense that may be raised at any time by a defendant entitled to governmental immunity." Thus, the Court held that dismissal was proper when the notices were timely filed, but lacked verification. *Id.* at 299-300.

In *Mays I*, the plaintiffs alleged inverse condemnation and constitutional claims against the state and several agencies arising from the change in the source of drinking water for the city of Flint. The plaintiffs did not file a separate notice of their intention to file a claim, but filed a complaint in the Court of Claims on January 21, 2016. Because the plaintiffs sought damages for personal injury and property damage, strict compliance with MCL 600.6431 required the filing of a claim or a notice of claim within six months of accrual of the claims. *Mays I*, 323 Mich App at 27; MCL 600.6431(4). The defendants sought summary disposition on the plaintiffs' claims alleging personal injury and property damage under MCR 2.116(C)(7), arguing that the plaintiffs' claims accrued no later than April 25, 2014, when residents began receiving the contaminated water. The Court of Claims denied the motion, reasoning that the defendants' position required "a finding that plaintiffs should have filed suit or provided notice of a claim when the state itself claims it had no reason to know that the Flint River water was contaminated." *Mays I*, 323 Mich App at 28.

In a split decision, this Court affirmed the Court of Claims' decision to deny summary disposition under MCR 2.116(C)(7). Noting the plaintiffs' allegations that the defendants had taken affirmative acts to conceal both the contamination of the water and any events that would trigger the onset of the notice period, this Court held that "[i]t would be unreasonable to divest plaintiffs of the opportunity to vindicate their substantive, constitutional rights simply because defendants successfully manipulated the public long enough to outlast the statutory notice period." *Id.* at 37. Thus, this Court held that the plaintiffs must be afforded the opportunity to support their

[4] MCL 600.6431 was amended by 2020 PA 42, effective March 3, 2020, but the statute applies retroactively to March 29, 2017.

allegations that the defendants intentionally delayed discovery of their causes of action. *Id.* This Court then held that the Court of Claims erred by rejecting the plaintiffs' claims that MCL 600.5855 applied to toll the notice period, expressly holding "the fraudulent-concealment exception may provide an alternative basis for affirming the denial of defendants' motions for summary disposition." *Id.* at 38.

Examining the interplay between the COCA and the fraudulent-concealment exception, this Court found that the Legislature clearly intended to incorporate MCL 600.5855 into the COCA, citing MCL 600.6452(2).[5] Reasoning that MCL 600.6452(2) would be rendered nugatory if the fraudulent-concealment exception did not apply to the notice period as well as to the statute of limitations, this Court held that "[i]n this case, to read MCL 600.5855, as imported into the COCA, and MCL 600.6431 in harmony requires the conclusion that when the fraudulent-concealment exception applies, it operates to toll the statutory notice period as well as the statutory limitations period." *Mays I*, 323 Mich App at 43-44. Thus, if the plaintiffs could prove that the defendants actively concealed information so that the plaintiffs could not or should not have known of their causes of action until less than six months before filing their complaint, "application of the fraudulent concealment exception will fully apply and plaintiffs should be permitted to proceed regardless of when their claims actually accrued." *Id.* at 45.[6]

In *Mays* II, a decision comprising five separate opinions, our Supreme Court considered a number of issues, including inverse condemnation and governmental liability for the violation of a constitutional right. An equally divided Supreme Court[7] affirmed the decision of the Court of Appeals. In the lead opinion by Justice BERNSTEIN, with concurrences by Chief JUSTICE MCCORMACK, Justice CAVANAGH, and Justice VIVIANO, a majority of the Supreme Court agreed that the applicability of MCL 600.6431 and MCL 600.5855 involved "questions of fact to be resolved in further proceedings," *Mays II*, 506 Mich at 186, but declined to address whether any exceptions, including fraudulent concealment, applied, explaining that "[b]ecause we believe that there still remain questions of fact about when plaintiffs' harms accrued, we see no need to look to these doctrines at this point in the proceedings." *Id.* at 186 n 11.

In a separate concurrence, Justice BERNSTEIN explained his view that the fraudulent-concealment exception should apply to the notice requirement of MCL 600.6431. *Id.* at 209-210 (BERNSTEIN, J., concurring). However, no other justice concurred with that opinion,[8] and Justice

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[5] "Except as modified by this section, relative to the limitation of actions, also applies to the limitation under this section." MCL 600.6452(2).

[6] The dissenting judge concluded that neither the possibility of harsh and unreasonable consequences nor the fraudulent-concealment exception of MCL 600.5855 tolled the notice period of MCL 600.6431. *Mays I*, 323 Mich App at 93-96 (RIORDAN, J., dissenting).

[7] Justice CLEMENT did not participate in the decision.

[8] In his opinion concurring with the lead opinion, Justice VIVIANO noted his belief that additional factual development was necessary to determine whether the fraudulent-concealment exception might operate to toll the notice period of MCL 600.6431. *Mays II*, 506 Mich at 225 n 1 (VIVIANO, J., concurring).

MARKMAN, joined by Justice ZAHRA, dissented from that view, expressly stating the belief that "[t]he fraudulent-concealment statute only constitutes an exception to statutes of limitations and does not constitute an exception to the statutory notice provision at issue here." *Id.* at 283 (MARKMAN, J., dissenting).

A decision by an equally divided Supreme Court is not binding precedent, *Int'l Union, United Plant Guard Workers of America (UPGWA) v Dep't of State Police*, 422 Mich 432, 439; 373 NW2d 713 (1985), and a majority of the Supreme Court declined to decide whether MCL 600.5855 operated to toll the notice period. Therefore, *Mays I* was not reversed by the Supreme Court and is binding precedent under MCR 7.215(J)(1).

In this appeal, MSU minimizes the import of *Mays I*, describing it as "arguably dicta." However, the fact that this Court described its holding as an "alternative basis for affirming the denial of defendants' motions for summary disposition," *Mays I*, 323 Mich App at 38, does not deprive its decision on this issue of its precedential effect. In *Johnson v VanderKooi*, 330 Mich App 506, 527; 948 NW2d 650 (2019), lv granted __ Mich __; 954 NW2d 524 (2021), this Court held that reliance on an alternative basis for a ruling does not convert a holding of this Court into dicta; rather, this Court is required to correct a lower court's error "when allowing it to stand could have affected the plaintiff's rights in the proceedings below."

In *Mays I*, 323 Mich App at 45, this Court explicitly held that if the plaintiffs were able to prove, on remand, that the defendants had actively concealed information necessary to support their claims, "the fraudulent-concealment exception will fully apply and plaintiffs should be permitted to proceed regardless of when their claims actually accrued." Thus, its holding on this issue affected the plaintiffs' rights in the Court of Claims proceedings and is not dicta.

Defendants also argue that *Mays I* is "questionable precedent" because "*Fairley* and its progeny stand for the proposition that the notice provision in MCL 600.6431 is not a statute of limitations and therefore not subject to legal or equitable tolling." However, *Fairley* did not involve a claim of either legal or equitable tolling, and the *Fairley* Court did not state that MCL 600.6431 is not subject to tolling. Moreover, the "progeny" cited by defendants comprises three unpublished opinions of this Court which were decided before *Fairley*. These unpublished opinions are not precedentially binding, MCR 7.215(C)(1). However, *Mays I* is binding. MCR 7.215(J)(1).

Nevertheless, plaintiffs' argument that the Court of Claims erred by failing to apply the holding of *Mays I* has no merit. The Court of Claims clearly recognized the holding of *Mays I*, noting that "as interpreted and applied by *Mays*, the fraudulent concealment statute, see MCL 600.5855, provides that the notice period does not begin to run until the litigant discovers, or should have discovered, the existence of a claim." The Court of Claims found that plaintiffs knew or should have known of the existence of their claims in June 2018, and ruled that "their appeal to the fraudulent-concealment exception in *Mays* is of no avail." Whether the court was correct in this holding is addressed below. However, reversal is not warranted on the ground that the Court of Claims failed to apply *Mays I*.

B. *PROGRESS MICHIGAN*

Plaintiffs next contend that the Court of Claims' order granting summary disposition in favor of MSU must be reversed under the Supreme Court's decision in *Progress II*. To the extent that the Court of Claims held that plaintiffs' unverified complaint was a nullity that could not be cured by amendment, we agree.

Section 6431 of the COCA establishes "conditions precedent to pursuing a claim against the state," *Fairley*, 497 Mich at 292, and requires a plaintiff initiating legal action against the state to file a written claim or written notice of intention to file a claim within one year after the claim has accrued, MCL 600.6431(1), or, in a claim for property damage or personal injury, within six months of the event giving rise to the claim, MCL 600.6431(4). The claim must include "[a] signature and verification by the claimant before an officer authorized to administer oaths." MCL 600.6431(2)(d).

In *Progress I*, the plaintiff filed a request for records from the Attorney General (AG) pursuant to the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* On October 19, 2016, the AG denied the plaintiff's request. On April 11, 2017, the plaintiff filed a complaint in the Court of Claims alleging a violation of the FOIA. After the AG moved for summary disposition on the ground that the complaint was not signed and verified as required by MCL 600.6431(1), the plaintiff filed an amended complaint, signed and verified, but otherwise identical with the original complaint, on May 26, 2017. The AG then filed a second motion for summary disposition, arguing, in relevant part, that the plaintiff's claim was time-barred by FOIA's 180-day limitations period, MCL 15.240(1)(b), and that the amended complaint could not relate back to the filing date of the original complaint because it did not add a claim or defense and was, therefore, not a proper amended complaint. The Court of Claims denied the motion, holding that the amended complaint complied with the signature requirements of MCL 600.6431 and related back to the filing date of the original complaint, and was therefore timely under the FOIA. *Progress I*, 324 Mich App at 662-664.

On appeal, this Court disagreed. Analogizing the COCA's requirement of a signed and verified claim or notice to the requirements for initiating a medical malpractice claim, this Court observed that the Supreme Court has held that the filing of a complaint without the required affidavit of merit was insufficient to commence a malpractice action and did not toll the limitations period. *Progress I*, 324 Mich App at 671, citing *Scarsella v Pollack*, 461 Mich 547, 549-550; 607 NW2d 711 (2000). This Court reasoned, again citing *Scarsella*, that allowing an amendment to cure the initial failure to file a signed and verified claim or notice would effectively repeal the requirements of MCL 600.6431, and held that because the plaintiff's complaint "was invalid from its inception, there was nothing that could be amended." *Progress I*, 324 Mich App at 673. This Court concluded that the Court of Claims had erred by holding that the amended complaint related back to the date of the initial complaint; therefore, "because the complaint was fatally deficient from its inception, it could not and did not toll the limitations period." *Id.* at 673-674.

Our Supreme Court granted the plaintiff's application for leave to appeal; relevant to this appeal, the Court directed the parties to address whether this Court erred by holding that the plaintiff's failure to comply with the verification requirement of MCL 600.6431(1) rendered the complaint invalid and incapable of amendment, and whether this Court erred by holding that the

verified amended complaint could not "relate back" to the date the original complaint was filed. *Progress Mich v Attorney General*, 503 Mich 982, 982-983; 923 NW2d 886 (2019).

In its opinion reversing this Court's decision, our Supreme Court observed that the AG had conceded that MCL 600.6431 did not apply because the AG was not "the state," citing *Pike*, 327 Mich App at 695-697. *Progress II*, 506 Mich at 90. However, the Court explained that, even if MCL 600.6431 did not apply, the plaintiff was required to comply with MCL 600.6434, which requires a complaint filed in the Court of Claims to be verified. Moreover, the Court noted that the amended complaint did not appear to be properly verified, but the defendant had waived any argument to that effect because the defendant repeatedly asserted that the complaint was verified. In addition, the Court noted that there is no difference between the verification requirements of MCL 600.6431 and MCL 600.6434. *Progress II*, 506 Mich at 91-92.

The Supreme Court disagreed with this Court's holding that an unverified complaint is a nullity, explaining that MCL 600.6434 requires that pleadings in the Court of Claims comply with the rules for pleadings in the circuit court. The Court observed that MCL 600.1901 provides that an action is commenced with the filing of complaint, MCL 600.5856(a) states that a statutory period of limitations is tolled when a complaint is filed, and nothing in the COCA or the FOIA provided otherwise; thus, the plaintiff's action was commenced and the 180-day FOIA limitations period was tolled when the complaint was filed. Because the amended complaint was timely filed within 14 days of the motion for summary disposition, MCR 2.118(A)(1), and an amended pleading supersedes the previous pleading, MCR 2.118(A)(4), the plaintiff's amended complaint superseded the original complaint. *Progress II*, 506 Mich at 94-95.

The Supreme Court also disagreed with this Court's reliance on *Scarsella*, noting that *Scarsella* was limited to the affidavit of merit requirement of MCL 600.2912d(1), and the language of that statute differs from the verification requirement of the COCA. *Id.* at 96. Moreover, the Court stated:

> [N]othing in MCL 600.6431 or MCL 600.6434 suggests that the failure to comply with the verification requirement renders a complaint "null and void." Nor does any other provision of the COCA or the FOIA. Finally, as already stated, MCL 600.6422(1) dictates that the court rules governing civil actions in the circuit court govern actions in the Court of Claims, and no court rule renders a complaint filed without the requisite verification a nullity. [*Id.* at 97].

The Supreme Court also rejected the argument that allowing an amended complaint to cure the lack of verification would nullify the statutory requirement, observing that plaintiffs are still required to verify their complaints and face dismissal if they fail to do so. *Id.* at 98. Thus, the Court reversed this Court's decision in *Progress I* and remanded to the Court of Claims for further proceedings. *Id.* at 99.

In a recent opinion, *Elia Co LLCs v Univ of Mich Regents*, ___ Mich App ___; ___ NW2d ___ (2021) (Docket No. 351064), this Court applied the holding of *Progress II* to reverse a decision of the Court of Claims under a fact pattern similar to that presented in this case. In *Elia*, the plaintiff entered into a lease agreement in 2013 for space in the Michigan Union in which to operate a Starbucks coffee shop. In April 2018, the defendant sent the plaintiff a letter terminating the

lease, effective three days later, alleging violations of the lease agreement, and required the plaintiff to vacate the premises. In August 2018, the plaintiff filed an action in the Washtenaw Circuit Court. When the action was transferred to the Court of Claims, the defendant filed an answer and affirmative defenses asserting that many of the plaintiff's claims were barred by governmental immunity and that the complaint was not verified as required by MCL 600.6434(2). The Court of Claims allowed the plaintiff to file an amended complaint alleging breach of contract and various tort and statutory claims, but subsequently granted the defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and dismissed the case, holding that the plaintiff had failed to comply with the verification requirement of MCL 600.6431(1). *Elia*, ___ Mich App at ___; slip op at 1-2.

On appeal, this Court first affirmed the dismissal of all of the plaintiff's claims, other than breach of contract, on the alternative grounds cited by the Court of Claims, holding that the claims were barred by governmental immunity or controlled by the breach-of-contract claim. *Id.* at ___; slip op at 3-7. This Court then addressed the application of MCL 600.6431(1) and (2) to the plaintiff's remaining claim for breach of contract. After finding that neither of the plaintiff's complaints had been verified within the meaning of MCL 600.6431 or MCL 600.6434, this Court, citing *Progress II*, concluded that while the plaintiff is required to comply with the verification requirements, the failure to comply may be corrected during the pendency of the proceedings, holding that "to the extent the Court of Claims dismissed plaintiff's breach-of-contract claim on the grounds that it was too late for plaintiff to provide proper verification, that dismissal must be reversed." *Id.* at ___; slip op at 9.

In this case, *Progress I* was binding precedent, pursuant to MCR 7.215(C)(2), when the Court of Claims concluded that an unverified complaint was invalid from its inception and could not be amended in order to comply with MCL 600.6131(1).[9] Thus, the Court of Claims did not err by holding that plaintiffs' initial complaint was a nullity and that it was compelled to dismiss plaintiffs' claims against MSU. However, on July 27, 2020, three months after the conclusion of proceedings in this case in the Court of Claims, our Supreme Court issued its opinion in *Progress II*. Because decisions of the Supreme Court are typically applied retroactively to all pending cases in which the issue has been raised and preserved, *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005), the holding of *Progress II* applies to this case. Thus, to the extent that the Court of Claims ruled that the original complaint filed by plaintiffs was a nullity that could not be amended to comply with MCL 600.6131(1), we reverse the Court of Claims' order dismissing all of plaintiffs' claims against MSU.

MSU argues that *Progress II* is distinguishable because the defendant in that case conceded that MCL 600.6431 did not apply and that case involved the limitations period of MCL 15.240 rather than the notice period of MCL 600.6431. However, in *Progress II*, 506 Mich at 97, the Supreme Court unambiguously held that nothing in the COCA renders an unverified complaint

[9] The Supreme Court granted the plaintiff's application for leave to appeal from this Court's decision in *Progress I* on March 20, 2019. *Progress Mich v Attorney General*, 503 Mich 982; 923 NW2d 886 (2019). That appeal had not yet been decided on October 22, 2019, when the Court of Claims granted MSU's motion for summary disposition.

null and void, and the distinctions cited by MSU cannot alter that holding. Moreover, this Court's subsequent decision in *Elia*, more clearly on point with this case, is also binding precedent under MCR 7.215(C)(2). In that case, this Court held that "to the extent the Court of Claims dismissed plaintiff's breach-of-contract claim on the grounds that it was too late for plaintiff to provide proper verification, that dismissal must be reversed." *Elia*, ___ Mich App at ___; slip op at 9. Similarly, in this case, to the extent that the Court of Claims held that it was too late for plaintiffs to cure the failure to verify their complaint, that decision is reversed.

MSU also argues *Progress II* does not require reversal in this case because the Court of Claims had an independent basis for dismissing the claims against MSU—plaintiffs had sufficient knowledge of their tort claims by mid-June 2018 and failed to file a notice or claim within one year, and had knowledge of their breach-of-contract claim by June 29, 2018, but failed to file a notice or a complaint within the six-month period prescribed in MCL 600.6431(4).

This argument has no merit as applied to plaintiffs' breach of contract claims. Plaintiffs alleged that MSU terminated the ELA on June 29, 2018. Plaintiffs' complaint was filed on June 28, 2019. Thus, although plaintiffs alleged several actions as breaches of the ELA, to the extent that plaintiffs allege that MSU breached the contract by "improperly terminating" it, the original complaint was filed within the one-year notice period prescribed in MCL 600.6431(1).

However, MSU's argument does have merit as applied to plaintiffs' tort claims and alleged contractual breaches that occurred before the June 29 2018 termination of the ELA. If those claims accrued more than one year before June 28, 2019, the dismissal of those claims should be affirmed, unless the fraudulent-concealment exception applies to toll the notice period.

C. FRAUDULENT CONCEALMENT

Plaintiffs next contend that the Court of Claims improperly applied the "possible cause of action standard" and erred by resolving factual questions in favor of MSU, the moving party. Because the Court of Claims correctly held that plaintiffs were sufficiently aware of their possible causes of action in June 2018, we disagree.

The fraudulent-concealment statute, MCL 600.5855, operates to toll the running of a period of limitations, and provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations. [MCL 600.5855].

Fraudulent concealment requires affirmative fraudulent acts designed to prevent inquiry, prevent investigation, or hinder acquisition of information regarding a cause of action. *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 642; 692 NW2d 398 (2004). The period of limitations stated in MCL 600.5855 begins to run when a plaintiff is aware of a "possible cause of action." *Id.* at 643, quoting *Moll v Abbott Laboratories*, 444 Mich 1, 23-24;

506 NW2d 816 (1993), abrogated not in relevant part by *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 393; 738 NW2d 664 (2007). This standard "encourages claimants to diligently investigate and pursue causes of action," and a lack of diligence will not toll the period of limitations. *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 48; 698 NW2d 900 (2005).

This appeal involves application of MCL 600.5855 to the notice period of MCL 600.6431(1). Under our Supreme Court's holding in *Progress II* and this Court's holding in *Elia*, plaintiffs' original complaint, filed on June 28, 2019, as subsequently amended by the verified first amended complaint, complied with the notice requirements of MCL 600.6431(1) for all claims that accrued after June 28, 2018. These include plaintiffs' claims for breach of contract stemming from termination of the ELA, any fraud alleged to have occurred after termination of the ELA on June 29, 2018, and any tortious inference caused by termination of the ELA. This Court need not consider whether the fraudulent-concealment statute applies to those claims.

However, application of MCL 600.5855 remains relevant to those claims that accrued before June 28, 2018, including claims that MSU misrepresented facts in order to induce plaintiffs to enter into the ELA in July 2013 and the First Amendment in December 2016. The Court of Claims found that "Swain began accusing defendants of fraud and concealment of certain, material facts back in June 2018" and that plaintiffs "had, at the latest, until June 2019 to file a signed and verified claim against defendant MSU." The court then held that plaintiffs "did not do so, and their appeal to the fraudulent-concealment exception in *Mays* is of no avail, even assuming that the originally invalid claim against MSU could be amended." The Court of Claims did not examine the facts alleged by plaintiffs any further, and did not state a date in June 2019 by which time plaintiffs' claims should have been filed in order to comply with MCL 600.6431(1).

The Court of Claims correctly held that "plaintiffs were able to know of the existence of a possible cause of action in June 2018." On June 1, 2018, Swain e-mailed Chylla stating that "CIG has additional points of discussion regarding the following topics concerning MSU." The topics listed included "False and/or Fraudulent Representations and Claims" and "Lack of Good Faith." On June 11, 2018, Swain again e-mailed Chylla. In this e-mail, under the subject heading "NEGLIGENCE, FRAUD & PERJURY," Swain accused Chylla and MSU of violating federal law and stated that Chylla did not provide documents, including a disclosure of invention and an election of title that MSU "supposedly had sent to the Federal Agency." He accused MSU of "licensing property without title, which is FRAUD" and accused MSU of "FRAUD AGAIN" in connection with the First Amendment in December 2016. Swain was clearly not requesting information, as plaintiffs argued, but was, instead, accusing MSU of misconduct and threatening to "report these abuses to the appropriate state and federal authorities." Even viewing these statements in the light most favorable to plaintiffs, it is clear that plaintiffs knew of a possible cause of action by June 11, 2018, at the latest.

Plaintiffs misstate the Supreme Court's holding in *Moll*, by claiming that the possible cause of action standard requires that the plaintiff have sufficient information to file a "viable lawsuit." In *Moll*, a case that involved application of the discovery rule to pharmaceutical products liability actions, rather than the fraudulent-concealment exception of MCL 600.5855, the Court held that "[o]nce a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action." *Moll*, 444 Mich at 24. In a footnote, the Court explained that this standard

"advocates, in harmony with the statute of limitations, diligently pursuing and investigating a possible cause of action, once the plaintiff's cloak of ignorance is swept away." *Id.* at 24 n 28. The Court explained further that a plaintiff would then have three years in which to investigate before bringing suit. *Id.* Thus, the Court clearly did not state that the discovery rule operated to toll a statute of limitations until the plaintiff had enough information to file a viable claim; rather, it held that the rule operates to toll a period of limitations until the plaintiff knows of an injury and a possible cause of the injury. At that point, the plaintiff is then required to investigate to obtain sufficient information to initiate an action. In this case, plaintiffs had sufficient information to investigate possible causes of action for fraud and misrepresentation by June 11, 2018, at the latest.

MSU now argues that the six-month notice period of MCL 600.6431(4) should apply to plaintiffs' breach of contract claims because the plaintiffs alleged property damage. MSU did not raise that issue in the Court of Claims, but clearly argued that the one-year period of MCL 600.6431(1) applied to bar plaintiffs' claims. Because this issue was neither raised in, nor decided by, the Court of Claims, we decline to address it. See *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014).

The Court of Claims correctly concluded that plaintiffs knew, or should have known, of possible causes of action in June 2018. However, because the Court of Claims held that MCL 600.5855 did not apply to toll the notice periods stated in MCL 600.6431, the court did not assign a precise date by which plaintiffs knew or should have known of the possible causes of action and did not discuss application of MCL 600.5855 to the various allegations stated in the amended complaint. Moreover, in the Court of Claims, plaintiffs argued only that their verified amended complaint was timely. In this Court, plaintiffs recognize, in a footnote, that under *Progress II*, the original complaint, as amended, would have satisfied MCL 600.6431. On remand, the Court of Claims should consider plaintiffs' verified amended complaint and determine whether any of plaintiffs' claims against MSU are subject to tolling in light of *Progress II* and *Elia*.

D. GOVERNMENT EMPLOYEE IMMUNITY

Plaintiffs argue that the Court of Claims erred by finding that Chylla acted in good faith and that his actions were discretionary. We disagree.

Following the dismissal of plaintiffs' claims of negligent misrepresentation (Count IV) and innocent misrepresentation (Count V), three intentional tort claims remained outstanding against Chylla: fraudulent misrepresentation (Count I), fraud in the inducement (Count II), and silent fraud (Count III). The GTLA does not apply to intentional torts alleged against an employee of a government agency and "does not alter the law of intentional torts as it existed before July 7, 1986." MCL 691.1407(3). Thus, as the Supreme Court explained in *Odom*, 482 Mich at 472-473, individual immunity from liability for intentional torts is determined by the test stated in *Ross*, 420 Mich at 633-635. Under this test, an employee is immune from liability for intentional torts if the employee's actions were taken during the course of employment, the employee was acting, or believed he or she was acting, within the scope of the employee's authority, and the employee's actions were undertaken in good faith. A lack of good faith may be shown by malicious intent, capricious conduct, or willful and corrupt conduct. *Odom*, 482 Mich at 473-475. The good-faith element is subjective, protecting the employee's honest belief and good-faith conduct. *Id.* at 481-482. The employee must also show that the actions were discretionary, rather than ministerial in

nature. Actions that require personal deliberation, decision, and judgment are discretionary; mere obedience to orders, performance of a duty in which the individual has no choice, and execution of an act once a decision has been made are ministerial in nature. *Id.* at 475-476.

Plaintiffs' claims that Chylla acted in bad faith do not withstand scrutiny. As an initial consideration, much of plaintiffs' case hinges on the allegation that defendants misrepresented that they had patents and patent applications for the invention when the parties entered into the ELA on July 1, 2013. However, even a cursory review of the ELA reveals the falsity of this claim; the agreement defined "patent rights" as "(a) all of the University's rights in the patents and patent applications listed on Schedule 1 and (b) all of the University's rights in all divisions, continuations, reissues, renewals, re-examinations, foreign counterparts, substitutions, or extensions thereof." Schedule 1 of the agreement did not identify any patent applications serial numbers or patent grant numbers, but merely listed an MSU reference number. The ELA did not state that MSU held any patents or that any applications had been filed.

As the Court of Claims recognized, plaintiffs alleged that Chylla made false representations in order to induce them to enter the ELA and the First Amendment. In his affidavit, Chylla asserted that, although he had reviewed and signed a Confidential Disclosure Agreement and the ELA in 2013, his staff communicated with CIG. Chylla also asserted that he did not correspond with plaintiffs before sending a default notice in April 2018 and did not meet or speak with plaintiffs or their representatives before the May 2, 2018 meeting with Swain. The Court of Claims correctly observed that plaintiffs have not presented any evidence to contradict these statements. Having not communicated with plaintiffs before April 2018, Chylla could not have misrepresented any facts to them. The Court of Claims also correctly determined that an October 2018 memo from a member of Chylla's staff requesting an extension of time to elect title cannot serve as evidence of Chylla's lack of good faith in entering the ELA and the First Amendment in 2013 and 2016. Plaintiffs assert that Chylla was actively involved in negotiating the agreements between the parties, but have provided no evidence of such involvement apart from Chylla's signature on the agreements. In short, the Court of Claims correctly concluded that plaintiffs failed to rebut Chylla's assertion that he acted in good faith.

The Court of Claims also properly addressed the discretionary nature of Chylla's conduct. On appeal, plaintiffs appear to concede that Chylla's actions regarding the ELA, First Amendment, and services agreement were discretionary, and instead focus on the requirements of the Bayh-Dole Act to argue that "the specific acts complained of in CIG's complaint are statutory and regulatory obligations" and not acts "relating to *entering* the ELA or determining its terms." This assertion is misleading. Plaintiffs' cause of action is not premised on violations of the Bayh-Dole Act, but clearly alleges fraud in inducing plaintiffs to enter into the agreements. The Court of Claims accepted Chylla's description of his deliberative and decision-making processes and correctly held that plaintiffs "have not presented anything compelling to the contrary." Therefore, the trial court properly granted summary disposition in favor of Chylla on the basis of governmental immunity.

IV. CONCLUSION

Pursuant to the Supreme Court's decision in *Progress II* and this Court's decision in *Elia*, we reverse the order of the Court of Claims granting summary disposition in favor of MSU and

remand for further proceedings consistent with this opinion. We affirm the order of the Court of Claims granting summary disposition in favor of defendant Chylla. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ James Robert Redford