

STATE OF MICHIGAN
IN THE SUPREME COURT

GRANT BAUSERMAN, KARL
WILLIAMS, TEDDY BROE, individually
and on behalf of similarly situated persons,

Supreme Court No. 156389
Court of Appeals No. 333181
Court of Claims No. 15-202-MM

Plaintiffs-Appellants,

v

MICHIGAN UNEMPLOYMENT
INSURANCE AGENCY,

Defendant-Appellee.

**MICHIGAN UNEMPLOYMENT INSURANCE AGENCY'S
BRIEF IN OPPOSITION TO
PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Laura Moody (P51994)
Chief Legal Counsel

Jason Hawkins (P71232)
Debbie K. Taylor (P59382)
Assistant Attorneys General
Attorneys for Appellee - Michigan
Unemployment Insurance Agency
Labor Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-2560

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COUNTER-STATEMENT OF JURISDICTION

The Michigan Court of Appeals issued its decision on July 18, 2017. In that decision, the Court of Appeals ruled in favor of the Michigan Unemployment Insurance Agency by reversing the Court of Claims and remanding the case to that court for entry of an order granting the Agency's motion to dismiss. The Court of Appeals held the Agency was entitled to dismissal of the claim because Plaintiffs failed to file the claim, or a notice of intent to file the claim, within six months of the event giving rise to the claim, as required under MCL 600.6431(3). This Court's jurisdiction to grant leave to appeal rests on MCR 7.305(B).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. To maintain an action for property damage against a State department, a claimant must file a claim or notice of intent to file a claim within six months after the happening of the event giving rise to the claim. Plaintiffs filed a due-process claim against the Unemployment Insurance Agency, but did so more than six months after allegedly being denied due process. Did the Court of Appeals correctly order the dismissal of Plaintiffs' claim on that basis and correctly reject Plaintiffs' assertion that a due-process claim cannot arise unless or until the claimant suffers the financial consequences of being denied due process?

Plaintiffs-Appellants' answer: No.

Unemployment Insurance Agency's answer: Yes.

Court of Claims' answer: No.

Court of Appeals' answer: Yes.

2. Plaintiffs ask this Court to remand this case to the Court of Claims so they can try to locate a putative class member to file a timely claim. But Plaintiffs did not preserve this issue for appeal. Further, any remand for that purpose would be futile. Should this Court therefore reject Plaintiffs' alternative request for relief?

Plaintiffs-Appellants' answer: No.

Unemployment Insurance Agency's answer: Yes.

Court of Claims' answer: No.

Court of Appeals' answer: Yes.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article 1, § 17 of Michigan's 1963 Constitution

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

MCL 600.5827

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

MCL 600.6419(1)

(1) Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive. All actions initiated in the court of claims shall be filed in the court of appeals. The state administrative board is vested with discretionary authority upon the advice of the attorney general to hear, consider, determine, and allow any claim against the state in an amount less than \$1,000.00. Any claim so allowed by the state administrative board shall be paid in the same manner as judgments are paid under section 6458 upon certification of the allowed claim by the secretary of the state administrative board to the clerk of the court of claims. Except as otherwise provided in this section, the court has the following power and jurisdiction:

(a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

(b) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ that may be pleaded by way of

counterclaim on the part of the state or any of its departments or officers against any claimant who may bring an action in the court of claims. Any claim of the state or any of its departments or officers may be pleaded by way of counterclaim in any action brought against the state or any of its departments or officers.

(c) To appoint and utilize a special master as the court considers necessary.

(d) To hear and determine any action challenging the validity of a notice of transfer described in section 6404(2) or (3).

MCL 600.6431

(1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

....

(3) In 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 600.6452(1)

(1) Every 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 or suit instituted thereon in federal court as authorized in section 6440, within 3 years after the claim first accrues.

MCR 7.212(C)

(C) Appellant's Brief; Contents. The appellant's brief must contain, in the following order:

....

(7) The arguments, each portion of which must be prefaced by the principal point stated in capital letters or boldface type. As to each issue, the argument must include a statement of the applicable standard or standards of review and supporting authorities, and must comply with the provisions of MCR 7.215(C) regarding citation of unpublished Court of Appeals opinions. Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court. Page references to the transcript, the pleadings, or other document or paper filed with the trial court must also be given to show whether the issue was preserved for appeal by appropriate objection or by other means. If determination of the issues presented requires the study of a constitution, statute, ordinance, administrative rule, court rule, rule of evidence, judgment, order, written instrument, or document, or relevant part thereof, this material must be reproduced in the brief or in an addendum to the brief. If an argument is presented concerning the sentence imposed in a criminal case, the appellant's attorney must send a copy of the presentence report to the court at the time the brief is filed;

.....

INTRODUCTION

Plaintiffs' application for leave to appeal focuses on the negative impact the Court of Appeals' decision had on them, while ignoring the important fact that the court correctly applied the facts to the law. Applying controlling Michigan law, the Court of Appeals properly analyzed the nature of Plaintiffs' claim, and applied both the plain language of the Court of Claims Act and this Court's decisions on the pertinent issues. In the end, Plaintiffs simply failed to timely file their claim or notice of intent to file it.

The core allegation of Plaintiffs' claim is that the Unemployment Insurance Agency deprived them of their due-process rights when it concluded they had fraudulently obtained unemployment benefits. They assert the Agency used an automated system to adjudicate these issues and therefore deprived Plaintiffs of the opportunity to contest the Agency's allegations. Because this lack of notice and opportunity to object was therefore the event giving rise to Plaintiffs' claim, they were required to file the claim or notice of intent within six months of the denial of due process. But they did not, and they therefore cannot maintain their claim.

The Agency does not mean to suggest the consequences of having their claim dismissed are not real or important to Plaintiffs. They no doubt are, and the Agency has taken many actions to address the issues raised by Plaintiffs and other claimants. But those consequences do not change the fact that the Court of Appeals correctly applied the law to the facts presented, and that this Court should therefore deny leave to appeal.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

A. Plaintiffs allege the Agency's fraud-detection and adjudication system violated their due-process rights, resulting in economic harm.

Plaintiffs allege they were deprived of their property without due process of law. Their stated "property interest" includes unemployment benefits, wages, and tax returns. (Am Compl, p 32.) As with any procedural-due-process case, and especially in this case where the accrual of such a claim is at issue, it is crucial to examine the facts underlying the alleged due-process violation. The relevant portion of each named Plaintiffs' factual scenario is presented below.

Grant Bauserman

After separating from his employment, Bauserman collected unemployment benefits from September 2013 until early March 2014. (Am Complaint, p 17; App for Leave, p 6.) During a later investigation, the Agency learned that Bauserman received a sizeable payment (\$256,299.16) from his former employer for the quarter ending December 31, 2013, and \$36,963.00 for the quarter ending March 31, 2014, and that he failed to report that remuneration to the Agency. (Ex 8 to Agency Br in Supp of Mot to Dismiss.) On December 3, 2014, the Agency issued a redetermination finding Bauserman ineligible for benefits, demanding repayment of all improperly received benefits, and assessing a penalty for intentionally misleading or concealing information from the Agency in order to obtain benefits. (*Id.*, Ex 14; App for Leave, p 18.) Bauserman did not protest or appeal that redetermination within the time period provided in the redetermination. He later

sent letters to the Agency asserting his former employer had mistakenly reported earnings, but he never fully explained what the unreported money was for until March 2015—after the Agency began collection activity on the December 3, 2014 redetermination. (Am Compl, pp 18-20.) These collection efforts included intercepting Bauserman’s tax refunds. (Am Compl, p 21; App for Leave, pp 6, 18.)

Bauserman filed a late protest of the Agency’s December 3, 2014 redetermination, and the Michigan Administrative Hearing System returned the matter to the Agency with a request for more information. The Agency then reviewed the information submitted by Bauserman (after the December 3, 2014 redetermination became final) and concluded that the payment from his former employer was a bonus earned in 2013 and was not remuneration. Thus, the Agency issued a redetermination on September 30, 2015, finding the December 3, 2014 redeterminations “null and void.” (Ex 25 to Agency Br in Supp of Mot to Dismiss.) The Agency has returned all monies collected from Bauserman.

Karl Williams

Williams collected benefits in May of 2011, while also working full-time and training to be a manager. (Am Compl, pp 22-23.) On June 22, 2012, the Agency issued a redetermination finding Williams ineligible for benefits, and assessing a penalty for intentionally misleading the Agency to obtain benefits by failing to report his remuneration. (*Id.*, p 23.) He did not protest or appeal that redetermination within the time period provided in the redetermination. The

Agency later began collecting on the debt from the June 22, 2012 redetermination, and provided him a notice of garnishment on October 29, 2013. (Am Compl, p 24.)

Williams filed a late protest of the June 22, 2012 redetermination, and on July 1, 2014, an ALJ held Williams failed to establish good cause for his late protest. (Am Compl, p 23.) Williams took no further appeal.

On February 19, 2015, Williams was notified his federal income tax refund had been intercepted and seized to be applied to the debt he owed to the Agency stemming from the June 22, 2012 redetermination. (Am Compl, p 24.) The Agency continues to collect Williams's debt.

Teddy Broe

Broe collected benefits in 2013, and after his employer disputed his eligibility, the Agency requested information from Broe but he did not respond. (Am Compl, pp 24-25.) Based upon information available to it, the Agency issued redeterminations on July 15, 2014, finding Broe ineligible for benefits and assessing penalties. (*Id.*, p 25.) Broe did not protest or appeal the redeterminations within the time period provided in the redetermination. (*Id.*) In 2015, the Agency sent a notice that Broe owed the Agency over \$8,000 in restitution for the improperly paid benefits, interest, and fraud penalties. (*Id.*) The Agency then collected on that debt by intercepting Broe's state and federal tax refunds in May of 2015. (*Id.*, p 26.)

Broe filed a late appeal of the 2014 redeterminations, but an ALJ denied the late protest on September 24, 2015, because Broe failed to establish good cause for the late appeal. (Am Compl, p 26.) Broe appealed the ALJ's decision and on

October 8, 2015, the matter was returned to the Agency. The Agency reconsidered its previous redeterminations and additional information submitted by Broe, and on November 4, 2015, issued a new determination in Broe's favor. (Ex 18 to Agency Supplemental Br in Supp of Mot to Dismiss.) All intercepted monies have been returned to Broe.

The complaints

On September 9, 2015, Bauserman (as the sole named class representative) filed a complaint with the Court of Claims. (Register of Actions, Entry 1.) The complaint alleged that the Agency's use of the Michigan Data Automated System (MiDAS) to "detect and adjudicate suspected instances of unemployment benefit fraud . . . deprives UIA claimants of due process and fair and just treatment because it determines guilt without providing notice, without proving guilt and without affording claimants an opportunity to be heard before penalties are imposed." (Compl, pp 1-2.) The "result of the violations of the Michigan Constitution" to Bauserman and the putative class were "economic damages." (*Id.*, p 21.)

After the Agency filed a motion to dismiss based, in part, on Bauserman's failure to comply with the notice requirement of the Court of Claims Act, Bauserman filed an amended complaint on October 19, 2015, adding Williams and Broe as additional class representatives. (Register of Actions, Entry 11.) The allegations and thrust of the amended complaint were nearly identical to the original complaint. But the amended complaint included allegations that the

Agency's means of collecting debts owed to it violated the Michigan Employment Security Act, MCL 421.1, *et seq.* (Am Compl, pp 2-3 and 14-17.) The Agency again moved to dismiss the amended complaint.

B. The Court of Claims denies the Agency's motion to dismiss, holding that Plaintiffs' claims accrued after the filing of the complaint.

Following oral argument, the court issued its opinion and order on May 10, 2016 denying the Agency's motion to dismiss. (Opinion and Order (Attach A), p 2.) The court held, in relevant part, that Bauserman and Broe could not "fully allege the elements" of their constitutional tort claim (false accusation of fraud and wrongly deprived of property) until the Agency issued the redeterminations on September 30, 2015 and November 4, 2015, respectively, which rendered the previous fraud determinations null and void. (*Id.*, p 7.) Thus, the court concluded, the filing of the amended complaint on October 19, 2015 was filed within six months of the redetermination dates, and plaintiffs therefore complied with the requirements of MCL 600.6431. (*Id.*, p 8.)

The Court of Claims made other rulings that are not involved in this appeal.

C. The Court of Appeals reverses the Court of Claims and holds that a due-process claim accrues when a plaintiff is denied notice and an opportunity to be heard, not when a plaintiff ultimately realizes the economic consequences of the denial of due process.

The Agency appealed the Court of Claims' decision and argued the court erred in holding that Plaintiffs' claims accrued *after* they filed their complaints.

The Court of Appeals agreed and held that the Court of Claims' conclusion on when Plaintiffs' claims accrued was incorrect and warranted reversal. *Bauserman v Unemployment Ins Agency*, unpublished opinion per curium of the Court of Appeals, issued July 18, 2017 (Docket No. 333181) (Attach B), p 9. Instead, the Court of Appeals concluded that since the nature of Plaintiffs' claim was a violation of the Due Process Clause of the Michigan Constitution, and because the fundamental requirement of due process is reasonable notice of proceedings and a meaningful opportunity to object and be heard, the wrong on which Plaintiffs' claim was therefore based was the Agency's adjudication they fraudulently obtained unemployment benefits without giving Plaintiffs notice and a chance to be heard. *Id.*, pp 9-10 (citations and quotations omitted).

The court expressly rejected Plaintiffs' argument that their claim did not accrue until they suffered economic harm. Attach B, pp 9-10. Citing this Court's recent decision in *Frank v Linkner*, __ Mich __; 894 NW2d 574 (2017), the court noted the difference between the occurrence of a wrong on which a claim is based—the accrual of that claim—and the resulting monetary damages or financial injury from the harm. *Id.*, citing *Frank*, 894 NW2d at 584-586 (internal quotations and citations omitted). The court concluded that Plaintiffs here, like those in *Frank*, “erroneously focus on the potential consequence of a due process violation, the taking of their property, rather than the hallmark of a due process claim, the right to notice and an opportunity to be heard.” *Id.*, p 10.

Thus, because each Plaintiff failed to file a notice of intent to file their claim, or the claim itself within six months of the happening of the event giving rise to their claim—the issuance of their fraud adjudications—the Court of Appeals concluded Plaintiffs failed to comply with MCL 600.6431(3). Attach B, pp 10-11. The court remanded the matter to the Court of Claims to grant the Agency’s motion to dismiss. *Id.*, p 11.

STANDARD OF REVIEW

The question before this Court, like it was before the Court of Appeals, is whether Plaintiffs claims are barred because Plaintiffs failed to pursue them in accordance with MCL 600.6431. Analysis of that question requires the Court to interpret MCL 600.6431, which it does de novo. *McCahan v Brennan*, 492 Mich 730, 736 (2012).

ARGUMENT

- I. **The Court of Appeals correctly applied the plain language of MCL 600.6431 and this Court’s precedent, in concluding that Plaintiffs could not maintain their claim because they failed to timely file the claim or a notice of intent to file it.**

It is a well-known fact that a party seeking to sue the State of Michigan or any of its departments or officers, for most claims, must do so in the Court of Claims. MCL 600.6419(1). In order to maintain such action, the party must file the claim or a notice of intent to file it, within a specific time period. MCL 600.6431. That is, within so much time of the happening of the event giving rise to the claim. MCL 600.6431, 600.5827. When the resulting damage from the event occurs simply

does not factor into the analysis. MCL 600.5827 (“the claim accrues at the time the wrong upon which the claim is based was done *regardless of the time when damage results*”) (emphasis added). Plaintiffs refuse to recognize this well-settled point of law, and continue to argue their claim did not accrue until they suffered financial harm. The law dictates a different result, and it is the result reached by the Court of Appeals. Plaintiffs’ claim accrued when they allege they were deprived of due process—the chance to learn about the Agency’s conclusion that they fraudulently obtained unemployment benefits and to rebut that conclusion in a meaningful way. Plaintiffs did not file this claim within the statutory period required to maintain the claim. Thus, the Court of Appeals correctly ordered the dismissal of the claim.

A. Failure to bring a claim in conformity with MCL 600.6431 requires the dismissal of the claim.

1. The Court of Claims Act is a narrow abrogation of governmental immunity.

Governmental agencies in Michigan are generally immune from tort liability, but the Legislature can subject the governmental agency to liability or suit and can determine whether and on what terms the State may be sued. *McCahan*, 492 Mich at 732 (citing *Rowland v Washtenaw Co Road Comm*, 477 Mich 197, 202 (2007)). The Court of Claims Act, MCL 600.6401, *et seq.*, is a legislative expression waiving governmental immunity, authorizing suit against the State under certain requirements and only where certain procedural requirements are met. If these conditions precedent to bringing and maintaining an action against the State are

not met, governmental immunity is not abrogated and the case must be dismissed. *McCahan*, 492 Mich at 752.

Thus, to bring a claim against the State or one of its agencies in derogation of governmental immunity, a plaintiff must fully and completely follow the provisions of the Court of Claims Act. *McCahan*, 492 Mich at 737; see also *Fairley v Dep't of Corrections*, 497 Mich 290, 293 (2015). One such provision is the notice requirement of MCL 600.6431. Specifically, subsection 6431(1) provides that no claim may be maintained against the State unless the claimant files a written claim or written notice of intent to file a claim within “1 year after such claim has accrued” MCL 600.6431(1). Further, section 6431(3) modifies the one-year requirement in section 6431(1) for claims where a claimant alleges property damage or personal injury. In such cases, the claimant must file a notice of intent 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); *McCahan*, 492 Mich at 741-742. A failure to comply with the notice provision entitles State defendants to dismissal of the action without a showing of prejudice. *Id.*, at 746.

The notice requirements of MCL 600.6431 must be met even where the claim is constitutional in nature. *Rusha v Dep't of Corrections*, 307 Mich App 300, 313 (2014). Thus, the analysis of when the claim accrued (when the wrong on which the claim is based occurred) turns to the nature of the constitutional claim at issue. As the Court of Appeals correctly held in this case, Plaintiffs' due-process claim accrued when they were allegedly denied the fundamental requirement of due process—

reasonable notice of the government's action and a chance to have a meaningful hearing.

2. Plaintiffs were required to file their claim, or a notice of intent to file it, within six months of the wrong on which the claim was based.

The Court of Appeals held, and Plaintiffs concede, that the six-month notice requirement of MCL 600.6431(3) is applicable here. Attach B, p 5; App for Leave, p 9. Section 6431(3) provides that a claimant who seeks damages from the State for personal injury or property damage must file with 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).

Plaintiffs continue to ignore this distinction, and they assert that any argument or decision against their position would compel them to file their claim prematurely. (See App for Leave, pp 1, 14.) But a written *claim* and a written *notice of intent to file a claim* are distinct filings. A plaintiff *is not* required to file a claim within six months of the event giving rise to the claim. They can simply file the notice of intent, and still comply with MCL 600.6431(3). Once a plaintiff has complied with the MCL 600.6431 notice requirement, they must file the claim itself within the three-year statute of limitations. MCL 600.6452(1). Thus, MCL 600.6431 recognizes there may be situations where a plaintiff is not able to bring the *claim* itself within six months of the event giving rise to the claim. But the plaintiff still must file the notice of intent within six months of that date.

So, Plaintiffs are wrong when they assert the Court of Appeals' ruling, if left to stand, would require claimants to file premature claims. Neither the Court of Claims Act nor the Court of Appeals' decision requires that. Rather, they require that a claimant file a claim for property damage, or notice of intent to file such a claim, within six months of the event giving rise to the claim. And all the Court of Appeals did was analyze the nature of Plaintiffs' claim to determine which event gave rise to it, and therefore when the claim or notice of intent had to be filed. The following sections discuss the nature of Plaintiffs' claim and the event that gave rise to it, and explain why the Court of Appeals' decision was correct.

B. At its core, due process requires notice of pending action and the opportunity to be heard.

State action that takes property from its owner must comport with due process. *Sidun v Wayne County Treasurer*, 481 Mich 503, 509 (2008). A fundamental requirement of due process in such proceedings is “notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* (quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314 (1950)).

Plaintiffs seem to believe that Article 1, § 17 of Michigan's Constitution is a blanket ban on the government taking property. But it is no such thing. Rather, it prohibits taking such property without due process. That right to due process is the right granted by Article 1, § 17. Thus, a claim alleging a deprivation of property without due process does more than allege the deprivation of property. Otherwise it

would be a claim for conversion. What makes a due-process claim unique—indeed, the core of a due-process claim—is that the claimant was deprived of notice of an action or proposed action, and an opportunity to present evidence and be heard. Plaintiffs ignore this distinction and assert their claim (unequivocally styled as a due-process claim) focuses solely on being deprived of property, and therefore they could not have brought this claim until they were deprived of that property. But as explained in the following sections, that assertion ignores the Plaintiffs’ own words throughout this litigation.

C. Plaintiffs’ claims accrued when the Agency issued adjudications that they fraudulently obtained unemployment benefits, not when the Agency collected on those adjudications.

Plaintiffs have asserted from the beginning of this case, up to and including now, that the Agency’s use of the MiDAS system violates Article 1, § 17 of the Michigan Constitution because it adjudicates them as having fraudulently obtained unemployment benefits without first affording them notice of the issue and a chance to defend themselves. (Compl, pp 1-2; Am Compl, p 2; Resp to Mot to Dismiss, pp 4, 17; Merits Br to Court of Appeals, pp 1, 3; App for Leave, pp 7, 11.)

In their complaint, amended complaint, and this application for leave, Plaintiffs stated that the Agency’s use of MiDAS to detect suspected instances of fraud and adjudicate those issues deprived claimants of due process because it determines a claimant’s guilt without providing notice, without actually proving guilt, and because it fails to give claimants an opportunity to protest the charge before penalties are imposed. (Compl, pp 1-2, 8-9; Am Compl, pp 2, 10-12; App for

Leave, p 7.) In briefing before the Court of Claims and the Court of Appeals, Plaintiffs asserted their case arose out of the Agency's use of MiDAS to adjudicate suspected instances of fraud, and that they were challenging the constitutionality of that "fraud-determination procedure." (Resp to Mot to Dismiss, p 17; Merits Br to Court of Appeals, pp 1, 3.) Finally, in their application for leave to this Court, Plaintiffs state their "core allegation" is that the Agency deprived them of their property (tax returns and wages) "without *first* affording them adequate *prior* notice and a hearing." (App for Leave, p 11 (emphasis added).) Thus, going on Plaintiffs' own words, it is clear the event giving rise to their due-process claim (not being afforded a hearing) occurred before the Agency actually intercepted their tax returns or garnished their wages.

- 1. The Court of Appeals correctly identified the triggering date for Plaintiffs' claim, and correctly concluded that it happened well more than six months prior to the filing of the claim.**

If, as just described, Plaintiffs claim that they were entitled to notice and a hearing *before* the Agency made a fraud adjudication, then the latest their claim could have accrued (the happening of the event giving rise to the claim) was when the Agency made the adjudication while allegedly failing to notify the Plaintiffs and afford them a hearing. The Court of Appeals reached this straight-forward conclusion. Attach B, pp 9-10. For Bauserman, that date was December 3, 2014; for Williams, that date was June 22, 2012; and for Broe, that date was July 15, 2014. (Am Compl, pp 23, 25; App for Leave, p 18.) These adjudications (and

accompanying lists of overpayments) explained to Plaintiffs what the Agency concluded, how much money the Agency determined they owed (including restitution and fraud penalties), and how the Agency could collect that money. By filing their claims in September and October of 2015, Plaintiffs failed to comply with the notice requirement in MCL 600.6431(3). The Court of Appeals correctly held that Plaintiffs could therefore not maintain this claim.

Like other plaintiffs bringing an action against the State, Plaintiffs here were required to file their due-process claim, or notice of intent to file it, within six months of the event giving rise to the claim. MCL 600.6431(1), (3). The Court of Appeals correctly held that Plaintiffs' failure to timely bring the claim was fatal to the maintenance of their claim.

2. Plaintiffs are incorrect when they assert their claims did not accrue until the Agency collected on the fraud adjudications.

Plaintiffs continue to assert that their claim that the Agency adjudicated them to have committed fraud, allegedly without due process, did not accrue until the Agency collected on that adjudication. (App for Leave, pp 15-17.) That is, they say that their constitutional claim did not accrue until they suffered financial harm. But as the Court of Appeals correctly noted, the Agency's collection on the fraud adjudications was the consequence of the Agency's alleged unlawful adjudication; not the harm on which the due-process claim was based. Attach B, p 9.

The Court of Appeals properly concluded the tax intercepts and wage garnishments were *the consequence* of the Agency's alleged due-process violation—

not the triggering event for the due-process claim itself. Plaintiffs insist the actual financial consequences of the lack of due process are the be-all and end-all of a due-process claim; that such a claim cannot be brought unless these financial consequences occur. That is simply inaccurate. See *Carey v Piphus*, 435 US 247, 266 (1978) (recognizing an actionable claim for the denial of due process even if there is no actual injury). Further, Plaintiffs' assertion is the precise conflation of harm and damages that this Court proscribed in *Frank*.

As this Court instructed in *Frank*, the focus is on the date the Plaintiffs "first incurred the harms they assert." 894 NW2d at 584. Here, that was when the Agency adjudicated Plaintiffs to have fraudulently obtained benefits. Under the MES Act, the Agency can collect restitution, interest, and penalties only after a final determination that an individual fraudulently obtained those benefits. MCL 421.54, 421.62. Thus, the adjudication issued to each Plaintiff was the event giving rise to Plaintiffs' claim because it was the event that allowed the Agency to later engage in collection activity. So the "harm" of being adjudicated to have committed fraud is separate from the resulting financial damage of the Agency collecting on the final adjudication.

Plaintiffs have seemingly recognized this distinction throughout the litigation. (See Compl, p 21; Am Compl, p 34 ("*as a result*" of the due-process violation, Plaintiffs "have suffered significant economic damages"); Resp to Mot to Dismiss, p 3; Merits Br to Court of Appeals, p 2 (stating that the Agency's improper fraud adjudication "expos[ed]" Plaintiffs to fraud penalties); Merits Br to Court of

Appeals, p 1 (stating that the collection activities were a *consequence* of the improper “decision-making system”); Merits Br to Court of Appeals, p 3; App for Leave, p 7 (asserting that the “automated decision-making system” violates their due-process rights and “*culminat[es]* in the interception of tax refunds and other seizures of property”) (emphasis added.) But they continue to “conflate[] monetary damages with ‘harm.’” *Frank*, 864 NW2d at 585. This Court rejected that conflation in *Frank*. The Court of Appeals correctly did so in this case and other cases regarding MCL 600.6431(3). See *Ranch Rheaume, LLC v Dep’t of Agriculture*, unpublished opinion per curiam of the Court of Appeals, issued March 17, 2015 (Docket No. 317631) (Attach C, p 4) (holding that the happening of the event giving rise to the due process and taking claims at issue was the date the state placed his elk ranch under quarantine, not on a date the plaintiff may have suffered a recognizable loss).

3. Plaintiffs were arguably deprived of their tax refunds or wages prior to the actual interception or garnishment of them.

If the Court were inclined to agree with Plaintiffs that some sort of taking or deprivation is required before their due-process claim could accrue, that occurred long before the actual tax refund was intercepted (Bauserman and Broe) or wages garnished (Williams). The term “property” as used in the Due Process Clause “includes not only title and possession, but also the rights of acquisition and control, the right to make legitimate use or disposal of the thing owned, such as pledge it for a debt, or to sell or transfer it.” *Butcher v City of Detroit*, 131 Mich App 698, 706

(1984). Here, at the moment that each individual who received improperly paid benefits received a notice of intent to intercept his tax refund or garnish his wages, he no longer has the right “of acquisition and control” of the money. *Id.*

Bauserman admits that on February 13, 2015, the Agency sent him a notice of intent to intercept, which included the amount due and owing and informed him that the Agency’s collection action may include interception of his state and federal income tax refund. (Am Compl, pp 19-20; see also Ex 22 to Agency Br in Supp of Mot to Dismiss.) Using February 13, 2015 as the happening of the event, the six-month notice period expired on August 13, 2015. For Williams, the Agency served a notice of garnishment on October 29, 2013. (Am Compl, p 24.) Thus, the six-month period expired in April 29, 2014. And for Broe, the Agency issued its notice of intent to withhold federal income tax refund on September 2, 2014. (Ex 16 to Agency’s Supp Br in Support of Mot to Dismiss.) Thus, the six-month period expired on March 2, 2015.

Using the definition of “property” in *Butcher*, the deprivation occurred more than six months before the physical taking of the refunds. Under any of the above scenarios, none of the individual class representatives timely filed their claim in compliance with MCL 600.6431(3). Thus, the Agency is entitled to dismissal. *McCahan*, 492 Mich at 746.

II. Plaintiffs failed to preserve the issue of remanding this case for the substitution of a new class representative.

This Court requires parties appearing before it to properly preserve issues they ask the Court to consider, and it generally refuses to consider issues that are not properly preserved. Plaintiffs ask the Court to remand the matter to the Court of Claims so that they can search for a putative class member who might be able to file a timely claim, but they have never raised this issue before and therefore did not properly preserve it for this Court's consideration. But even if the Court were to consider the issue, it should reject Plaintiffs' request because a remand for that purpose would be futile.

A. Plaintiffs failed to properly preserve the remand issue.

As an alternative request for relief, Plaintiffs ask this Court to remand this matter to the Court of Claims to determine whether there may be a putative class member who could file a timely claim. (App for Leave, p 21.) But this Court should reject this request because Plaintiffs failed to properly preserve it for review.

This Court has long held that it is not required to address issues that are raised for the first time on appeal. See, *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234 (1993) (refusing to consider a constitutional claim raised for the first time on appeal to this Court). The Agency has consistently argued to the Court of Claims, the Court of Appeals, and now to this Court that Plaintiffs' claim did not meet the six-month notice requirement in the Court of Claims Act. Despite having several opportunities to assert that they should have the chance to find a potential putative class member who could file a timely claim, Plaintiffs did

not present that argument before this appeal. This Court has rejected consideration of such issues.

Plaintiffs fail to even acknowledge that they did not preserve this issue, as required by this Court's rules. MCR 7.212(C)(7) ("Page references to the transcript, the pleadings, or other document or paper filed with the trial court must also be given to show whether the issue was preserved for appeal by appropriate objection or by other means."). Instead, they hoist the issue upon the Court and expect the Court to consider it.

B. The notice requirement in the Court of Claims Act is not a statute of limitations that can be tolled upon the filing of a class-action complaint.

Plaintiffs cite *Cowles v Bank West*, 476 Mich 1 (2006), as support for their assertion that the filing of their complaint tolled the statute of limitations for other putative class members to file a complaint or be substituted as a class representative. (App for Leave, p 21.) But *Cowles* does not aid Plaintiffs' argument.

First, this Court has been very clear that the notice provision of the Court of Claims Act *is not* a statute of limitations. Rather, this Court views the notice requirement as an essential prerequisite to sue the state in the Court of Claims, and the failure to timely file a claim or notice of intent to file a claim bars the Court of Claims from considering the claim. In other words, the notice requirement is "bars-to-claims language." *McCahan*, 492 Mich at 738. The six-month notice requirement of MCL 600.6431(3), therefore, is a hard and fast rule; not something that can be tolled like a statute of limitations.

In addition to this Court’s interpretation of the Court of Claims Act, the Act itself draws a distinction between a written *claim* and a written *notice of intent to file a claim*. A plaintiff is only required to file the notice of intent to file a claim within six months of the event giving rise to the claim. Once a plaintiff complies with the notice requirement, their claim is *then* governed by the shorter of either the “all-purpose” three-year limitation period under MCL 600.6452, or an otherwise applicable statute of limitations. See *Gleason v Dep’t of Transp*, 256 Mich App 1, 2 (2003). Therefore, the six-month notice requirement is not a statute of limitations within which a party must bring their claim, because they need only file the notice within six months of the event giving rise to the claim. They would then turn to another statute to find the statute of limitations within which they must bring the actual claim. See MCL 600.6452(1). Thus, any discussion about statute of limitations and tolling is just not applicable to this case.

Second, *Cowles* addressed an issue that is not present in this case. There, the Court had to address “whether the filing of a class-action complaint tolls the period of limitations under MCR 3.501(F) for a putative class member’s claim when that claim was not pleaded in the initial class-action complaint but arose out of the same factual and legal nexus.” *Cowles*, 476 Mich at 4. The Court held that the statute of limitations was tolled “as long as the defendant ha[d] notice of both the claim being brought and the number and generic identities of the potential plaintiffs.” *Id.* But that is not the situation we confront in this case. Plaintiffs are not seeking to have a putative class member bring a new claim that was not pled in the October 19,

2015 amended complaint. Rather, they appear to be asking this Court to remand the matter so a *different person* can be the representative of the *same claim*. (App for Leave, p 21.)

C. A remand would be futile because no new putative class member could comply with the requirements of MCL 600.6431.

The only individuals who signed and verified a written claim before an officer authorized to administer oaths, as *required* by MCL 600.6431(1), are Bauserman, Williams, and Broe.¹ Any new class representative would also have to file such a verified claim or notice of intent to file a claim within six-months of the wrong on which the claim is based. In this case, that would be within six months of the Agency issuing a fraud adjudication through MiDAS, allegedly without any due-process protections. As explained below, no new class member could meet that requirement.

1. Any individual purporting to represent a class must file a signed and verified claim or notice of intent to file a claim within the statutory deadline.

The Court of Claims Act is clear that “the claimant” who seeks damages from the state must file either a claim or notice of intent to file a claim that is *signed and verified by the claimant* within the specific deadline imposed under the statute. MCL 600.6431. Thus, under the plain language of section 6431, any class

¹ Plaintiff Bauserman signed and verified the original complaint (filed on September 9, 2015) on August 31, 2015, and Plaintiffs Williams and Broe signed and verified the amended complaint (filed on October 19, 2015) on October 19, 2015.

representative would be required to file a “signed and verified” claim or notice of intent to file a claim within the six-month period. There is no language within the statutory notice provision that allows one claimant or class representative to provide notice for other named claimants or class representatives who purport to assert their own “right, demand or claim.” Indeed, this Court held that the plain language of section 6431 did not allow an attorney to sign the notice on behalf of his client. *Fairley*, 497 Mich at 292. If an attorney is not authorized to sign the notice on behalf of a client, certainly one class representative cannot piggyback on the signature of another class representative. Yet that is exactly what Plaintiffs ask this Court to permit: to allow a speculative class member to represent the nonexistent class, without having to satisfy the requirements of MCL 600.6431. This requests flies directly in the face of clear precedent from this Court.

2. No new class representative could comply with the prerequisites in the Court of Claims Act that are necessary to maintain this action.

As the Court of Appeals correctly concluded, the “wrong” on which Plaintiffs’ due-process claim is based, is the Agency’s MiDAS-adjudicated determination that they fraudulently obtained unemployment benefits. We know that because every financial harm that Plaintiffs assert is a direct result of that determination, which Plaintiffs alleged violated their due-process rights because they were not afforded the opportunity to appear or present evidence. Even in their application for leave, Plaintiffs admit the fraud adjudication is the triggering event. They state, “that the Agency’s use of the MiDAS system caused them to be deprived of their property

without due process in violation of Art. 1, § 17 of the Michigan Constitution.” (App for Leave, p 7.) Further, in seeking a remand for the discovery of a new class representative, Plaintiffs specifically refer to “the discontinuation of the MiDAS system.” (*Id.*, p 21.) Plaintiffs only allegation on the Agency’s use of MiDAS was that it automatically determined people had fraudulently obtained benefits. Thus, to take Plaintiffs’ allegations at face value, if the Agency’s use of MiDAS is what allegedly violated their due-process rights, then this cannot be a collections case as they now claim. The Court of Appeals got it right—this case is about adjudicating Plaintiffs, through MiDAS, as having committed fraud without due process.

Because the Agency discontinued using MiDAS in the way described in Plaintiffs’ amended complaint in September of 2015, any purported class representative would have had to file a signed and verified claim or notice of intent by March of 2016.

Thus, there are no putative class members who could comply with the requirements in MCL 600.6431(1) and (3). That is, no class member could now sign and verify a claim or notice of intent to file a claim, before an officer authorized to administer oaths, and file it within six months of September 4, 2015. Because no new class representative could comply with the requirements necessary to maintain an action against the Agency, this Court should reject Plaintiffs’ request to remand this matter for the naming of a new class representative.

CONCLUSION AND RELIEF REQUESTED

A plaintiff cannot maintain a claim against the State unless it satisfies the requirements of MCL 600.6431. Because Plaintiffs' claim is one alleging a violation of their due-process rights, they were required to file their claim, or notice of intent to file it, within six months of allegedly being denied notice and an opportunity to be heard about whether they fraudulently obtained unemployment benefits. They plainly failed to do so.

The Court of Appeals therefore correctly determined that Plaintiffs failed to meet the notice requirement in the Court of Claims Act, and could not maintain their claim. Thus, this Court should deny Plaintiffs' application for leave.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Laura Moody (P51994)
Chief Legal Counsel

/s/ Jason Hawkins
Jason Hawkins (P71232)
Debbie K. Taylor (P59382)
Assistant Attorneys General
Attorneys for Appellee - Michigan
Unemployment Insurance Agency
Labor Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-2560

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