

STATE OF INDIANA

COUNTY OF LAKE

STATE OF INDIANA *ex rel.* CURTIS  
T. HILL, JR., ATTORNEY  
GENERAL OF INDIANA,

Plaintiff,

v.

WILLIAM J. PFISTER, RICHARD A.  
SOPKO, TRAVELERS CASUALTY  
AND SURETY COMPANY OF  
AMERICA, WESTERN SURETY  
INSURANCE COMPANY, and OHIO  
FARMERS INSURANCE  
COMPANY,

Defendants.

IN THE LAKE CIRCUIT COURT

CAUSE NO. 45C01-1705-PL-00051

**MOTION FOR CERTIFICATION OF INTERLOCUTORY ORDER  
AND FOR STAY OF PROCEEDINGS PENDING APPEAL**

Comes now Plaintiff, State of Indiana *ex rel.* Curtis T. Hill, Jr., Attorney General of Indiana (State), by Heather M. Crockett, Deputy Attorney General, pursuant to Indiana Appellate Rule 14(B), and respectfully requests that the Court certify for appeal the interlocutory order entered October 27, 2020, and stay further proceedings in the trial court pending disposition of Plaintiff's interlocutory appeal.

Specifically, the State argues that the Court erred in deciding how the discovery rule applies to the Crime Victims Relief Act to the extent that the State is barred from pursuing those claims. Pursuant to case law, the statute of limitations, while it is two (2) years, does not begin to run until the Office of the Attorney

General has notice of the potential claim by referral of either a preliminary or final audit report from SBOA.

## **BACKGROUND**

The State filed its complaint in this matter alleging that Defendants William J. Pfister and Richard A. Sopko (collectively defendants) had misappropriated funds through the calculation of annuity and pension payments in their contracts with the School Town of Munster. The State seeks to collect a total of \$851,451.35 from Defendants including audit costs. The Audit Report at issue was verified and referred to the Office of the Attorney General (OAG) on June 8, 2016 and this case was filed May 23, 2017—less than one year later.

Between October 2017 and January 2018, defendants filed their motion for summary judgment, arguing in part that the State's action was untimely, and the State filed its related briefings. On March 27, 2018, this Court granted defendants' motion for summary judgment, concluding that the State's recovery of claims and CVRA claims were barred by the applicable statutes of limitations. The State appealed that ruling and the matter was remanded by the Indiana Supreme Court to the trial court on April 3, 2020, to reconsider in light of *Robertson v. State*, 141 N.E.3d 1224 (Ind. 2020).

Pfister and Sopko filed their motion to maintain the summary judgment decision and memorandum in support and related briefings followed. On October 27, 2020, the Court entered its order setting aside the March 27, 2018 order

in part. Specifically, the Court set aside the order as it related to the underlying claims seeking recovery of public funds but reaffirmed its ruling on the State's treble damages claim.

The order setting aside the March 27, 2018 order in part did not dispose of all claims against all parties in this matter, and the Court did not expressly direct entry of judgment as to such defendants, making any appeal from the order interlocutory. In accordance with Indiana Appellate Rule 14(B)(1), the State respectfully requests that the Court certify the order to allow for an immediate interlocutory appeal. This motion to certify has been filed within the requisite timeframe of 30 days following the entry of the interlocutory order, as required by Indiana Appellate Rule (14)(B)(1)(a).

While the Court's order correctly applies *Robertson* to allow the State's recovery claims to proceed, the order incorrectly reaffirms the Court's earlier ruling that the State's CVRA claims are barred by the two-year statute of limitations. But there is considerable debate about that issue in view of the Court of Appeals' controlling decision in *Mizen v. State ex rel. Zoeller*, 72 N.E.3d 458 (Ind. Ct. App. 2017), *trans. denied*. The evidence is undisputed here that the Attorney General—that is, the plaintiff—did not know and could not have known of the injury caused by Pfister and Sopko until the State Board of Accounts certified the final report. Unlike in the *Robertson* case, SBOA did not issue a preliminary report to the Attorney General, and there is no other basis to charge the Attorney General with earlier constructive knowledge owing to the confidentiality of an SBOA special

audit. And this Court's attempt to distinguish *Mizen* away conflicts with *Mizen* itself, for the Court in *Mizen* made it clear that it was *not* deciding the timeliness of the State's CVRA claim under the doctrine of fraudulent concealment. 72 N.E.3d at 468 n.4. The State acknowledges that this Court has taken a different view, but the State's view is at least equally as plausible. Importantly, if the State ends up being correct on appeal after a final judgment, the Court will have to go through a second trial.

The State thus asks that this Court certify the order for immediate interlocutory appeal so that the Court of Appeals can determine whether the State's CVRA claim accrued when the Attorney General—i.e., Plaintiff—knew or should have known of the injury or earlier.

#### **GROUND FOR CERTIFICATION OF AN INTERLOCUTORY ORDER FOR APPEAL**

The Court should certify its order for interlocutory appeal because the accrual date for the State's CVRA claim presents a substantial legal question, the early determination of which will promote a more orderly disposition of the case. Ind. Appellate Rule 14(B)(1)(c)(ii). Additionally, if the State has to await an appeal after final judgment, this Court and the parties could be faced with further prolonging the proceedings and holding a second trial if the State ends up being correct in its understanding of the applicable law.

**Application of the discovery rule in this context presents a substantial question of law**

The parties and the Court seemingly agree on three points: First, a two-year limitations period applies to the State's CVRA claim. *See*, Defendants' Motion to Maintain Summary Judgment, p. 8 *and* Plaintiff's Response to Defendants' Supplemental Briefing on Prior Order on Motions for Summary Judgment, p. 13 *and* Order Setting Aside March 27, 2018 Order, In Part, p. 2. Second, the discovery rule applies to determine accrual of the State's CVRA claim. *See* Plaintiff's Response to Defendants' Supplemental Briefing on Prior Order on Motions for Summary Judgment, p. 13 *and* Order Setting Aside March 27, 2018 Order, in Part, p. 2. And third, the discovery rule provides that a claim accrues "when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another." *Robertson v. State*, 141 N.E.3d 1224, 1229 (Ind. 2020).

Where the State and Court differ is the accrual of the statute of limitations. Specifically, the issue is whose discovery controls the accrual of the statute. The question whether the accrual date for a CVRA claim brought by the Attorney General runs from when the Attorney General knew or should have known of the injury or from when another person or entity had the requisite knowledge is a substantial legal question. And well-established law firmly supports the State's position that what matters is when the Attorney General knew or should have known of the injury and could bring suit.

The Supreme Court’s decision in *Robertson*, supports the State’s view. There, the Court held that although the State’s recovery claim under Indiana Code section 5-11-15-1 did not accrue until the Attorney General received the final, verified report SBOA report, its CVRA claim accrued “when the SBOA provided the OAG with a copy of its preliminary report.” *Id.* at 1229. In *Robertson*, because OAG received the preliminary report more than two years before filing its complaint, the Court held that the State’s CVRA claim was untimely. *Id.* Importantly, the Court did *not* hold, let alone suggest, that the State’s CVRA claim accrued any earlier than when the Office of the Attorney General knew or should have known of the misappropriation. For instance, the Court did not consider when local officials knew or should have known, and it did not ask when SBOA knew or should have known.

The *Robertson* rule—that application of the discovery rule depends on when the Attorney General knew or should have known of the misappropriation—is consistent with the statutes and prior case law. For one thing, the Attorney General is the plaintiff in this suit and cannot bring any action based on an SBOA audit until it receives either a preliminary or final SBOA audit report. Pursuant to Indiana Code section 5-11-5-1(a), upon receiving a referred audit report, Plaintiff “[S]hall diligently institute and prosecute civil proceedings against the delinquent officer, or upon the officer’s official bond, or both, and against any other proper person that will secure to the state or to the proper municipality the recovery of any funds misappropriated.” *State ex rel. Pearson v. Brown*, 537 N.E.2d 534, 536-37 (Ind. Ct. App. 1989); *State v. Clamme*, 134 N.E. 676, 682 (Ind. Ct. App. 1922). The

State had no knowledge and/or ability to file a lawsuit for conduct subject to the allegations in the State’s complaint before June 8, 2016. The statute of limitations applicable to the claims contained in the State’s Complaint commenced on June 8, 2016, the date the State Examiner published and certified the audit report to the Attorney General’s Office pursuant to Indiana Code section 5-11-5-1 on June 8, 2016. As the party charged by statute to bring an action based on the referred audit report, it is whether the *State* had the *ability* to file a lawsuit that is critical to a statute of limitations analysis in this cause. The recovery statute imposes strict confidentiality requirements on SBOA when conducting a special audit, such that even the Attorney General is unaware of that audit until it receives the final, verified report. *See* Ind. Code § 5-11-1-10. The only way the Attorney General can learn about the injury sooner and have the ability to sue is if the SBOA exercises its discretion and delivers the Attorney General a preliminary report. *See* Ind. Code § 5-11-5-1(e) Other than those two routes, the Attorney General—i.e., the plaintiff—has virtually no means of discovering an injury that can be remedied by the CVRA.

The timing of the SBOA’s knowledge is irrelevant because of the applicable confidentiality provisions, irrespective of any principal-agency relationship. *See Kramer v. Catholic Charities of Diocese of Fort Wayne-S. Bend, Inc.*, 32 N.E.3d 227, 234 (Ind. 2015) (a duty of disclosure may be limited by the terms of the agreement between the parties); *see also Indiana v. Pastrick*, 2006 WL 2078212, at \*5 (N.D. Ind. July 21, 2006) (it is only after receipt of the certified report from the State Examiner, “that the Attorney General had both the knowledge of an injury and the

ability to file a lawsuit seeking redress for the injury. Prior to these dates the SBOA had the knowledge, but not the power to act. And the Attorney General, though capable of filing a lawsuit, had no knowledge of an injury.”). Furthermore, even if the SBOA and the Office of the Indiana Attorney General have a principal-agency relationship, common law principles of agency do not impute knowledge when one is subject to a duty not to disclose the fact to the other. *See Restatement (Third) of Agency* §§ 5.03, 8.11 (2020). Any informal sharing of information regarding the Audit Report would have been prohibited by the confidentiality provisions of Indiana Code § 5-11-5-1(c). The reality of the confidential SBOA audit process clearly demonstrates that the absence of any relevant existing principal-agency relationship. And unlike the relationship with SBOA, the Attorney General does *not* have an agency relationship with a local school board or other local officials. The Attorney General does not represent municipalities or other arms of local government.

For these reasons, the Court of Appeals has held that a CVRA claim does not accrue merely because local officials should have known something or because SBOA should have noticed something was amiss in an earlier, routine audit. In *Mizen*, the Court of Appeals specifically held that prior SBOA audit reports are irrelevant to a determination of whether the State filed its claims within the statutory timeframe. In its reasoning, the Court determined that the prior audits merely indicated that the local governmental unit “did a poor job keeping its records, that certain records were missing, and that there were questions over

Mizen’s salary’ and other benefits.” *Mizen*, 72 N.E.3d at 467. And in *Montalvo v. State ex rel. Zoeller*, the Court of Appeals determined that, “[a]lthough the record indicates that the SBOA conducted prior audits of the East Chicago Public Library, those audits are not relevant for the resolution of the particular issues addressed herein.” 27 N.E.3d 795, 802 (Ind. Ct. App. 2015).

In view of these controlling legal principles, the State’s CVRA claims against Pfister and Sopko are timely under the two-year limitations period. The undisputed evidence shows that, unlike in *Robertson*, SBOA did *not* send the Attorney General a preliminary report. Instead, the first time the Attorney General knew or should have known of the injury caused by Pfister and Sopko was on June 8, 2016, when SBOA sent its final, verified report to the Attorney General. SBOA’s examination of the School Town, the exit conference, and the publishing of the Audit Report itself, are all conditions precedent before the Attorney General’s Office can lawfully be made aware about the existence of the Audit Report and acts outlined therein. The only exemption to this rule is when a preliminary report is issued to the OAG under Indiana Code section 5-11-5-1(e), and in this case there was no preliminary report issued to the OAG by the SBOA. *See* the State’s response to defendants’ supplemental briefing p. 8; *and* the State’s response in opposition to Pfister and Sopko’s motion for summary judgment p. 11.

The State has not slept on any rights, nor has the public—for whose benefit this lawsuit actually serves—because the State could not have had knowledge of the audit report before June 8, 2016, consistent with the explicit prohibition of Indiana

Code section 5-11-5-1(c). The State's claims for recovery of treble damages under the CVRA were brought less than two years from the date the audit report was certified and referred to the Attorney General's Office, such that the undisputed facts show the State's timely brought its treble damages claims.

**Early Determination of the Substantial Questions of Law Regarding the State's Claims Will Promote a More Orderly Disposition of the Case**

Given the substantial questions regarding whether the proper sources of law governing the State's claims were applied here to determine the appropriate running of the statute of limitations, the early determination of the substantial questions of law regarding the State's claims will promote a more orderly disposition of this case, regardless of the determination of these questions on appeal. If this issue is not resolved at this time through an interlocutory appeal, the trial court and the parties face the possibility of having two trials in this case if the State succeeds on its statute of limitations argument on appeal after the remaining issues are tried to the court. A second trial on the treble damages alone will require the same evidence and testimony to be presented to the court and jury as would have already been presented for the underlying misappropriation charges. This would be a misuse of judicial time and cost. Granting certification for this interlocutory appeal will avoid entirely the unnecessary commitment of time and resources that would need to be expended by the court, the parties, and the public in trying this matter at a trial before all dispositive questions of law have been conclusively determined.

Therefore, pursuing further litigation before resolution of these legal questions on appeal would require the State to incur additional costs and cause further unnecessary delay that is properly avoided if the State's contentions are accurate statements of the law.

### **REQUEST FOR STAY OF PROCEEDINGS**

For many of the same reasons this matter should be certified for an interlocutory appeal, the remainder of the proceedings should be stayed pending the outcome of the appeal. If the State is correct in the accrual date of the CVRA claim, the same evidence will have to be presented for both the underlying inappropriate claims and the CVRA claims. The CVRA requires a showing of the underlying actions and damages to a degree of a crime and to determine the amount of an award under the CVRA. As the same evidence will be presented, for judicial economy and to save costs and time for the parties, a stay of the remaining proceedings should be entered.

WHEREFORE, Plaintiff, State of Indiana *ex rel.* Curtis T. Hill, Jr., Attorney General of Indiana, by counsel, pursuant to Indiana Appellate Rule 14(B), respectfully requests that the Court grant this motion to certify pursuant to Indiana Appellate Rule 14(B), note the certification of the order in the chronological case summary, stay all proceedings in this case pending appeal, and grant all other just and proper relief in the premises.

Respectfully submitted,

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By: /s/ Heather M. Crockett  
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## CERTIFICATE OF SERVICE

I certify that on November 25, 2020, I electronically filed the foregoing document using the Indiana E-filing System (“IEFS”).

I also certify that on November 25, 2020, the foregoing document was served upon the following counsel of record by IEFS:

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