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STATE OF MICHIGAN
IN THE SUPREME COURT

SUSAN CHRISTIE,

Plaintiff-Appellee,

v

WAYNE STATE UNIVERSITY,

Defendant-Appellant.
_____/

Supreme Court No. 162706

Court of Appeals No. 350321

Wayne County Cir. No. 19-4888-CD

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL'S AMICUS CURIAE BRIEF

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STATEMENT OF JURISDICTION

This Court has jurisdiction over Defendant-Appellant Wayne State University's (the University) application for leave to appeal a final order of the Michigan Court of Appeals. See *Christie v Wayne State University*, unpublished opinion per curiam of the Court of Appeals, issued January 28, 2021 (Docket No. 350321) (Opinion attached as Ex A). See also MCL 600.215(3); MCR 7.303(B)(1).

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STATEMENT OF QUESTIONS PRESENTED

1. Whether Christie's claims against the University, which were filed in the circuit court, are subject to MCL 600.6431(1)'s notice requirements.

   Appellant's answer: Yes.

   Appellee's answer: No.

   Amicus' answer: Yes.

   Trial court's answer: No.

   Court of Appeals' answer: No.

2. Whether the order denying the appellant's motion for summary disposition, which asserted governmental immunity, is a final order that is appealable by right under MCR 7.202(6)(a)(*v*).

   Appellant's answer: Yes.

   Appellee's answer: No.

   Amicus' answer: Yes.

   Trial court's answer: No.

   Court of Appeals' answer: No.

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STATUTES AND RULES INVOLVED

MCL § 600.6419:

(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.

* * *

(2) The judgment entered by the court of claims upon any claim described in subsection (1), either against or in favor of the state or any of its departments or officers, upon becoming final is res judicata of that claim. Upon the trial of any cause in which any demand is made by the state or any of its departments or officers against the claimant either by way of setoff, recoupment, or cross declaration, the court shall hear and determine each claim or demand, and if the court finds a balance due from the claimant to the state, the court shall render judgment in favor of the state for the balance. Writs of execution or garnishment may issue upon the judgment the same as from the circuit court of this state. The judgment entered by the court of claims upon any claim, either for or against the claimant, is final unless appealed from as provided in this chapter.

* * *

(4) This chapter does not deprive the circuit court of this state of jurisdiction over actions brought by the taxpayer under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, upon the circuit court, or proceedings to review findings as provided in the Michigan employment security act, 1936 (Ex Sess) PA 1, MCL 421.1 to 421.75, or any other similar tax or employment security proceedings expressly authorized by the statutes of this state.

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(5) This chapter does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law.

(6) This chapter does not deprive the circuit court of exclusive jurisdiction to issue, hear, and determine prerogative and remedial writs consistent with section 13 of article VI of the state constitution of 1963.

(7) As used in this section, "the state or any of its departments or officers" means this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties.

MCL § 600.6421(1)–(3)**:**

(1) Nothing in this chapter eliminates or creates any right a party may have to a trial by jury, including any right that existed before November 12, 2013. Nothing in this chapter deprives the circuit, district, or probate court of jurisdiction to hear and determine a claim for which there is a right to a trial by jury as otherwise provided by law, including a claim against an individual employee of this state for which there is a right to a trial by jury as otherwise provided by law. Except as otherwise provided in this section, if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue.

(2) For declaratory or equitable relief or a demand for extraordinary writ sought by a party within the jurisdiction of the court of claims described in section 6419(1) and arising out of the same transaction or series of transactions with a matter asserted for which a party has the right to a trial by jury under subsection (1), unless joined as provided in subsection (3), the court of claims shall retain exclusive jurisdiction over the matter of declaratory or equitable relief or a demand for extraordinary writ until a final judgment has been entered, and the matter asserted for which a party has the right to a trial by jury under subsection (1) shall be stayed until final judgment on the matter of declaratory or equitable relief or a demand for extraordinary writ.

(3) With the approval of all parties, any matter within the jurisdiction of the court of claims described in section 6419(1) may be joined for trial with cases arising out of the same transaction or series of transactions that are pending in any of the various trial courts of the state. A case in the court of claims

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that has been joined with the approval of all parties shall be tried and determined by the judge even though the trial court action with which it may be joined is tried to a jury under the supervision of the same trial judge.

MCL § 600.6431:

(1) 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.

(2) A claim or notice under subsection (1) must contain all of the following:

(a) A statement of the time when and the place where the claim arose.

(b) A detailed statement of the nature of the claim and of the items of damage alleged or claimed to have been sustained.

(c) A designation of any department, commission, board, institution, arm, or agency of the state involved in connection with the claim.

(d) A signature and verification by the claimant before an officer authorized to administer oaths.

(3) A claimant shall furnish copies of a claim or notice filed under subsection (1) to the clerk at the time of filing for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms, or agencies of this state designated in the claim or notice.

(4) For a claim against this state for property damage or personal injuries, the claimant shall file the claim or notice under subsection (1) with the clerk of the court of claims within 6 months after the event that gives rise to the claim.

(5) This section does not apply to a claim for compensation under the wrongful imprisonment compensation act, 2016 PA 343, MCL 691.1751 to 691.1757.

MCL § 600.6452:

(1) Every claim against this state, cognizable by the court of claims, is forever barred unless the claim is filed with the clerk of the court or an action is

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commenced on the claim in federal court as authorized in section 6440, within 3 years after the claim first accrues.

(2) Except as modified by this section, chapter 58, relative to the limitation of actions, also applies to the limitation under this section.

(3) The attorney general has the same right as a creditor under the statutes of this state to petition for the appointment of a personal representative of the estate of a deceased person.

(4) The attorney general has the same right as a superintendent of the poor under the statutes of this state to petition for the appointment of a guardian of the estate of a minor or any other individual under a disability.

(5) This section does not apply to a claim for compensation under the wrongful imprisonment compensation act, 2016 PA 343, MCL 691.1751 to 691.1757.

MCR 7.202(6) **Definitions:**

For the purposes of this subchapter:

* * *

(6) "final judgment" or "final order" means:

(a) In a civil case,

* * *

(v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity.

MCR 7.203(A) Jurisdiction of the Court of Appeals

(A) Appeal of Right. The court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) A final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6), except a judgment or order of the circuit court

(a) on appeal from any other court or tribunal;

(b) in a criminal case in which the conviction is based on a plea of guilty or nolo contendere;

An appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right.

(2) A judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule[.]

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STATEMENT OF AMICUS CURIAE

The Michigan Department of Attorney General states in support of its brief as amicus curiae that the Court of Appeals' unpublished opinion below, which relied in large part upon the Court of Appeals' published opinion in *Tyrrell v University of Michigan*, 335 Mich App 254 (2020), directly conflicts with the plain language of the Court of Claims Act and the Court Rules. Further, the questions that this Court ordered the parties to brief in its December 22, 2021 order granting oral arguments on the application will have an outsized impact on the State, its departments, and agencies (including the controlling boards of public universities such as the University).

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INTRODUCTION

At issue in this appeal are two important questions of first impression. First, this Court asked whether the statutory notice provision in MCL 600.6431 applies to all claims against the state, including those claims that may be filed in the circuit courts. Second, the Court asked whether the denial of a request for governmental immunity premised upon a failure to comply with § 6431 is a final order that is appealable by right under MCR 7.202(6)(a)(*v*). Under the text of the relevant statutes and court rules, the answers to both questions are unequivocally "yes."

The first question is answered by § 6431's text which provides that "except as otherwise provided *in this section*, a claim may not be maintained against this state unless the claimant" complies with the section's notice requirements. (Emphasis added). In short, § 6431 provides no exceptions for claims that may be filed in the circuit courts, and its text expressly limits the universe of exceptions to those contained within the section itself. The result of this clear statutory language is that no claim against the State, regardless of where it is filed, may be maintained without the claimant providing notice within one year of the claim's accrual.

As for the second question, a trial court's denial of governmental immunity, regardless of how the appellate court resolves the question of immunity, is a "final order" within the meaning of MCR 7.202(6)(a)(*v*). However, because "governmental immunity" and "sovereign immunity" have been used interchangeably by our appellate courts, this Court should issue an opinion, for the benefit of the bench and bar, clarifying that denials of sovereign immunity are final orders that are also appealable by right. For these reasons, this Court should reverse.

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STATEMENT OF FACTS AND PROCEEDINGS

Background

The instant case arises out of age and disability discrimination allegations that were filed by Susan Christie against her employer, Wayne State University, under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., and the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq*. In response to Christie's complaint, the University moved for summary disposition under MCR 2.116(C)(7) and argued that it was entitled to immunity for Christie's failure to comply with the notice and verification requirements contained in section 6431 of the Court of Claims Act, MCL 600.6431. The trial court denied the University's motion, and the University filed an appeal by right asserting that the trial court's order denying its motion was a final order as defined under MCR 7.202(6)(a)(*v*).

In affirming the trial court and ruling in Christie's favor, the Court of Appeals explained that it was bound by one of its recently published opinions, *Tyrrell v University of Michigan*, 324 Mich App 254 (2020). For this reason, it is necessary to review the opinion in *Tyrrell* as well as the opinion below.

The opinion in *Tyrrell*

In *Tyrrell*, the Court of Appeals answered both questions presented here: it held that (1) § 6431 does not apply to claims properly filed in the circuit courts; and (2) because § 6431 does not apply, it lacked jurisdiction to hear the University of Michigan's appeal as of right. 324 Mich App at 258–273. Both aspects of the Court of Appeals' holdings warrant review.

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As for the jurisdictional issue, according to the Court of Appeals, its opinion in *Progress Michigan v Attorney General*, 324 Mich App 659 (2018), was the basis for UM's appeal. The Court of Appeals further commented that because this Court reversed the Court of Appeals in *Progress Michigan* and stated that "[w]hether compliance with [MCL 600.6431] is properly considered a question of immunity or a question of compliance with the rules of the forum is a question of no moment because [the] plaintiff was required to comply with the [Court of Claims Act] either way," whether § 6431 implicates immunity became an open question again. *Tyrrell*, 335 Mich App at 260, quoting *Progress Michigan v Attorney Gen*, 506 Mich 74, 89 (2020). And because the question was open again, the Court of Appeals in *Tyrrell* concluded that a "plaintiff's failure to comply with MCL 600.6431" in a case that is properly filed in the circuit court "d[oes] not implicate governmental immunity" and, as such, "the trial court's denial of defendants' motion under MCR 2.116(C)(7) was not appealable as of right." *Id.*

In reaching this conclusion, the Court of Appeals found it relevant that section 10(1) of the Governmental Tort Liability Act (or GTLA), MCL 691.1410(1), instructs claimants that "[c]laims against the state authorized under the [GTLA] shall be brought in the manner provided in [the Court of Claims Act.]" See *Tyrrell*, 335 Mich App at 263, quoting MCL 691.1410(1). The Court further found relevant this Court's opinion in *Fairley* which provided that "while [§ 6431] does not confer governmental immunity, it establishes conditions precedent for avoiding the

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governmental immunity conferred by the GTLA, which expressly incorporates [§ 6431]." *Id.*, quoting *Fairley v Mich Dep't of Corr*, 497 Mich 290, 297 (2015).

With this background in place, the Court of Appeals concluded as follows:

> Because the Legislature expressly waived governmental immunity in the PWDCRA, see *In re Bradley Estate*, 494 Mich at 393 n 60, the PWDCRA does not require compliance with MCL 600.6431 for a plaintiff to proceed with his or her claim against a state defendant, and "MCL 600.6431 does not confer governmental immunity," *Fairley*, 497 Mich at 297, plaintiff's failure to comply with MCL 600.6431 when bringing her PWDCRA claim does not implicate governmental immunity. [*Tyrrell*, 335 Mich App at 264 (citations cleaned up).][1]

In light of this conclusion, the Court of Appeals ruled that it lacked jurisdiction to hear UM's appeal as of right and instead exercised its discretion to treat the appeal as one on leave granted. *Id.* at 265.

As for the issue regarding compliance with § 6431, the Court of Appeals noted that while "[t]he language in [§] 6431 providing that '[n]o claim may be maintained against the state unless' the claimant adheres to the listed procedural requirements clearly creates a condition precedent for bringing a claim against the state[,]" it questioned whether "the Legislature's intent was that no claim may be maintained

[1] It should be noted that the portion of this Court's opinion in *In re Bradley's Estate* upon which the Court of Appeals relied to include that the Legislature waived governmental immunity is most likely obiter dictum. The citation is to the 60th footnote in *Bradley's Estate* opinion and is contained within a citation sentence followed by the introductory signal "compare." See *In re Bradley's Estate*, 494 Mich 367, 393 n 60 (2013); see also *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597–98 (1985) (explaining the well-settled rule that "statements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication").

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against the state *in any court in the state* unless the listed conditions were met, or whether the Legislature's intent was that no claim may be maintained against the state *in the Court of Claims* unless the conditions were met." *Tyrrell*, 335 Mich App at 269. And in the very next sentence, it answered the question by stating that "[t]he [Court of Claims Act], when read as a whole, and the placement of [§] 6431 in the statutory scheme suggest that the Legislature intended for [§] 6431 to apply only to claims brought in the Court of Claims." *Id.* And the Court summarized its conclusion by commenting that "it would make little sense for the Legislature to intend for a law placed in the middle of the 'the court of claims act,' [§] 6401, and sandwiched between two Court-of-Claims-specific laws, to be applicable to claims filed *in any court in the state*[.]" *Id.* at 270.

The opinion below

In the opinion below, the Court of Appeals relied on its opinion in *Tyrrell* in concluding that it lacked jurisdiction to hear the University's appeal as of right and that § 6431 does not apply to claims properly filed in circuit court. (Ex A, pp 2–4.) Specifically, the Court explained that "[g]iven the conclusions in *Tyrrell* and its clear and direct application to the matter before this Court, defendant here was not entitled to governmental immunity from suit based on the claim that plaintiff failed to comply with MCL 600.6431." (Ex A, p 4, quoting See MCR 7.215(J)(1).)

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The pending application

After the University filed its application and Christie filed her response, UM filed an amicus brief in support of the University's position.[2] Ultimately, in lieu of ruling on the application, this Court entered an order directing the clerk to schedule oral arguments on the University's application and the parties to brief the following issues:

> (1) [W]hether [Christie's] claims against the [University], which were filed in the circuit court, are subject to MCL 600.6431(1)'s notice requirements, see *Tyrrell v. Univ. of Michigan*, 335 Mich App 254 (2020); and (2) whether the order denying the appellant's motion for summary disposition, which asserted governmental immunity, is a final order that is appealable by right, see MCR 7.202(6)(a)(*v*). [*Christie v WSU*, 967 NW2d 379 (2021) (citations cleaned up).]

For the reasons set forth below, each of these questions is properly answered in the affirmative. That is, Christie's claims against the University are subject to § 6431's notice requirement regardless of whether the claims were properly filed in the circuit court. And further, because the University moved for and was denied governmental immunity, it properly filed its appeal as of right.

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[2] The Department of Attorney General did not file an amicus brief at the application stage. However, because this Court has ordered oral arguments on the application and directed the clerk to schedule arguments together with *Elia Companies, LLC v University of Michigan Regents*, 967 NW2d 237 (2021), in which the Department did file an amicus brief at the application stage, and because of the importance of the questions presented, the Department is filing the instant amicus brief under MCR 7.312(H)(2).

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STANDARD OF REVIEW

"[W]hether MCL 600.6431 requires dismissal of a plaintiff's claim for failure to provide the designated notice raises questions of statutory interpretation, which [this Court] . . . review[s] de novo." *McCahan v Brennan*, 492 Mich, 730 (2012). And "[s]imilarly interpretation of a court rule, like a matter of statutory interpretation, is a question of law that this Court reviews de novo." *CAM Const v Lake Edgewood Condo Ass'n,* 465 Mich 549, 553 (2002).

ARGUMENT

I. Under the Court of Claims Act's plain language, Christie's Elliott-Larsen and PWDCRA claims are subject to the notice and verification requirements set forth in MCL 600.6431.

For its first question, this Court instructed the parties to address the following issue: "[W]hether [Christie's] claims against the [University], which were filed in the circuit court, are subject to MCL 600.6431(1)'s notice requirements." *Christie*, 967 NW2d 379. In short, the answer to this question is "yes," Christie's claims were subject to § 6431's notice requirements.

The answer to this question is "yes" for three reasons. First, the clear statutory language in § 6431 leaves no room for avoiding the broad application of the Court of Claims Act's notice requirements. Second, the notice requirement contained within § 6431 has been in place since 1941, and although the Legislature has authorized Elliott-Larsen and PWDCRA claimants to sue the state in circuit court, it has done nothing to relieve such claimants from complying with § 6431's notice requirement. And third, considering the Court of Appeals' comment that "it

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would make little sense" for one section in the Court of Claims Act to apply to all claims against the State, a review of the Court of Claims Act as a whole supports the conclusion that § 6431 applies all claims against the State.

A. The unambiguous language in the Court of Claims Act leaves no room for the courts to relieve Christie from complying with § 6431's notice requirements.

The answer to this question starts and ends with the plain language of the Court of Claims Act. Considering that answering the question requires an interpretation of a statute, it is well-understood that "[i]f the statutory language is clear and unambiguous, the statute is enforced as written" and "judicial construction is not permitted[.]" *People v Schaefer*, 473 Mich 418, 430; (2005); *2 Crooked Creek, LLC v Cass Co Treasurer*, 507 Mich 1, 9 (2021) Additionally, that the Court of Claims Act is this State's controlling waiver of immunity from suit and submission to the jurisdiction of a court further supports a strict construction of § 6431. See *Greenfield Const Co Inc v Michigan Dept of State Highways*, 402 Mich 172, 195 (1978).

This waiver of immunity from suit and consent to jurisdiction is significant because, even though the Legislature consented to the jurisdiction of a court, "by [enacting] the court of claims act," the Legislature "[di]d not waive[ ] or abrogate[ ] the right to rely on its sovereign immunity." *Van Antwerp v State*, 334 Mich 593, 601 (1952). In fact, "[i]t being optional with the [L]egislature whether it would confer upon persons injured a right of action . . . or leave them remediless, it could attach to the right conferred any limitations it chose." *Rowland v Washtenaw Co*

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Rd Comm'n, 477 Mich 197, 212 (2007), favorably quoting *Moulter v City of Grand Rapids*, 155 Mich 165, 166 (1908). And importantly, when the Legislature relinquishes its sovereign immunity, "any [such] relinquishment . . . must be strictly interpreted." *Pohutski v City of Allen Park*, 465 Mich 675, 681 (2002).

Consistent with this above jurisprudence, by enacting the Court of Claims Act generally and § 6431 specifically, the Legislature conditioned its waiver of sovereign immunity upon the requirement that those with claims against the State provide notice within one year of their claims' accrual. Specifically, the present version of § 6431, which was amended in 2020, provides as follows:

> (1) *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[.]
>
> * * *
>
> (5) *This section does not apply to a claim for compensation under the* [*WICA*.] [MCL 600.6431 (Emphasis added).]

This is precisely the type of unambiguous language that courts must apply as written. And the statute means what it says—that is, "except as otherwise provided in this section" means "except as otherwise provided in this section." The only portion of § 6431 that relieves a claimant from complying with its notice and verification requirements is subsection (5), which states that "[t]his section does not apply to a claim for compensation under the [WICA]." Conspicuously absent from this section, however, is any language that affirmatively relieves claimants who

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choose to file their claims in the circuit courts from complying with § 6431. In short, the plain language leaves no room for any additional exceptions.

In addition to the above straightforward analysis of the present statutory language, the Legislature's 2020 amendment to § 6431 further strengthens the conclusion that Christie was required to timely provide the University with notice of her claims. As to the amendment's impact on the question at issue here, the Court of Appeals did recognize that § 6431 was recently amended, but it ultimately commented that the "amendment . . . is not relevant to this appeal." *Tyrrell*, 335 Mich App at 262 n 3. With respect, the Court of Appeals is simply mistaken as to the significance of the 2020 amendment.

Indeed, before the amendment, because exceptions were not referenced one way or the other, an argument could be made that there was an ambiguity as to whether the Legislature intended any exceptions to apply to the notice requirement. However, with the 2020 amendment, the Legislature expressly added an exception for claims for compensation under the WICA, see § 6431(5), and qualified the bar-to-claims portion of the statute in subsection (1) by adding the phrase "except as otherwise provided in this section," see § 6431(1). In so doing, the Legislature clarified that this new exception for WICA claims was the only exception to § 6431.

Accordingly, if this Court allows Christie to maintain her claims against the University, it would not only be reading into § 6431 an exception that is not present, but it would also be reading out of § 6431 the words "except as otherwise provided in this section." Such a result conflicts with the basic rule of construction that

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statutes are to be interpreted in a manner that avoids rendering any portion of the statute as surplusage. See, e.g., *Esurance Prop & Cas Ins Co v Michigan Assigned Claims Plan*, 507 Mich 498, 508–09 (2021) (providing that "[c]ourts must interpret statutes in a way that gives effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory").

In the end, any construction of MCL 600.6431 that permits a claimant to maintain a claim against the state without timely complying with its notice requirement will add an additional exception to the unambiguous language of § 6431. Consistent with the basis for this Court unanimous holding in *ACLU Michigan v Calhoun County*[3], "if the Legislature wanted" to add such an exception to § 6431 for claims that may be filed in the circuit courts, "it would have included language to that effect." ___ Mich ___ (2022), slip op at 9 (opinion attached as Exhibit B). But because the Legislature added no such exception, courts must "interpret [§ 6431] as written." See *id.*

[3] In the *ACLU Michigan* case, this Court unanimously reversed a more than 20-year-old precedent in which the Court of Appeals had construed the word "statute" to include the word "regulation" in the FOIA exemption that provides for the nondisclosure of [r]ecords or information specifically described and exempted from disclosure by statute." See *ACLU Mich*, slip op at 9; MCL 15.243(1)(d). In support, it explained that a "statute" is not a "regulation" and that if the Legislature wanted to create a similar exemption for "regulations," it "would have added language to that effect." *ACLU Mich*, slip op at 9.

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B. The Court of Claims Act's notice requirement has been in place since 1941, and the Legislature has not taken any affirmative steps to relieve civil rights claimants from compliance with § 6431.

Again, it is well-understood that "[f]rom the time of Michigan's statehood, this Court's jurisprudence has recognized that the state, as sovereign, is immune from suit unless it consents, and that any relinquishment of sovereign immunity must be strictly interpreted." *Pohutski*, 465 Mich at 681. In fact, "until 1939 the state could not be sued because the requisite legislative consent had not been given." *Greenfield Const Co Inc*, 402 Mich at 195; see also 1939 PA 135 § 2 (creating the court of claims). But as noted above, by enacting the Court of Claims Act, the Legislature passed "this state's controlling legislative expression of waiver of the state's sovereign immunity from direct action suit[.]" *Greenfield Const Co Inc*, 402 Mich at 195. And a review of the Court of Claims Act's history further illustrates the Legislature's intent for all claims against the State to be subject to § 6431's notice requirement.

To this end, when the Court of Claims Act was first enacted, the Legislature required the filing of verified claims, but not in the same manner as it does today. Specifically, at its inception, the Court of Claims Act provided as follows:

> In lieu of a declaration or bill of complaint, *suit in said court* shall be started by filing with the clerk thereof a verified statement of claim in the form of a petition setting forth with reasonable certainty and with detail . . . the nature and extent of the claim. [1939 PA 135, § 12 (emphasis added).]

Essentially, the Court of Claims Act required a verified claim in lieu of a complaint. And by using the phrase "in said court," the Legislature was clear that the

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procedure set forth in 1939 PA 135, § 12 applied to the newly created Court of Claims specifically, as opposed to circuit courts generally.

However, two years later, the Legislature again amended the Court of Claims Act. And in its 1941 amendment, it added the following notice provision that has, in large part, been in place for the past 80 years:

> No claim shall be maintained against the state unless the claimant shall, within 1 year after such claim shall have accrued, file 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. [1941 PA 179, § 11a.]

What stands out most in comparison to § 12 of the 1939 version of the Court of Claims Act is certain language that is missing in the subsequently enacted § 11a. Specifically, 1939 PA 135 § 12 discusses "suit[s] in said court," but the Legislature, in the subsequent 1941 amendment, chose not to add the limiting language "in said court" to the statutory notice provision in § 11a. Cf. 2B Singer & Singer, Sutherland Statutory Construction (7th ed.), § 51:2 (explaining that "[g]enerally, . . . courts presume a different intent when a legislature omits words used in a prior statute on a similar subject"). Thus, the Legislature's decision to omit the phrase "in said court" from the statutory notice provision in § 11a should be construed as intentional considering that it decided to include the phrase in when it previously enacted § 12.

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What is more, in 1961 when the current version of the Court of Claims Act was enacted, § 11a, the original notice provision, was reenacted in largely identical form when it became § 6431. Compare 1941 PA 179, § 11a with 1961 PA 236, § 6431. And, as discussed above, the only change that occurred to § 6431's notice requirement in 2020 was the addition of the WICA exception and corresponding clarification that the WICA exception was the only exception to § 6431's notice requirement. Ultimately, it has been the case since 1941 (long before 1976 when Elliott-Larsen and the PWDCRA were enacted) that "no claim may be maintained against the state" unless the claimant timely files, with the clerk of the Court of Claims, a written claim or notice of intention to file a claim.

Taken together, several things are clear from a review of the Court of Claims Act's history. First, the Legislature's 1941 decision not to limit application of the notice requirement to suits filed in the Court of Claims should be construed as intentional in comparison to its decision to limit the procedural requirements in § 12 to "suit[s] in said court." Second, the Legislature's 2020 decision to create an exception for WICA claims but not for any other claims should likewise be deemed intentional. And third, considering § 6431 had essentially been the law for 80 years when it was amended in 2020, and that the Legislature is presumed to know the law, its decision not to create an exception for Elliot-Larsen and PWDCRA claimants should again be deemed intentional. See, e.g., *McCahan*, 492 Mich at 749 (noting that "a legislature legislates by legislating, not by doing nothing, not by

keeping silent"). In short, each of these takeaways supports the conclusion § 6431 applies equally to all claims that may be asserted against the state.

C. That § 6431 applies to all claims against the State is further supported by reviewing the Court of Claims Act as a whole.

The Court of Appeals in *Tyrrell*, in second-guessing the Legislature's intent as expressed in the plain language of § 6431, commented that "it would make little sense for the Legislature to intend for a law placed in the middle of the "the court of claims act[ ]". . . and sandwiched between two Court-of-Claims-specific laws, to be applicable to claims filed *in any court in the state*." *Tyrrell*, 335 Mich App at 270. But an examination of the Court of Claims Act as a whole shows that it is indeed an act of broad applicability to all claims that may be filed against the State.

One example of the Court of Claims Act's broad applicability is in § 6419, where the Legislature vested the Court of Claims with a broad grant of "exclusive" jurisdiction "[t]o hear and determine *any claim or demand* . . . against the state or any of its departments or officers *notwithstanding another law that confers jurisdiction of the case in the circuit court*[.]" MCL 600.6419(1)(a) (emphasis added). This grant of exclusive jurisdiction is subject to the exceptions set forth in §§ 6421 and 6440, and § 6421, which is relevant here, provides as follows: "Except as otherwise provided in this section, if a party has the right to a trial by jury and asserts that right as required by law, the claim may be heard and determined by a circuit, district, or probate court in the appropriate venue." MCL 600.6421(1). In interpreting §§ 6419 and 6421 in the context of an Elliott-Larsen claim, the Court of

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Appeals has held that for cases in which a claimant has a right to trial by jury, the Court of Claims shares concurrent jurisdiction with the circuit courts. See *Doe v Dept of Transp*, 324 Mich App 226, 238 (2018). Accordingly, under § 6421(1), it would appear that Elliott-Larsen claimants have their choice as to which court should hear their claims.

But the very next subsection provides additional considerations for those with claims against the State. For example, an individual that has a claim for declaratory or equitable relief arising out of the same transaction as the claim for which they have a right to a jury trial must consider the effect of § 6421(2). This subsection provides that "[t]he court of claims shall retain exclusive jurisdiction over the matter of declaratory or equitable relief . . . until a final judgment has been entered, and the matter asserted for which a party has the right to a trial by jury . . . shall be stayed until final judgment on the matter of declaratory or equitable relief[.]" MCL 600.6421(1). Accordingly, under §§ 6421(1) and 6421(2), an Elliott-Larsen or PWDCRA claimant with both legal and equitable claims must consider whether they wish to file their equitable claim, since, if they do, the Court of Claims will have exclusive jurisdiction and will enter a final judgment on that claim before the legal claim may be heard in the circuit court.[4]

What this means for purposes of § 6431's applicability to claims filed in the circuit courts is that, contrary to the Court of Appeal's complaints about § 6431's

[4] For a helpful chart that sets forth the various jurisdictional scenarios for civil rights claimants, see pages 21 and 22 of the University's application.

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placement "in the middle" of the Court of Claims Act making little sense, see *Tyrrell*, 335 Mich App at 270, every individual with a claim against the State, even Elliott-Larsen and PWDCRA claimants, must review the Court of Claims Act to determine which courts will have jurisdiction over their claims. Simply put, by placing an unambiguous and broadly applicable statutory notice provision that applies to all claims against the State in a chapter of the RJA that every individual with a claim against the State needs to consult, the Legislature made its intent perfectly clear.[5]

In short, together with the plain language and history of § 6431 dictating that all claims against the State are subject to the Court of Claim Act's notice provision, this conclusion is further supported by the overall structure and purpose of the Court of Claims Act. Stated otherwise, the Court of Claims Act is a chapter of the Revised Judicature Act that broadly applies, in at least some manner, to all claims and demands against the State. As such, a statutory notice provision that similarly applies to all claims and demands against the State is perfectly consistent with the nature and structure of the Court of Claims Act as a whole.

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[5] It is also worth noting that because the Legislature created an exception to the Court of Claims' exclusive jurisdiction in § 6419 for claims that have an underlying right to a jury trial but chose not to provide that same exception in § 6431 is strong evidence that its decision not to include such an exception in § 6431 was intentional. In fact, as the University notes in its application (see App, pp 18–19), the Legislature added the § 6421 exception for claims with rights to a jury trial just over a month after it amended the Court of Claims Act to transfer the Court of Claims from Ingham County to the Court of Appeals. Compare 2013 PA 164 with 2013 PA 205. Put simply, common sense strongly suggests that if the Legislature had wanted to add a corresponding exception to § 6431, it would have done so in 2013 PA 205.

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II. The trial court's order below was plainly an order denying governmental immunity and therefore appealable by right under MCR 7.203(A)(1).

For its second question, this Court instructed the parties to address the following issue: "[W]hether the order denying the [University's] motion for summary disposition, which asserted governmental immunity, is a final order that is appealable by right under MCR 7.202(6)(a)(*v*)." *Christie*, 967 NW2d 379. The answer to this question is "yes"; the trial court's order denying the University's motion premised upon governmental immunity is a final order appealable by right under the plain language of MCR 7.202(6)(a)(*v*).

The answer to this question is "yes" for two reasons. First, under the plain language of MCR 7.202(6)(a)(*v*), any order that denies a request for governmental immunity is a final order. Second, a commonsense application of the court rules dictates applying MCR 7.202(6)(a)(*v*) to denials of motions that are more accurately premised on sovereign immunity.

A. A trial court order that denies a governmental party's motion for summary disposition premised on governmental immunity is a "final order" or "final judgment" under MCR 7.202(6)(a)(*v*).

When it is necessary to interpret a court rule, it is well-understood that "[t]he interpretation and application of a court rule is governed by the principles of statutory construction, commencing with an examination of the plain language of the court rule." *Magdich & Assoc, PC v Novi Dev Assoc LLC*, 305 Mich App 272, 275 (2014). However, whereas the "goal in interpreting a statute is to give effect to the Legislature's intent, focusing first on the statute's plain language[,]" *Bank of Am,*

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NA v First Am Title Ins Co, 499 Mich 74, 85 (2016), "[c]ourt rules should be interpreted to [a]ffect the intent of the drafter, the Michigan Supreme Court[,]" *Fleet Bus Credit v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591 (2007). And ultimately, "[t]he intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Haliw v City of Sterling Hts*, 471 Mich 700, 706 (2005).

Considering that the starting point when interpreting a court is examining the court rule's plain language, it is necessary to review both MCR 7.203(A) and MCR 7.202(6)(a)(*v*). First, MCR 7.203(A)(1) provides, in relevant part that the Court of Appeals "has jurisdiction of an appeal of right filed by an aggrieved party from . . . [a] final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6)[.]" And second, MCR 7.202(6)(a)(*v*) defines "final judgment" or "final order" to mean "an order denying governmental immunity to a governmental party . . . under MCR 2.116(C)(7)[.]"[6] Accordingly, under these rules, when a party asserts the defense of governmental immunity in a dispositive motion and the trial court denies the motion, that denial is appealable by right under MCR 7.203(A).

But as the University notes in its application, the Court of Appeals below and in *Tyrrell* simply concluded an appeal by right was unavailable *after* it concluded that § 6431 "did not implicate governmental immunity[.]" *Tyrrell*, 335 Mich App at

[6] Also included within MCR 7.202(6)(a)(*v*)'s definition of "final order" or "final judgment" is "an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity."

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272; (Ex A, *Christie*, unpub op, at p 3). Essentially, by ruling in this manner, the Court of Appeals avoided consideration of the fact that the University's request for immunity was denied by simply concluding governmental immunity was not available in the first place.

This ruling was in error. In *Watts v Nevils*, 477 Mich 856 (2006), this Court overruled a Court of Appeals opinion that concluded the trial court's order was not a final order under MCR 7.202(6)(a)(*v*) as it "did not make a legal determination concerning whether defendant was entitled to claim governmental immunity" but instead made a factual determination regarding the sufficiency of the evidence. *Newton v Michigan State Police*, 263 Mich App 251, 259 (2004), overruled by *Watts*, 477 Mich 856. And in overruling the Court of Appeals, this Court aptly explained that the "[state d]efendants had a right to an appeal under MCR 7.2026(a)(*v*) and 7.203(A)(1) because the circuit court order denied governmental immunity to these defendants." *Watts*, 477 Mich at 856.

In short, this Court applied the plain language of MCR 7.202(6)(a)(*v*) as written and the Court of Appeals should have done the same here. Whether § 6431 applies to claims brought under Elliott-Larsen and the PWDCRA is a legal question of first impression that, if answered in the affirmative, would entitle the University to immunity from Christie's claims. And when the trial court concluded that § 6431 did not apply, it denied the University's request for immunity. To borrow from the Court of Appeals opinion in *Walsh v Taylor*, which was favorably cited by this Court in *Watts*, "[w]hen the trial court denied [the University's] motion in this case, the

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practical effect of the court's ruling was to deny [the University's] claim of governmental immunity." 263 Mich App 618, 625 (2004). "Logic dictates that such a determination be reviewable" as a final order under MCR 7.202(6)(a)(v). *Id*.

B. Common sense dictates applying MCR 7.202(6)(a)(*v*) to denials of motions premised on both sovereign immunity and governmental immunity.

Even though the plain language of MCR 7.202(6)(a)(*v*) applies to the trial court's denial of the University's request for governmental immunity, the Department does acknowledge that there has been uncertainty regarding the proper use of the terms "governmental immunity" and "sovereign immunity." This uncertainty warrants further discussion. Accordingly, a discussion of both the grounds for this uncertainty and the effect of this uncertainty is helpful.

1. The separate concepts of governmental immunity and sovereign immunity have been used interchangeably by our appellate courts, causing confusion among both the bench and bar.

To this end, sovereign immunity is the common law doctrine that "the state, as sovereign, is immune from suit unless it consents," and it "exists in Michigan because the state created the courts and so is not subject to them." *Pohutski*, 465 Mich at 681, citing *Manion v State Hwy Comm'r*, 303 Mich 1, 19 (1942) and *Ross v Consumers Power Co*, 420 Mich 567, 598 (1984). Governmental immunity, on the other hand, "is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a governmental agency[,]" *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143, 155–56 (2000), which is now

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codified in the GTLA, see MCL 691.1407 (providing that, subject to several exceptions, "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function").

While it would appear straightforward to conceptualize these two types of immunity, it has not always been the case in our appellate courts' opinions. For example, this Court explained in *Pohutski* as follows:

> Sovereign immunity and governmental immunity are not synonymous. True, they have been over the years used interchangeably in decisions, but a delineation may be helpful. *Sovereign* immunity is a specific term limited in its application to the State and to the departments, commissions, boards, institutions, and instrumentalities of the State. The reason is the State is the only sovereignty in our system of government, except as the States delegated part of their implicit sovereignty to the Federal government.
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> * * *
>
> Over the years, by judicial construction, this "sovereign" immunity has been transmogrified into "governmental" immunity and made applicable to the "inferior" divisions of government, *i.e.,* townships, school districts, villages, cities, and counties, but with an important distinction. These subdivisions of government enjoyed the immunity only when engaged in "governmental" as distinguished from "proprietary" functions. [*Pohutski*, 465 Mich at 682, quoting *Myers v Genesee Auditor,* 375 Mich 1, 6, 8–9 (1965) (cleaned up).]

To summarize, the precise meanings of the terms "governmental immunity" and "sovereign immunity" are not entirely clear in Michigan jurisprudence, and this Court has never addressed whether the phrase "governmental immunity" in MCR 7.202(6)(a)(*v*) includes "sovereign immunity." But see *Hart v State*, 946 NW2d 285, 288 n 5 (2020) (CLEMENT, J., concurring) (where Justice Clement discusses the differences between the two types of immunity and, for the purpose of her analysis,

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"assume[s] that the definition of a 'final order' in MCR 7.202(6)(a)(v) includes a denial of sovereign immunity").

However, if there are any doubts as to whether sovereign immunity should be included within the meaning of "governmental immunity" under MCR 7.202(6)(a)(*v*), common sense suggests that it should. To explain, it is helpful to review the collateral order doctrine that is employed by the federal courts.

Under federal law, the federal appellate courts' jurisdiction is set by 28 USC 1291 which provides, in relevant part, that "[t]he courts of appeals . . .shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States." (Emphasis added). In interpreting the meaning of the term "final decisions" as used in 28 USC 1291, federal courts employ the "collateral order doctrine" which the Supreme Court has explained is "best understood . . . [as] a 'practical construction' of [§ 1291]" that "accommodates a 'small class' of rulings, not concluding the litigation, but conclusively resolving 'claims of right separable from, and collateral to, rights asserted in the action[.]'" *Will v Hallock*, 546 US 345, 349 (2006). Put differently, the collateral order doctrine protects claims that are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v Beneficial Indus L Corp*, 337 US 541, 546 (1949).[7] And among the types of rulings

[7] For an order to be reviewable under the collateral order doctrine, it must satisfy the three following conditions: (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Will*, 546 US at 349.

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that fall within the collateral order doctrine are "orders rejecting absolute immunity. . . and qualified immunity" as well as orders "denying [a] claim to Eleventh Amendment immunity[.]"[8] *Will*, 546 US at 350 (collecting cases).

As for why denials of Eleventh Amendment immunity are immediately reviewable under the collateral order doctrine, the Supreme Court has explained that "the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct & Sewer Auth v Metcalf & Eddy, Inc*, 506 US 139, 145 (1993). The same reasoning should apply here. If the State is denied an appeal of right from a trial court's order denying a motion based on sovereign immunity, the trial court's denial is effectively a final one as the State's immunity is "lost as litigation proceeds past motion practice."[9] What is more, the United States Supreme Court's reasoning regarding Eleventh Amendment immunity is consistent with this Court's reasoning on governmental immunity. See, e.g., *Mack v City of Detroit*, 467 Mich 186, 203 (2002) (noting that "a central purpose of governmental immunity . . . is . . . to prevent a

[8] It is worth noting that the Supreme Court has previously explained that the phrase "Eleventh Amendment immunity" is "something of a misnomer" and is more accurately described as the sovereign immunity the "States enjoyed before the ratification of the Constitution, and which they retain today[.]" *Alden v Maine*, 527 US 706, 713 (1999).

[9] Examples of cases where the State could move for summary disposition based on sovereign immunity include a breach of contract claim where the plaintiff fails to timely comply with § 6431, see, e.g., *Elia Companies, LLC v University of Michigan Regents*, Supreme Court Docket No. 162830, or federal claims against the state brought in the circuit courts which lack subject matter jurisdiction, see, e.g., *McKenzie v Department of Corrections*, 964 NW2d 370 (2021).

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drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity").

For these reasons—that is, because the grounds for creating an appeal of right for the denial of sovereign immunity are largely the same as those relating to orders denying governmental immunity—this Court should interpret the MCR 7.202(6)(a)(*v*) to include orders denying motions premised on sovereign immunity.

2. The result below is an example of the confusion created by the interchangeable use of these two types of immunity.

Until this Court issues a published opinion regarding the meaning of "governmental immunity" as used in MCR 7.202(6)(a)(*v*), there will likely be confusion in the lower courts. For example, the Court of Appeals' focus on the fact that the claim at issue in *Fairley v Michigan Department of Corrections* was brought under the GTLA appears to be a result of this confusion. In its opinion, the Court of Appeals reasoned that "[a]bsent the Legislature's conditioning its consent to be sued on compliance with the [Court of Claims Act,] . . . compliance with the [Court of Claims Act], including MCL 600.6431, is "a question of compliance with the rules of the forum[.]" *Tyrrell*, 335 Mich App at 271. What this means, the Court of Appeals argued, is that MCL 600.6431 requires compliance only for those claims brought against state defendants *in the Court of Claims*." *Id.*

But in arriving at this conclusion, the Court of Appeals misses the obvious, which is that the Legislature, by providing that "[a] claim may not be maintained" unless the claimant complies with the Court of Claims Act's notice provision, plainly

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conditioned its consent to suit upon compliance § 6431. Simply put, tort claims are not the only claims to which the State, as sovereign, enjoys immunity. To the contrary, as noted above, prior to 1939, a claimant could not even sue the State as a result of the State's immunity from suit. See *Greenfield Const Co Inc*, 402 Mich at 195. But within two years after consenting to suit for the first time, the Legislature prohibited individuals from maintaining claims against the State absent timely compliance with the legislatively enacted notice requirements. See 1941 PA 179, § 11a. Put differently, the Legislature does not need to condition its consent to suit in two separate statutes in order for the courts to enforce § 6431 as written.[10]

In short, even though the instant appeal is one based on the denial of sovereign immunity as opposed to governmental immunity, common sense dictates that it be treated as a final order within the meaning of MCR 7.202(6)(a)(*v*). And to provide additional and clarity for the bench and the bar regarding the meaning of the term "governmental immunity" as used in the Court Rule, for the reasons state above, this Court should issue an opinion explaining that a final order includes an order that denies the State's motion for summary disposition premised on sovereign immunity.

[10] In fact, when reviewing section 10(1) of the GTLA, MCL 691.1410(1), it appears that the Legislature is simply instructing claimants that claims against state governmental entities are to be filed in the Court of Claims whereas claims against local governmental entities are to be filed in the circuit courts. And clarifying that suits against the State are to be brought in the Court of Claims makes sense considering that the purpose of the GTLA is to "to make uniform the liability of municipal corporations, political subdivisions, and the state[.]" 1964 PA 170.

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CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the Department respectfully requests that this Court issue an opinion and order vacating the Court of Appeals' opinion in *Tyrrell v University of Michigan*, as well as its opinion below, and issue an opinion clarifying that (1) all individuals with claims against the State (except for those seeking compensation under the WICA) must comply with the notice and verification set forth in MCL 600.6431 and (2) any order that denies a motion for governmental immunity is appealable by right under MCR 7.203(A).

Respectfully submitted,

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