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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
STEPHENS, P.J.
SERVITTO, J.
LETICA, J.

Wayne Cir. No. 19-4888-CD
ALLEN, J.

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SUPPLEMENTAL BRIEF FOR ORAL ARGUMENT ON THE APPLICATION BY WAYNE STATE UNIVERSITY

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QUESTIONS PRESENTED

In its order directing the Clerk to schedule oral argument on the application, *Christie v Wayne State Univ*, 967 NW2d 379 (2021), the Court directed the University to submit a supplemental brief addressing these two questions:

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

University:	Yes
Christie:	No
Circuit Court:	No
Court of Appeals:	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?

University:	Yes
Christie:	No
Circuit Court:	No
Court of Appeals:	No

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Mindful of the Court's instruction that "[t]he parties should not submit mere restatements of their application papers," *Christie v Wayne State Univ*, 967 NW2d 379 (2021), and that its application papers thoroughly address the merits of the questions presented, the University relies chiefly on its earlier filings while offering the following supplemental arguments.

SUPPLEMENTAL STATEMENT OF THE CASE

The University's application fully states the material facts of this case. The University has no supplemental statement of facts to offer.

SUPPLEMENTAL ARGUMENT

I. *Section 6431*. The Legislature has conditioned waivers of sovereign immunity on compliance with procedures that balance a private plaintiff's interest in a remedy with a range of public interests.

The state enjoys sovereign immunity from suit because the courts cannot exercise power over that which created them without the state's consent. *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002). There are two components to the doctrine of sovereign immunity: "sovereign immunity from suit and sovereign immunity from liability." *Manion v State*, 303 Mich 1, 19; 5 NW2d 527 (1942). Recognizing these distinct components, the Court has said that it is the Legislature's prerogative to decide whether and on what terms the state may be sued. *McCahan v Brennan*, 492 Mich 730, 732; 822 NW2d 747 (2012).

Against this backdrop, it is useful to note the points on which the parties agree. They agree that the Legislature has waived immunity from liability for claims arising under the Elliot-Larsen Civil Rights Act ("**ELCRA**") and the Persons with Disabilities Civil Rights Act ("**PWDCRA**"). They also agree that the Legislature has waived immunity from suit by submitting the state to the jurisdiction of various trial courts through the Court of Claims Act ("**COCA**"). The parties further seem to agree that the Legislature has

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conditioned its waiver of immunity from suit by imposing conditions precedent to filing a claim against the state under §6431. The point where they diverge is on the question of whether those conditions precedent apply to all claims against the state or just those claims filed against the state in the Court of Claims.

The University's application papers fully explain why the conditions precedent in §6431 apply to all claims against the state as a matter of statutory interpretation. The language is plain and unambiguous: "[e]xcept as otherwise provided in this section, a claim may not be maintained against this state unless the claimant [timely complies with certain requirements]." On its face, this provision isn't limited to claims filed in a particular court; it applies to *all* claims against the state. Argument II.A, Application 15–19. Even if the Court were to deem this language unclear, applying the rules of statutory construction and the rule that waivers of sovereign immunity are to be strictly construed, *Greenfield Const Co Inc v Dep't of State Highways*, 402 Mich 172, 197; 261 NW2d 718 (1978) (holding that any relinquishment of sovereign immunity must be "strictly construed," citing *Manion*, 303 Mich at 19), yields the same result. Argument II.B, Application 19–22. Rather than rehash those arguments, which the University incorporates by reference, it uses this supplemental brief to expand on the policy rationales that reinforce why §6431 applies to all claims against the state, not just those filed in the Court of Claims.

The most significant analytical flaw in Christie's argument is that it does not acknowledge, much less account for the fact, that *the exact same claims*—the same parties, the same facts, the same causes of action—can be filed in the Court of Claims and in circuit court. See Argument II.B.3, Application 21–22. The forum depends only on whether the plaintiff demands a jury trial. Christie offers no persuasive reason why §6431(1) should be understood as legislative insistence upon the benefits of notice for bench trials but not jury trials. *Ibid.* The Court has held that notice provisions like the one found in §6431(1) give the state an opportunity to investigate and evaluate claims, to reduce the uncertainty of the extent of future demands, to put claimants to an early choice regarding how to

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proceed, and to ensure that the correct government agency receives notice by designating the Clerk of the Court of Claims as the agent to received verified notice of potential claims. *McCahan*, 492 Mich at 744 and n 24. None of these objectives turn on whether a claim is tried to the bench or a jury. Identical policy considerations are in play regardless of who serves as the factfinder.

Consider, for example, the opportunity to investigate and evaluate claims. This involves conducting interviews of employees and preserving and reviewing emails and other records. Early notification under §6431(1) facilities those activities before employees may separate from the institution or records may be lost to routine record retention policies. Conversely, delayed notification may result in avoidably lost opportunities to interview fact-witness employees who separate from the institution, perhaps relocating to another state for work or retirement. Delayed notification, coupled with the routine implementation of record retention policies, may result in the avoidable loss of relevant evidence (*e.g.*, email, memoranda, officer bodycam footage, etc.)—whether it be "smoking gun" evidence for the claimant or "silver bullet" evidence for the defendant institution. The obvious rejoinder to extend the retention period, while perhaps superficially appealing, is not a cost-free proposition. Paper records must be warehoused; digital data requires storage space. State institutions must work within budgets and appropriations; added expense in one area often means cutbacks in others. Through the notice requirement, the Legislature has struck a balance between giving a claimant judicial redress while maximizing the likelihood of preserving relevant evidence at the lowest possible cost. Neither *Tyrrell* nor Christie offer any support for the dubious proposition that the Legislature intended this careful balance to apply to cases tried to the bench but not to the very same claims when tried to a jury.

Verified notice also helps state institutions separate serious claims from those that are not. State institutions have finite personnel to dedicate to the investigation and evaluation of claims. "Verification is a certification of truth," *Stone v Dep't of State Police*, unpublished per curiam opinion of the Court of Appeals, issued July 8, 2014 (Docket No.

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314848) (quoting *Jackson v City of Detroit Bd of Ed*, 18 Mich App 73, 80; 170 NW2d 489 (1969)), rev'd on other grounds, *Fairley v Dep't of Corrections*, 497 Mich 290; 871 NW2d 129 (2015), and the COCA requires that claimants make their verifications under oath before an officer authorized to administer oaths, MCL 600.6431(2)(d). Those who make willfully false verifications are guilty of perjury. MCL 750.423. The notice requirement further conserves public resources by requiring state institutions to allocate them only to claimants who are willing to promptly declare under oath the material facts of their claims. Here again, this policy objective doesn't change merely because a jury will decide the facts instead of a judge.

Centralized notice through the Clerk of the Court of Claims also facilitates rational legislative objectives. It reduces the burden on the claimant by eliminating the time and expense that would otherwise be incurred to effectuate service, while at the same time it increases efficiency for state institutions, which can establish and implement standardized processes for handling and investigating notices upon receipt of the notice from the Clerk. These objectives do not depend in any way on who serves as the factfinder at trial.

At the same time, applying § 6431 to claims filed in circuit court would not bar or seriously impede plaintiffs who pursue such claims. "[P]roviding statutory notice requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of the statutory notice provision …." *Rusha v Dep't of Corrections*, 307 Mich App 300, 312; 859 NW2d 735 (2014) (cleaned up). Filing the required notice is no more difficult for a person who demands a jury trial than it is for one who cannot demand one (or chooses not to do so). Indeed, there are already plaintiffs' attorneys who file notices in cases filed against state defendants in circuit court. See, *e.g.*, Compl. ¶ 12, *El-Sayed v Eastern Mich Univ*, No. 18-608-CD (Washtenaw Cir., Jun. 4, 2018) ("In accordance with MCL 600.6431(1), on June 1, 2018, Plaintiff filed a written Notice of Intent with the Michigan Court of Claims stating the time and place where Plaintiff's claims arose and setting forth the nature of the

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Plaintiff's claims and of the items of damage alleged"), Appx. 83a.

Tyrrell also creates opportunities for gamesmanship. For example, following *Tyrrell*, the Court of Appeals recently ruled in *Elia Cos, LLC v Univ of Mich Regents*, 335 Mich App 439, 457; 996 NW2d 755 (2021), *moaa gtd*, 967 NW2d 237 (2021), that the notice requirement still applies when a plaintiff first files her claim in circuit court but the case is later transferred to the Court of Claims. So, rather than transferring a claim, a state defendant could move to dismiss based on exclusive Court of Claims jurisdiction, forcing the plaintiff to file a timely notice or verified complaint in the Court of Claims. Or more shrewdly yet, a state defendant could assert a lack of subject-matter jurisdiction in its answer and wait until after the one-year deadline for filing notices before moving to dismiss for lack of jurisdiction. The plaintiff would then be time-barred from filing a notice or a complaint in the Court of Claims, losing their right to seek relief altogether. The same opportunities for sharp litigation practices exist when a plaintiff seeks both legal and equitable relief because the Court of Claims would have exclusive jurisdiction over the equitable claims. Thus, *Tyrrell* has needlessly injected risk and the possibility of gamesmanship into a plain and unambiguous statute that supplies a bright-line rule. It should be reversed and clarity restored.

II. *Jurisdiction. Tyrrell* directly conflicts with early decisions from this Court and the Court of Appeals regarding the jurisdiction of right of the Court of Appeals.

The University relies on its application papers on the jurisdictional issue. To comply with the Court's order, *Christie*, 967 NW2d at 379, it briefly summarizes its position here.

The Court of Appeals has jurisdiction of right over appeals from final orders entered by circuit courts. MCR 7.203(A)(1); MCR 7.204(A)(1)(a). Orders denying governmental immunity to a governmental party are final orders. MCR 7.202(6)(a)(v).

The ultimate success or failure of a claim of immunity has no bearing on the of-right jurisdiction of the Court of Appeals: "Whenever the effect is to deny a defendant's claim of immunity, the trial court's decision is, in fact, 'an order denying governmental immunity.'

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Logic dictates that such a determination be reviewable under MCR 7.203(A)." *Walsh v Taylor*, 263 Mich App 618, 624–25; 689 NW2d 506 (2004).[1]

The University claimed it was immune from suit because Christie's failure to comply with the notice requirement in §6431(1), one of the conditions precedent for waiver of immunity, left intact the immunity that would otherwise apply. MSD at 6, Appx. 34a; MSD Reply at 2–3, Appx. 53–54a; MSD Tr. 11:2–16, Appx. 19a. The circuit court disagreed. MSD Order, Appx. 5–6a; MSD Tr. 12:8–13:21, Appx. 19–20a. Thus, under *Watts*, the circuit court denied a claim of governmental immunity. The Court of Appeals therefore had jurisdiction of right over the University's appeal.[2]

This straightforward analysis notwithstanding, the Court of Appeals held that it lacked jurisdiction of right because §6431 does not "implicate" immunity based on its earlier ruling in *Tyrrell*. *Christie v Wayne State Univ*, unpublished per curiam opinion of the Court of Appeals, issued January 28, 2021 (Docket No. 350321), Appx. 2–3a. Yet such reasoning conflates the *merits* of an immunity argument with the *claim* of immunity. Under *Watts*, all that is necessary to trigger the right to immediate appellate review is an order denying a *claim* of immunity, regardless of whether the Court of Appeals believes the claim has merit. Accordingly, *Tyrrell*—and by extension *Christie*—directly conflicts with *Watts* and should be reversed on the jurisdictional ruling as well.

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[1] As noted in the University's application, *Walsh* was a conflicting opinion issued under Rule 7.215(J)(2). A month before *Walsh*, a different panel reached the opposite conclusion in *Newton v Department of State Police*, 263 Mich App 251; 688 NW2d 94 (2004). This Court adopted *Walsh* and overruled *Newton* in *Watts v Nevils*, 477 Mich 856; 720 NW2d 755 (2006).

[2] More precisely, the orders in this case and *Tyrrell* denied a claim of sovereign immunity. As this Court clarified in *Pohutski v City of Allen Park*, 465 Mich 675, 682; 641 NW2d 219 (2002), sovereign immunity applies to the state and its instrumentalities, while governmental immunity is a statutory creation under the GTLA. When used in Rule 7.202(6)(a)(v), the term "governmental immunity" includes both types of immunity. *Hart v State*, 946 NW2d 285, 288 n 5 (2020) (Clement, J., concurring).

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CONCLUSION

For these reasons, and for those argued in the University's application papers, the Court should (*i*) overrule *Tyrrell*; (*ii*) reverse *Christie*; (*iii*) reaffirm *Walsh* and *Watts* on the jurisdictional issue; (*iv*) hold that §6431(1) applies to all claims filed against state institutions in all courts of this state and that compliance with the requirements of that section are conditions precedent to suing the state in any forum; and (*v*) remand to the trial court for entry of judgment in favor of the University on its claim of immunity because Christie did not comply with §6431(1).

Respectfully submitted,

BUTZEL LONG, P.C.

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