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State of Michigan
In the Supreme Court

SUSAN CHRISTIE,

Plaintiff–Appellee,

v.

WAYNE STATE UNIVERSITY,

Defendant–Appellant.

Supreme Court No.

Court of Appeals No. 350321
STEPHENS, P.J.
SERVITTO, J.
LETICA, J.

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

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WAYNE STATE UNIVERSITY'S
APPLICATION FOR LEAVE TO APPEAL

FILED UNDER AO 2019-6

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OPINIONS BELOW

Wayne State University seeks permission to appeal from the decision of the Court of Appeals affirming an order of the Wayne County Circuit Court rejecting the University's assertion of governmental immunity. *Christie v Wayne State Univ*, unpublished per curiam opinion of the Court of Appeals, issued January 28, 2021 (Docket No. 350321), aff'g *Christie v Wayne State Univ*, unpublished order of the Wayne County Circuit Court, issued August 9, 2019 (Docket No. 19-4888-CD).

The opinion of the Court of Appeals is reproduced in the Appendix at 1a. The order of the Wayne County Circuit Court is reproduced at 11a.

QUESTIONS PRESENTED

Susan Christie sued the University in circuit court for allegedly terminating her employment in violation of civil rights statutes. Although the Legislature has authorized such suits against the state and its instrumentalities, the authorization is conditional: a plaintiff must file either a complaint or a notice of intent to sue with the Clerk of the Court of Claims within one year after the claim accrues. MCL 600.6431(1). The University argues that it remains immune from these claims because Christie failed to comply with this requirement. When the circuit court rejected the University's assertion of governmental immunity, the University claimed an appeal to the Court of Appeals.

I. Orders denying governmental immunity are final orders appealable of right under Rules 7.202(6)(a)(v) and 7.203 (A)(1), but the Court of Appeals held that it lacked jurisdiction of right under *Tyrrell v University of Michigan*, —Mich App—; —NW2d — (2020) (Docket No. 349020). Was *Tyrrell* wrongly decided, and if so, should the Court of Appeals have exercised jurisdiction of right over the appeal?

II. Does MCL 600.6431(1) apply to all actions filed against the state and its instrumentalities in circuit court?

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APPLICATION FOR LEAVE TO APPEAL

This is an employment discrimination case. Plaintiff Susan Christie sued Wayne State University in the Wayne County Circuit Court for allegedly terminating her employment because of her age and a purported disability, in violation of the Elliot-Larsen Civil Rights Act ("ELCRA") and the Persons with Disabilities Civil Rights Act ("PWDCRA"). The University contends that it enjoys immunity from suit because Christie failed to file a notice of intent to sue with the Clerk of the Court of Claims within one year from her last day of employment as required under MCL 600.6431, which is a legislatively mandated condition precedent for waiver of immunity.

The University claimed an appeal after the circuit court ruled that §6431 does not apply to claims filed against state institutions in the circuit courts. Even though orders denying governmental immunity are final orders appealable of right, MCR 7.202(6)(a)(v); MCR 7.203(A)(1), the Court of Appeals has held that it lacked jurisdiction of right over the University's appeal because §6431 does not "implicate" governmental immunity. *Christie v Wayne State Univ*, unpublished per curiam opinion of the Court of Appeals, issued January 28, 2021 (Docket No. 350321), pp 2–3. It did so based on its recently published decision in *Tyrrell v University of Michigan*, —Mich App—; —NW2d— (2020) (Docket No. 349020).[1] *Christie*, unpub op at 3.

Tyrrell directly conflicts with this Court's decision in *Watts v Nevils*, 477 Mich 856; 720 NW2d 755 (2006), where the Court adopted the holding in *Walsh v Taylor*, 263 Mich App 618, 624–25; 689 NW2d 506 (2004). Under *Watts* and *Walsh*, a rejected ***assertion*** of governmental immunity is sufficient to trigger an appeal of right, ***regardless*** of whether the government defendant prevails on the claim of immunity. See Argument I, *infra*. A decision of the Court of Appeals that conflicts with a decision of this Court or another decision of the Court of Appeals is grounds for granting leave to appeal. MCR 7.305(B)(5)(b).

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[1] The University of Michigan has applied to this Court for leave to appeal in *Tyrrell*. See *Tyrrell v University of Mich*, Docket No. _____.

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The Court of Appeals, again following *Tyrrell*, held that the University does not enjoy governmental immunity because § 6431 does not apply to claims filed against state institutions in the circuit courts. *Christie*, unpub op at 3–4. *Tyrrell* suffers, however, from several analytical flaws. See Argument II, *infra*. Given the frequency with which the University and other state institutions are sued in circuit court for statutory employment claims, the question of whether § 6431 applies to actions filed against state institutions in circuit court is one of major significance to the state's jurisprudence. This, too, is grounds for granting leave to appeal. MCR 7.305(B)(3).

JURISDICTION

In civil cases, the Court has jurisdiction to review decisions rendered by the Court of Appeals if a party requests review within 42 days after the Court of Appeals issues its opinion. MCR 7.303(B)(1); MCR 7.305(C)(2). The University timely filed this Application on March 11, 2021. The Court therefore has jurisdiction to grant leave in this case.

STATEMENT OF THE CASE

Susan Christie claims that the University terminated her employment because of her age and an alleged disability, in violation of ELCRA and the PWDCRA. Appx. 29a, 32–33a, Compl. ¶¶ 1, 25–40.

Christie's employment with the University ended on November 17, 2017. Appx. 29a, Compl. ¶ 1. On April 4, 2019, almost 17 months later, she sued the University in Wayne County Circuit Court. Appx. 13a, Circuit ROA. The parties agree that Christie did not file a notice with the Clerk of the Court of Claims under Section 6431 of the Court of Claims Act ("COCA"), MCL 600.6431, within one year after her employment ended.

The University sought summary disposition under Rule 2.116(C)(7). It argued that:

(1) although the Legislature has authorized ELCRA and PWDCRA suits against the state and its

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> instrumentalities, the authorization is conditional: a plaintiff must file either a complaint or a notice of intent to sue with the Clerk of the Court of Claims within one year after the claim accrues. MCL 600.6431(1).
>
> (2) if a plaintiff fails to comply with this mandatory condition precedent to suit, the state defendant remains immune;
>
> (3) the University, an instrumentality of the state, remains immune from Christie's claims because she did not file the required notice within one year from the date her employment ended.

Appx. 40a, MSD at 6; Appx. 59–60a, MSD Reply at 2–3; Appx. 24a, MSD Tr. 11:2–16. The circuit court denied the motion, ruling that §6431 does not apply to claims filed against a state defendant in circuit court. Appx. 25a–26a, MSD Tr. 12:8–13:21; Appx. 11a, MSD Order.

The University claimed an appeal to the Court of Appeals, relying on the definition of a final order, which includes orders denying governmental immunity to a governmental party. MCR 7.202(6)(a)(v); MCR 7.203(A)(1). After oral argument but before the panel issued its decision, another panel held in *Tyrrell* that §6431 does not implicate immunity; therefore, a circuit court's denial of a state defendant's motion to dismiss on that basis is not appealable of right. The parties promptly filed supplemental authorities on *Tyrrell*. In its supplemental authority, the University identified multiple analytical flaws in *Tyrrell* and asked the panel to issue a conflict opinion. Appx. 134a, Univ. Supp. Auth'y.

Applying *Tyrrell*, the panel held that it lacked jurisdiction to decide the appeal of right. *Christie*, unpub op at 3. It elected, however, to reach the merits as if on leave granted. *Ibid.* The panel then affirmed the circuit court based solely on *Tyrrell*. *Id.* at pp 3–4. It did not address the University's request for a conflict opinion or the University's critique of *Tyrrell*. See *ibid.*

The decision below correctly applied *Tyrrell*. Nevertheless, the University seeks leave to appeal to challenge both the jurisdictional and

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substantive holdings in *Tyrrell* as incorrect statements of the law. On the jurisdictional issue, *Tyrrell* erroneously conflated the ***assertion*** of governmental immunity with the ***merits*** of the assertion. And, on the merits, *Tyrrell* erroneously limited § 6431 to claims filed in the Court of Claims. Reversing *Tyrrell* on these points would necessarily require reversal of the decision below.

STANDARD OF REVIEW

Jurisdictional questions are reviewed *de novo*. *Lapeer County Clerk v Lapeer Circuit Judges*, 465 Mich 559, 566; 640 NW2d 567 (2002). So too are questions of statutory interpretation. *Wigfall v City of Detroit*, 504 Mich 330, 337; 934 NW2d 760 (2019).

ISSUE PRESERVATION

The University preserved the jurisdictional issue in its brief on appeal, in its answer to Christie's appellate motion to dismiss for want of jurisdiction, and in its supplemental authority. Appx. 144a, Univ. Br. at 1; Appx. 137–138a, Univ. Ans. to App. Mot. Dismiss at 4–5; Appx. 157a, Univ. Supp. Auth'y.

The University preserved the question of whether MCL 600.6431(1) imposes conditions precedent to waiving immunity and suing a state defendant, regardless of which state court presides over the case, in its motion for summary disposition. Appx. 37–45a, MSD at 3–11; Appx. 58–63a, MSD Reply at 1–6; Appx. 24–25a, MSD Tr. 11:8–12:3; Appx. 135–137a, Univ. Ans. to App. Mot. Dismiss at 2–4.

ARGUMENT

I. Jurisdiction: *Tyrrell* directly conflicts with earlier decisions from this Court and the Court of Appeals regarding the jurisdiction of right of the Court of Appeals.

This case is identically situated to *Tyrrell*. In both cases, a circuit court entered a summary disposition order denying a state institution's claim

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that it enjoyed immunity because the plaintiff failed to comply with the notice provision in §6431. Compare *Christie*, unpub op at 2, with *Tyrrell*, —Mich App at —; slip op at 1–2. In both cases, the state institution timely claimed an appeal of right from that order. Compare *Christie*, unpub op at 2, with *Tyrrell*, —Mich App at —; slip op at 2. And in both cases, the Court of Appeals held that it lacked jurisdiction of right over the appeals. Compare *Christie*, unpub op at 2–3, with *Tyrrell*, —Mich App at —; slip op at 2–5.

Both decisions are wrong. 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 University asserted that it was immune from suit as a state institution because Christie failed to comply with a condition precedent to suit. The circuit court's order was therefore an order denying the assertion of governmental immunity.[2]

The ultimate success or failure of a claim of immunity has no bearing on the of-right jurisdiction of the Court of Appeals. "[T]he purpose of governmental immunity is to protect the governmental body, not only from liability, but from the trial itself … [W]henever the effect is to deny a defendant's ***claim*** of immunity, the trial court's decision is, in fact, 'an order denying governmental immunity.' Logic dictates that such a determination be reviewable under MCR 7.203(A). MCR 7.202(6)(a)(v)." *Walsh*, 263 Mich App at 624–25 (emphasis added).

Walsh was a conflicting opinion issued under Rule 7.215(J)(2). A month earlier, a different panel reached the opposite conclusion in *Newton v*

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[2] More precisely, the orders in this case and *Tyrrell* denied a claim of sovereign immunity. As the 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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State Police, 263 Mich App 251; 688 NW2d 94 (2004). The Court of Appeals declined to convene a special panel to resolve the conflict. *Walsh v Taylor*, 263 Mich App 801; 689 NW2d 778 (2004). Importantly, however, this Court overruled *Newton* "to the extent it is inconsistent with this order [holding that the defendants had a right to appeal from a circuit court's denial of governmental immunity] and *Walsh*." *Watts*, 477 Mich at 856. Thus, since *Watts*, *Walsh* is binding precedent on the jurisdictional issue.

Tyrrell (and thus this case) cannot be reconciled with *Watts* and *Walsh*. In *Tyrrell*, the University of Michigan claimed that it was entitled to governmental immunity because the plaintiff failed to file a notice of intent to sue with the Clerk of the Court of Claims as required under §6431. *Tyrrell*, —Mich App at —; slip op at 1. Under *Watts* and *Walsh*, it doesn't matter if the immunity argument succeeds or fails, the mere fact that the argument was raised and the trial court rejected it entitled the university to an immediate appeal of right. Yet *Tyrrell* held that the university had no right of appeal because §6431 does not "implicate" governmental immunity, and there can be no "denial" of immunity when immunity doesn't exist. Such reasoning incorrectly conflates the ***merits*** of an immunity argument with the ***assertion*** of immunity. Under *Watts* and *Walsh*, the unsuccessful ***assertion*** of immunity triggers the right of review.

Tyrrell's confusion of jurisdiction for merits caused it to misread the decisions in *Progress Michigan v Attorney General*, 324 Mich App 659, 666; 922 NW2d 654 (2018) ("*Progress I*"), rev'd on other grounds 506 Mich 74; —NW2d— (2020) ("*Progress II*"), as support for its analysis.

In *Progress I*, the Court of Appeals ruled that the Attorney General had a right to appeal from an order denying governmental immunity. The plaintiff sued the Attorney General for an alleged FOIA violation, but the complaint was not signed or verified as required under §6431. *Progress I*, 324 Mich at 670–71. The Attorney General argued that the claim had to be dismissed, since no claim can be maintained against the state without first complying with the mandatory conditions precedent to suit in §6431. *Ibid.* The plaintiff filed an amended complaint to cure the deficiencies, but the Court of Appeals held that this had no effect. *Id.* at 672–73. The initial

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complaint was a legal nullity because it did not comply §6431, and although the proposed amended complaint could serve as a valid complaint, it could not be timely filed because the 180-day limitations period for FOIA claims had already elapsed. *Ibid.*

In *Progress II*, this Court reversed, holding that failing to verify the initial complaint did not render it a legal nullity. Under §6422, the rules of practice and procedure in circuit court also govern practice and procedure in the Court of Claims, and those rules allow for an amendment of right within 14 days after being served with a responsive pleading. *Progress II*, 506 Mich at 93–95 (analyzing MCL 600.6422 and MCR 2.118(A)(1)). The plaintiff properly took advantage of this rule and amended its complaint to supply the missing verification. *Progress II*, 506 Mich at 95. So, even though the amendment occurred after the 180-day limitations period elapsed, the plaintiff had, nonetheless, "timely" complied with the verification requirements by operation of §6422 and Rule 2.118(A)(1). *Ibid.* Therefore, plaintiff's claim was both timely and complied with the mandatory conditions precedent to suing the state under §6431.

Because the plaintiff had sued in the Court of Claims and complied with §6431, this Court chose to leave open the substantive question at issue here and in *Tyrrell*: does §6431 apply to all actions filed against state defendants, regardless of which court will preside over the case, or is it merely a rule of the forum that applies only to cases filed in the Court of Claims? *Id.* at 87–89.

Critically, this Court in *Progress II* never questioned that the Court of Appeals had properly exercised jurisdiction of right over the Attorney General's claim of immunity in *Progress I*.

Even if the Court is unpersuaded to grant leave on the merits of the University's claim of immunity, it should vacate the jurisdictional ruling so that state defendants are not stripped of their right to an appeal whenever a trial court rejects an assertion of immunity.

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II. Section 6431: *Tyrrell*'s misinterpretation of § 6431 deprives state institutions of their sovereign immunity in cases filed in circuit court.

A. Section 6431 is facially clear and unambiguous; it should have been applied as written without further interpretation.

The University is an instrumentality of the State. Const 1963, art VIII, § 4; 1956 PA 183. The State and its instrumentalities are typically immune from suit. *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012). See also *Pohutski v City of Allen Park*, 465 Mich 675, 682; 641 NW2d 219 (2002) (noting that the state and its instrumentalities enjoy sovereign immunity). "[I]t is the sole province of the Legislature to determine whether ***and on what terms*** the state may be sued[;] the judiciary has no authority to restrict or amend ***those terms***." *McCahan*, 492 Mich at 732 (emphases added).

The notice requirement in § 6431(1) is one of those terms. It provides, in relevant part, that "***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 … institutions …." MCL 600.6431(1) (emphasis added).

This notice requirement is "an unambiguous condition precedent to sue the State." *Rusha v Department of Corrs*, 307 Mich App 300, 307; 859 NW2d 735 (2014) (cleaned up). *See also Fairley v Department of Corrs*, 497 Mich 290, 292; 871 NW2d 129 (2015). And it is strictly construed: "[A] claimant's failure to comply strictly with this notice provision warrants dismissal of the claim, even if no prejudice resulted." *Rusha*, 307 Mich App at 307. The parties agree that Christie never filed a notice with the Clerk of the Court of Claims.

Notwithstanding these decisions, *Tyrrell* deemed it to be unclear whether § 6431 applies to claims filed in every court or just in the Court of Claims. *Tyrrell*, —Mich App at —; slip op at 7. This erroneous determination rests in part on *Tyrrell*'s erroneous jurisdictional ruling, where the Court emphasized that the Legislature had waived immunity from

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suit under the PWDCRA. *Id.* at 3–5.

As an initial matter, neither the University of Michigan in *Tyrrell* (a case arising under the PWDCRA) nor Wayne State University in this case (arising under ELCRA and the PWDCRA) has argued that it remains absolutely immune from the statutory claims asserted against it. Wayne State acknowledges that a plaintiff can file ELCRA and PWDCRA claims against state instrumentalities in circuit court and demand trial by jury. It merely contends that plaintiffs must still fulfill the condition precedent to suit by filing a timely and sufficient notice with the Clerk of the Court of Claims.

But waiver of immunity is only the first half of the analysis, not the end. The Legislature's decision to allow plaintiffs to sue the state and its instrumentalities under ELCRA goes to issue of "***whether*** ... the state may be sued." The "***on what terms***" element from *McCahan* is a separate consideration. Both this Court in *Fairley* and the Court of Appeals in *Rusha* have held that the notice requirement in §6431 is one of those terms—an unambiguous condition precedent to filing suit. And *McCahan* says the judiciary has no authority to restrict or amend that term. *McCahan*, 492 Mich at 732.

Tyrrell unpersuasively dodged *McCahan* by pointing to *Fairley*, where the underlying claim arose under the Governmental Tort Liability Act ("GTLA"), which expressly refers to §6431. Implicitly, *Tyrrell* held that the unambiguous condition precedent in §6431 applies only where the Legislature incorporates it by reference into statutes waiving immunity, as was the case in *Fairley*. See *Tyrrell*, —Mich App at —; slip op at 4–5, 8. But a closer read of the GTLA does not support that proposition. The GTLA says only that a notice containing what the GTLA requires ***satisfies*** the notice requirement for §6431. MCL 691.1404 (1)–(2). In other words, *Fairley* held that the GTLA dictates how a plaintiff must comply with §6431 in GTLA cases; *Fairley* did not narrow *McCahan*'s broad, unqualified holding that §6431 is a mandatory condition precedent to the right to sue the State merely by noting that the GTLA refers to §6431.

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Tyrrell also misunderstood the importance of *Fairley*'s observation that § 6431 does not "confer" immunity. *Tyrrell*, —Mich App at —; slip op at 8. While true, it is because ***immunity is an attribute of sovereignty***, not a creation of positive law, for instrumentalities of the state like the University. The GTLA itself confirms that the Act "does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed," except as otherwise delineated in the Act. MCL 691.1407(1). Stated another way, if the GTLA had never been enacted, § 6431 would still be one of the conditions precedent that must be satisfied to avoid sovereign immunity when suing the state or its instrumentalities.

Bearing this all in mind, the first step in determining the legislative intent behind § 6431 is to consider the plain language of the statute, which must be applied as written when it is unambiguous. *Russell v Detroit*, 321 Mich App 628, 637; 909 NW2d 507 (2017). "The Legislature is presumed to have written the statute to mean what the Legislature intended it to mean." *McCahan*, 291 Mich App at 43. Specifically, "statutory notice requirements must be interpreted and enforced as plainly written and [ ] no judicially created saving construction is permitted to avoid a clear statutory mandate." *Id.* at 733. "When the words of a statute are unambiguous, judicial inquiry is complete." *Walters v Nadell*, 481 Mich 377; 751 NW2d 431 (2008) (cleaned up). Given that our courts have repeatedly held § 6431 to be an unambiguous condition precedent to suing the state, *McCahan*; *Fairley*; *Rusha*, the *Tyrrell* court was wrong to interpret or apply it in any way other than as plainly written—*i.e.*, by limiting it to cases filed in the Court of Claims.

One corollary of the rule that unambiguous language must be applied as written is that courts cannot imply language that the Legislature omitted:

> Whether or not a statute is productive of injustice, inconvenience, is unnecessary, or otherwise, are questions with which courts have no concern. ***It is to be assumed that the legislature had full knowledge of the provisions and we have no right to enter the legislative***

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> ***field[, assume an] unintentional omission[, and] supply what we may think might well have been incorporated.***

Johnson v Recca, 492 Mich 169, 187; 821 NW2d 520 (2012) (cleaned up) (emphasis added). Although it has amended the COCA several times of late, the Legislature has never chosen to include language limiting the requirements of § 6431 to cases pending in the Court of Claims or cases subject to the GTLA, as the Court of Appeals did in *Tyrrell*. Indeed, *Tyrrell* failed to address the COCA amendments in any meaningful way. See *Tyrrell*, —Mich App at —; slip op at 4 n 3.

The first amendment occurred shortly after the Court of Claims was transferred from the Ingham County Circuit Court to the Court of Appeals. The initial transfer legislation, 2013 PA 164, made no provision for jury trials. In response to concerns that PA 164 might be interpreted to eliminate existing rights to trial by jury, the Legislature passed 2013 PA 205, which preserved trial by jury and provided for concurrent jurisdiction. The Legislature did not amend § 6431(1) at that time, but rather left the broad language that "no claim" could be brought against the state or its institutions absent notice.

The Act was amended again in March 2020, and this time the Legislature amended the language of the notice provision itself. The Legislature could easily have inserted language that limited the notice requirement to claims to be tried in the Court of Claims. Or, it could have exempted jury claims from the notice requirement if it had intended to so limit its effect. For example, the Legislature could have amended the first sentence of § 6431(1) to state that "A claim, *except a claim subject to a trial by jury*, may not be maintained against the state unless…." Or, it could have stated that "a claim may not be maintained against the state *in the Court of Claims* unless…." Instead, the Legislature made minor, immaterial stylistic changes to § 6431(1) that left in place the broad, unqualified language that claims may not be maintained against the state.

Notably, the only exception to the notice requirement is for claims seeking compensation for wrongful imprisonment, first added in March

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2020. MCL 600.6431(5). Applying the time-honored maxim *expressio unius est exclusio alterius*, the existence of one exception means there are no other exceptions—and that means no exception for cases against state institutions filed in circuit court when there is concurrent jurisdiction.

B. *Tyrrell*'s interpretation of § 6431 violated basic rules of statutory construction.

Even if the Court were to disregard prior decisions that the language of § 6431 is clear and unambiguous, and agree with *Tyrrell* that § 6431 is unclear and therefore subject to interpretation, *Tyrrell* did not apply the canons of statutory construction correctly.

"The rules of statutory construction are well established. The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "This task begins by examining the language of the statute itself. The words of a statute provide the most reliable evidence of its intent." *Ibid.* (cleaned up). "In interpreting the statute at issue, [courts] consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Id.* at 237. "As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Ibid.* (cleaned up).

The *Tyrrell* court did not interpret the COCA as a whole. The Act is nearly 30 sections long, but the Court looked at only three sections and the title of the Act. *Tyrrell*, —Mich App at —; slip op at 7–8. This analysis falls short of the duty to construe an Act as a whole. The purpose and placement of § 6431 must be read in light of the entire COCA, not just the sections immediately preceding and following it. When considered in the context of the entire Act, both the purpose and placement of § 6431 support its application to all claims against the state, not just those litigated in the Court of Claims.

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1. The purpose of the notice requirement is not logically limited to claims filed in one trial court as opposed to all of them.

This Court has held that notice provisions like the one found in §6431 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 proceed, and to ensure that the correct government agency receives notice by designating the Clerk of the Court of Claims as the agent to receive verified notices of potential claims. *McCahan*, 492 Mich at 744 and n 24. The right to a jury trial and the functions served by notice requirements are two different means serving two different ends. One establishes a hurdle to filing a lawsuit, the other establishes a plaintiff's right to select the factfinder ***if he clears the hurdle to filing the lawsuit***. Applying §6431 as written would preserve the legislative objectives behind the notice requirement—especially the creation of a central repository for notices in a court at the seat of government—without limiting in any way a plaintiff's right to have a jury make factual findings for claims triable in circuit court.

2. Section 6452—overlooked by *Tyrrell*—shows that the Legislature knows how to limit the effect of the COCA to the Court of Claims when it wants to.

Comparing the italicized portions of §§6431 and 6452, MCL 600.6431(1); MCL 600.6452(1), shows that the Legislature intends the COCA to apply to all courts unless otherwise expressly limited:

Section 6431(1)	Section 6452(1)
[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 ….	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*** … within 3 years ….

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Note that there is no qualifier in §6431 limiting the notice requirement to claims filed in the Court of Claims. As a result, the Legislature needed to specify where the required notices must be filed: with the clerk ***of the Court of Claims***. In contrast, §6452 ***does*** contain qualifying language that limits the section to claims that proceed in the Court of Claims, so—unlike §6431—there was no need to specify which clerk's office would handle the filings. The Legislature could refer generically to the "clerk of the court" in §6452 because it is implicit from the earlier reference to the Court of Claims which court (and therefore which clerk) the section is referring to: the Court of Claims.[3]

3. The COCA governs all claims filed against the state in any state court.

The COCA governs all claims asserted against the state ***in every court***. The Act creates a primary forum for resolving claims against the state, MCL 600.6404–600.6413, while allowing a limited class of claims to proceed in the other trial courts of this state, MCL 600.6420–600.6421. After defining which courts have jurisdiction over which claims, the Legislature imposes limits on the courts' power to hear claims against the state by requiring notice and verified pleadings as prerequisites to seeking relief and by banning claims for which relief can be obtained in federal court. MCL 600.6431–600.6434, MCL 600.6440. It is only logical that a limit on jurisdiction would come after defining the courts' jurisdiction. Exceptions and limitations follow the rules to which they apply, not the other way around.

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[3] This distinction between the two sections shows that *Tyrrell* also ignored another rule of statutory interpretation: the rule against surplusage. "[E]very word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *Wickens v Oakwood Healthcare*, 465 Mich 53, 60; 631 NW2d 686 (2001). *Tyrrell* renders as surplusage the language in §6431 specifying that the filing is to be made "in the office of the clerk of the court of claims" when juxtaposed against §6452.

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Applying this statutory structure, the Court of Appeals has held that the Court of Claims and the circuit courts have concurrent jurisdiction over statutory civil-rights claims. *Doe v Department of Transp*, 324 Mich App 226, 238; 919 NW2d 670 (2018). This is critically important because a plaintiff can elect to forego the right to a jury trial in favor of a bench trial or in favor of an equitable remedy that can only be provided by the Court of Claims. In such cases, the plaintiff would unquestionably be required to file the notice required under § 6431. *Tyrrell* allows plaintiffs with jury claims to escape the notice requirement by foregoing equitable relief, which improperly creates a judicial exception to the unambiguous COCA language. Consider each of these scenarios:

- If a plaintiff has a nonjury claim against the State, then a notice or verified complaint must be filed with the Court of Claims;
- If a plaintiff has a jury claim, but waives the right to a jury, then a notice or verified complaint must be filed with the Court of Claims; and
- If a plaintiff has a jury claim, and seeks only injunctive or equitable relief, then a notice or verified complaint must be filed with the Court of Claims.[4]

It is only when a plaintiff has a jury claim, invokes the right to a jury trial, ***and*** waives any right to injunctive and equitable relief, that the case will proceed somewhere other than the Court of Claims. That this is the only scenario when a notice or verified complaint is ***not*** required underscores that *Tyrrell* has impermissibly imposed a saving construction that varies from the plain language of § 6431.

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[4] For example, in a civil rights case where a plaintiff seeks only reinstatement or front pay—forms of equitable relief—then the Court of Claims would have exclusive jurisdiction and the plaintiff would be required to file a § 6431 notice (or timely complaint) with the Court of Claims.

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C. *Tyrrell* misreads *Doe v Department of Transportation*.

Tyrrell supported its reasoning in part with *Doe*, *supra*, but *Doe* did not address whether the notice requirement applies to claims pursued in circuit court. After the plaintiff in *Doe* filed an ELCRA action in circuit court, MDOT transferred the case to the Court of Claims. The plaintiff sought a remand to the circuit court, arguing that she had a right to a jury trial on her claim. MDOT opposed the request, arguing that: (1) the Court of Claims had exclusive jurisdiction over the case because plaintiffs had no right to jury trials against the state under ELCRA, and (2) ***because of that exclusive jurisdiction*** the case should be dismissed because the plaintiff failed to file a notice or verified complaint. The Court of Claims ruled that the plaintiff had a right to a jury trial and transferred the case back to the circuit court. *Doe*, 324 Mich App at 228–29.

On appeal, relying solely on its exclusive-jurisdiction argument, MDOT ***conceded*** that the transfer back to circuit court was proper ***if*** the plaintiff had a right to a jury trial—*i.e.*, if the Court of Claims lacked exclusive jurisdiction. MDOT ***did not argue*** that the notice requirement applies to all claims against the state, even if properly pursued in circuit court, and this Court never considered or decided that issue in *Doe*. A one-sentence footnote finding Doe's noncompliance with the COCA to be moot was not a ruling on the merits of this unasserted argument. *Id.* at 239 n 4. *Doe* simply never considered the argument raised in this case.

D. Applying §6431 as written would work no hardship on plaintiffs who wish to pursue claims triable to a jury.

Not only is the University's position consistent with the plain language of the statute and the canons of construction, but applying §6431 to claims filed in circuit court will 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*, 307 Mich App at 312 (cleaned up). Filing the required notice is no more difficult for a person who demands a jury trial than it is for

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one who cannot demand one (or chooses not to do so). Nor is there any public policy rationale for holding that state defendants are entitled to *less* notice (and the benefits that come with that notice) when plaintiffs demand a jury trial. Whether it is sued for breach of contract or automobile negligence (claims for which notice must be given and that which must be pursued in the Court of Claims) or for employment discrimination, a state instrumentality has the same interest in ensuring that it receives timely notice, investigating and evaluating claims, reducing the uncertainty of future demands, and putting claimants to an early choice regarding how to proceed.

CONCLUSION

Even though orders denying governmental immunity are final orders appealable of right under Rules 7.202(6)(a)(v) and 7.203 (A)(1), the Court of Appeals has held that it lacked of-right jurisdiction because § 6431 does not "implicate" immunity. It did so based on the recently published decision in *Tyrrell*, but *Tyrrell* directly conflicts with this Court's decision in *Watts* and *Walsh*, which held that a rejected ***claim*** of immunity is sufficient to trigger an appeal of right, ***regardless*** of whether the government prevails on the claim of immunity. The Court should, at a minimum, vacate this portion of *Christie* because it conflicts with a decision of this Court and another published decision of the Court of Appeals. MCR 7.305(B)(5)(b).

The Court of Appeals, again following *Tyrrell*, held that the University does not enjoy governmental immunity because § 6431 does not apply to claims filed against state institutions in the circuit courts. *Tyrrell* suffers, however, from several analytical flaws. Section 6431 imposes conditions precedent to filing lawsuits against the state. One of those conditions precedent is giving timely notice to the state by filing a notice of intent to sue with the Clerk of the Court of Claims. *McCahan* requires that this notice requirement be strictly construed, and it prohibits the judiciary from interpreting that requirement in ways that allow plaintiffs to avoid this clear statutory mandate. The Court of Appeals did just that in *Tyrrell*. It failed to apply the plain language of § 6431 in favor of crafting a judicial

exception that excuses plaintiffs from complying with the notice requirement if they have a right to a jury trial—an exception that is unsupported by the text, structure, and purpose of the statute, or by recent legislative enactments affecting the Court of Claims Act.

Given the frequency with which the University and other state institutions are sued in circuit court for employment torts, the question of whether § 6431 applies to actions filed against state institutions in circuit court is one of major significance to the state's jurisprudence on immunity. The Court should grant leave to correct *Tyrrell*'s analytical errors and protect the Legislature's prerogative to set the terms on which waivers of immunity are granted.

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PRAYER FOR RELIEF

WHEREFORE, the University prays that the Court will grant leave and:

1. Reverse *Tyrrell*;

2. Hold that the Court of Appeals had jurisdiction of right over the initial appeal under the plain language of Rules 7.202(6)(a)(v) and 7.203(A)(1);

3. Hold that § 6431 applies to all claims filed against the state and its instrumentalities regardless of which trial court presides over the action; and

4. Remand the case for entry of an order of dismissal.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: March 11, 2021



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CERTIFICATE OF COMPLIANCE

This Application conforms to the requirements of AO 2019-6. It contains 5,877 countable words, and was prepared using 12-point Century Supra font. Line spacing is 18 points, except for headings, block quotes, and footnotes, the spacing for which is 16.5 points. At least 6 points of additional spacing is used between paragraphs and headings.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: March 11, 2021



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