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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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WAYNE STATE UNIVERSITY'S REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

FILED UNDER AO 2019-6

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REPLY

Both parties agree that the Court should review *Tyrrell*, at least on the jurisdictional issue. On the notice issue, the University's position is based on the clear and unambiguous language of the COCA, prior decisions of this Court, and well-established canons of statutory construction. Christie's position that §6419 applies only to cases filed in the Court of Claims contradicts the statute's plain language and the canons of statutory construction. The Court should grant leave and reverse the errors below.

I. *Claim of Immunity*: Christie erroneously argues that the University failed to assert an immunity defense, despite having said so multiple times in briefs and at oral argument while seeking C7 relief.

Just as she unsuccessfully argued below, Christie says that the University did not seek dismissal on grounds of governmental immunity. AE-BR 5. But that is precisely what the University did.

In its opening brief, the University observed that instrumentalities of the state are typically immune from suit, and that the state can impose limits or conditions on any waiver of that immunity: "The state and its instrumentalities would typically be immune from suit. And while that immunity can be voluntarily waived, the Legislature can set conditions for that waiver … The notice requirement is an unambiguous condition precedent to sue the state." Appx. 40a (quoting *McCahan v Brennan*, 492 Mich 730, 736; 822 NW2d 747 (2012), and *Rusha v Department of Corrs*, 307 Mich. App. 300, 307; 859 NW2d 735 (2014)) (cleaned up).

Opposing summary disposition, Christie argued against immunity, contending that the COCA does not apply to lawsuits filed against the state in circuit court, even though such lawsuits are filed under the jurisdictional and venue provisions of §6421 ***of the COCA***. Appx. 52–53a, 56a.

In its reply, the University confirmed that it had moved for summary judgment under the immunity provision of Rule 2.116(C)(7), and that Christie's failure to file an NOI required dismissal of her claim:

> [Christie] is correct that [the University's] motion is brought under the immunity provision of [C7] … If th[e] conditions precedent to suit are not satisfied, there is no waiver and the immunity which would otherwise be in effect absent waiver remains. [Christie's] admitted failure to file a Notice means that she has not met the condition necessary for the waiver of immunity, and therefore immunity still applies.

Appx. 59–60a, MSD Reply 2–3 (internal citation omitted).

At oral argument, the University again argued that it enjoyed immunity from suit because Christie failed to file the required statutory notice: "In this case one of those conditions is the filing of the notice and if that condition isn't applied, the waiver falls away and you're left with immunity." Appx. 24a, MSD Hr'g Tr. 11:2–16 (Aug. 1, 2019). Responding directly to this argument, Christie acknowledged that the University's motion was based on a claim of immunity but reiterated her argument that ELCRA and the PWDCRA abrogated immunity for the claims she had filed and that §6431 applies only to claims filed in the Court of Claims. *Id.* at 11:17–21.

Given this record, Christie is wrong that the University "did not *claim* immunity in its motion for summary disposition." AE-BR 5 (emphasis in original). The University made the argument. The circuit court simply rejected it.

II. *Jurisdiction*: Christie continues to confuse the existence of jurisdiction with the merits of the appeal.

In *McCahan v Brennan*, the Court explained that the Legislature gets to decide: (1) whether the state can be sued; and (2) if so, whether a plaintiff must satisfy any conditions before filing suit: "[I]t is the sole province of the Legislature to determine whether ***and on what terms*** the state may be sued[.]" 492 Mich at 732 (emphasis added).

As to whether the Legislature has waived immunity, the parties agree that the Legislature allows plaintiffs to sue the state for alleged violations of ELCRA and the PWDCRA. When it comes to whether the Legislature has

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imposed any terms that limit or condition the waiver of immunity, the parties disagree as to whether all plaintiffs in all courts must comply with §6431 before filing a lawsuit or whether §6431 is merely a rule of the forum that applies only to cases filed in the Court of Claims. Who is right is a merits question, not a jurisdictional one.

Christie acknowledges that "'a defendant who ***claims immunity*** may challenge, ***as of right***, a plaintiff's alleged exception to governmental immunity ….'" AE-BR 8 (quoting *Walsh v Taylor*, 263 Mich App 618, 625; 689 NW2d 506 (2004)) (emphases added). The University claims it remains immune because §6431 is a condition precedent, ***not*** a rule of the forum. Christie has asserted an exception to immunity by arguing that the Legislature waived immunity for her claims and that §6431 is ***not*** a condition precedent, but a rule of the forum. The circuit court agreed with Christie that §6431 is a rule of the forum. Appx. 25–26a, MSD Hr'g Tr. 12:8–13:21. This had the effect of denying the University's claim of immunity. Under *Walsh*, the University had a right to immediate review of that decision. *Walsh*, 263 Mich App at 624–25. *Tyrrell*, on which the Court of Appeals based its jurisdictional decision, plainly contradicts *Walsh* on this issue, which is a basis to grant the University's Application. MCR 7.305(B)(5)(b).

Christie makes no attempt to refute this analysis. Instead, she tries recasting the issue presented: "The question before this Court is whether a *procedural rule* applies in a case brought in circuit court, not whether immunity applies." AE-BR 7 (emphasis in original). But that is ***not*** the question before the Court. See Reply Arg. I, *supra*. The question is whether §6431 is a condition precedent to suit (which is fundamentally an immunity question under *McCahan*) ***or*** merely a procedural rule that applies only to cases filed in the Court of Claims.

The parties are sharply divided on this issue, and Christie generally opposes further appellate review of how to interpret §6431. Notably, however, she supports the University's request for clarification on this jurisdictional question. Compare AE-BR 8–9 (section titled "This Court should clarify that a denial of summary disposition of ELCRA and PWDCRA claims as they relate to the Court of Claims [NOI] issue do[es]

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not provide for an appeal of right to the Court of Appeals") with AT-BR 14 ("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").

III. Section 6431: Christie's critiques of the University's statutory analysis are unpersuasive.

A. The COCA governs all claims asserted against the state.

Christie contends that the "COCA explicitly excludes many claims from the reach of the Court of Claims and the rules applicable to those claims," citing MCL 600.6419 and MCL 600.6421. AE-BR 16 n10. Not so. The ***only*** claims that the Court of Claims cannot adjudicate are claims where there is an adequate remedy in federal court. MCL 600.6440.

Section 6419 provides, in relevant part, that "except as provided in sections 6421 and 6440, the jurisdiction of the court of claims … is exclusive … Except as otherwise provided in this section, the court has the following power and jurisdiction: (a) to hear and determine ***any claim*** … against the state … notwithstanding another law that confers jurisdiction of the case in the circuit court." MCL 600.6419(1)(a). Section 6421 confers concurrent jurisdiction to the other trial courts of this state to hear claims triable to a jury; it does not deny the Court of Claims jurisdiction over such claims. MCL 600.6421. As the University noted in its Application, if a plaintiff waives her right to a jury, the Court of Claims would have exclusive jurisdiction to decide an ELCRA or PWDCRA claim. AT-BR 22. Christie does not deny this. It is, therefore, simply incorrect to say, as she seems to, that ELCRA and PWDCRA claims are "excluded" from the reach of the Court of Claims or the COCA.

B. *Anzaldua*, *Doe*, and *Mays* do not support interpreting § 6431 as a mere procedural rule of the Court of Claims.

Christie concedes that the Legislature can determine when and on what terms the state can be sued. Nonetheless, she contends that the

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omission of a notice requirement in ELCRA and the PWDCRA means that the Legislature has imposed no conditions precedent to sue.[1] AE-BR 12 (citing *Anzaldua v Band*, 457 Mich 530, 546–47; 578 NW2d 306 (1998), *Doe v Department of Transp*, 324 Mich App 226; 919 NW2d 670 (2018), and *Mays v Governor*, unpublished per curiam opinion of the Court of Appeals, issued May 8, 2018 (Docket No. 338609)). None of these cases so held; they did not address the issue that the University raises here.

In *Anzaldua*, a Michigan State University employee sued MSU under the Whistleblowers' Protection Act. 457 Mich at 532. The primary question presented was whether whistleblowers had a right to a jury trial. *Ibid.* The statute was silent on that issue. *Id.* at 535. In holding that whistleblowers have a right to a jury trial, the Court explained that the Legislature's failure to specifically grant a jury trial did ***not*** mean that the Legislature intended to deny jury trials. *Ibid.* In much the same way, the omission of an express condition precedent in ELCRA or the PWDCRA does not mean the Legislature chose to impose no conditions precedent to suit. If, as the University contends here, the Legislature intended § 6431 to impose conditions precedent to filing lawsuits against the state and her instrumentalities in all the courts of this state, there would be no need to duplicate the conditions precedent in ELCRA and the PWDCRA.

The secondary question in *Anzaldua* was whether MSU was immune from suit as an arm of the state. 457 Mich at 550. MSU argued it could not be sued at all. *Ibid.* The Court disagreed, holding that the Legislature waived immunity from suit by defining the state as an employer and authorizing lawsuits against employers in the circuit court. *Id.* at 553; MCL

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[1] Christie also goes one step further and erroneously cites *Progress Michigan v Attorney General*, 506 Mich 74, 89; 954 NW2d 475 (2020), for the proposition that § 6431 "is a procedural rule of the [Court of Claims] forum." AE-BR 23 n15. Rather, the Court expressly reserved that question for another day: "[W]e need not decide whether compliance with the COCA is a question of immunity or a question of compliance with the rules of the forum …." *Progress Mich*, 506 Mich at 89 n8. This is the very issue that the University is asking the Court to take up on this Application.

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15.361(b). Wayne State's position is consistent with *Anzaldua* on this point—ELCRA and the PWDCRA likewise define the state as an employer and authorize lawsuits to be filed against employers in circuit court, see MCL 37.2103(g) (ELCRA employer) MCL 37.1103(g) (PWDCRA employer); MCL 37.2801(2) (ELCRA circuit jurisdiction); MCL 37.1606(2) (PWDCA circuit jurisdiction), and the University has never disputed that it can be sued in circuit court under these statutes. Yet Christie incorrectly contends that this represents a "complete waiver" of immunity. AE-BR 12. A "complete" waiver must address both of the *McCahan* factors: whether immunity has been waived and the terms, if any, of the waiver. *Anzaldua* only addressed ***whether*** immunity was waived. The ***terms*** of that waiver are a wholly different issue. The University contends that the Legislature has imposed an across-the-board rule that the state cannot be sued, regardless of the court or the claim, unless the plaintiff complies with the conditions precedent in §6431, unless another statute modifies those conditions. The Court never considered that argument in *Anzaldua*; MSU never raised it. Thus, *Anzaldua* cannot foreclose the University's argument, as Christie contends.

Christie's reliance on *Doe* is misplaced for the same reason. As in *Anzaldua*, the issue in *Doe* was whether plaintiffs have a right to a jury trial on ELCRA claims. MDOT contended that because there was no such right, the Court of Claims had exclusive jurisdiction. Although MDOT argued that the case should be dismissed for failure to comply with §6431, it conceded that the case could go forward in circuit court if there was a right to a jury trial. Unlike the University here, ***MDOT never argued*** that §6431 applies when the state is permissibly sued in circuit court. 324 Mich App at 228–29. And because the Court of Appeals determined there was a right to a jury trial, it concluded that it "need not address" the §6431 argument—the issue was moot by concession. *Id.* at 239 n4. But it is live in this case.

Nor does *Mays* support Christie's position. There, as in *Doe*, the defendant removed the ELCRA claim from circuit court to the Court of Claims arguing exclusive jurisdiction on the theory that there was no right to a jury trial for ELCRA claims against the state. The Court of Claims

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returned the case to circuit court, ruling that it lacked exclusive jurisdiction because there was a right to a jury trial. Unsurprisingly, and consistent with *Doe*, the Court of Appeals held that plaintiffs have a right to a jury trial for ELCRA claims against the state, and that there is concurrent jurisdiction between the Court of Claims and the circuit court. *Mays*, unpub op at 4. Again as in *Doe*, but unlike the University here, the defendant in *Mays* never argued that an NOI is required before a plaintiff can sue the state in circuit court, so the *Mays* panel never reached the issue. *Id.*, unpub op at 9.

C. This is not situation where a more specific statute governs over a more general one; there is only one notice statute at issue: §6431.

Christie cites *Miller v Allstate Insurance Co*, 481 Mich 601; 751 NW2d 463 (2008), and *Pike v Northern Michigan University*, 327 Mich App 683; 935 NW2d 86 (2019), for the proposition that more specific statutes govern over more general ones. While true, that rule of construction does not apply here. Neither ELCRA nor the PWDCRA contain a more specific notice provision than §6431.

Miller is wholly inapposite here. There, Allstate refused to pay no-fault benefits to an insured's physical therapy provider because it claimed the provider was unlawfully incorporated under the Business Corporations Act. 481 Mich at 605. Under MCL 450.1221, only the Attorney General can challenge the lawfulness of a business's incorporation under the Act. Still, Allstate pointed to MCL 500.3157, which says that only providers who lawfully render treatment can charge for their services. Allstate argued that MCL 500.3157 was an exception to MCL 450.1221. The Court disagreed, holding that a bad incorporation was but one type of unlawfulness, which made MCL 450.1221 the more specific statute over MCL 500.3157 which allowed challenges to all types of unlawfulness generally. Therefore, Allstate could not challenge the physical therapy provider's charges for that specific type of unlawfulness. So, not only does *Miller* deal with an entirely different set of statutes, but it involved two statutes that addressed the situation at hand. Here, because both ELCRA and the PWDCRA are silent on the issue of

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notice, there is simply no general/specific conflict to resolve.

While *Pike*, like this case, dealt with §6431, unlike this case it too involved a second statute—the GTLA—which contains a specific notice provision (which is, again, something missing from ELCRA and the PWDCRA). The GTLA sets a shorter deadline to file an NOI and specifies what must be included in it. MCL 691.1404(1). The GLTA goes on to say that timely filing such a notice ***satisfies*** §6431. MCL 691.1404(2). *Pike* held that where two statutes require notice and one imposes a shorter deadline or specific content for the notice, the more specific statute—in that case, the GTLA—controls over the more general one. *Pike*, 327 Mich App at 692–693. See also AT-BR 16–17 (analyzing *Fairley v Department of Corrs*, 497 Mich 290; 871 NW2d 129 (2015), regarding the interplay between the COCA and GTLA notice clauses).

Notably, in so holding, *Pike* held that the GTLA's notice provision "prevail[e]d over the notice provision in MCL 600.6431[, which] is only ***generally applicable to claims against the state***." *Pike*, 327 Mich App. at 693. Thus, *Pike* supports the University's contention that §6431 applies broadly to all claims against the state, yielding only to other statutes that impose more specific notice requirements (*e.g.*, as in the case of the GTLA) or exempt claimants from the notice requirement (*e.g.*, as in the case of claims arising under the Wrongful Imprisonment Compensation Act, MCL 600.6431(5)).

D. Christie mischaracterizes the University's statutory analysis while refusing to engage several of the University's points.

Christie faults the University for citing only one section of the COCA in its statutory analysis, AE-BR 16–17 n11, but that mischaracterizes the University's analysis. The University begins with the maxim that there is nothing to interpret if the language is plain and unambiguous. AT-BR 15. *Tyrrell* says §6431 is "unclear," but the words "a claim ***may not be maintained against this state unless*** [certain conditions precedent are met]" are perfectly clear. MCL 600.6431(1). *Tyrrell*'s interpretation requires adding five more words to the statute ("in the Court of Claims") that are simply not there.

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There is no need to proceed further in "interpreting" clear and unambiguous language. Christie does not explain what is unclear about §6431.

But, assuming *arguendo* that the Court finds some latent ambiguity, then interpreting the statute requires a robust analysis, which means looking to the purpose and placement of the language at issue in the context of the entire COCA. That is what the University has done.

For example, it argues that the purpose of the notice requirement is not logically limited to claims filed in one trial court as opposed to all of them. The right to a jury trial and the objectives served by notices are two different means serving two different ends. One establishes a hurdle to filing a lawsuit, while the other establishes a plaintiff's right to select the factfinder if she clears the hurdle. AT-BR 20. Christie doesn't address this argument.

The University also looked at the effect of the parties' dueling interpretations. Construing §6431 to apply to all claims filed against the state, regardless of which trial court presides over the action, ensures notice and uniformity across all claims and claimants. In contrast, construing §6431 to apply only to those claims filed in the Court of Claims creates a gap in notice for a small class of claims: those where a plaintiff has a jury claim, demands a jury trial, and waives any right to injunctive and equitable relief. Nothing in the COCA supports, much less compels, manufacturing this gap. *Id.* at 20. Christie doesn't address this argument, either.

The University also compared the grammar and structure of §§6431 and 6542. Section 6431 prohibits claims against the state unless a notice or verified complaint is filed with the clerk of the Court of Claims. Section 6542 says claims cognizable by the Court of Claims are barred unless they are filed with the clerk of the court. On its face, §6431 is not limited to claims cognizable in the Court of Claims, while §6542 is explicitly limited to such claims. This underscores that the Legislature intends the COCA to apply to all courts unless otherwise expressly limited, and that the Legislature knew how to use language expressly limiting the COCA when it intended to do so. *Id.* at 20–21. Christie does not address this argument, either.

CONCLUSION

For these reasons, and those argued in the Application, the Court should grant leave.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: April 26, 2021

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CERTIFICATE OF COMPLIANCE

This Application conforms to the requirements of AO 2019-6. It contains 3,200 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,

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Dated: April 26, 2021

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