IN THE STATE OF MICHIGAN
SUPREME COURT

MICHIGAN IMMIGRANT RIGHTS CENTER,

Plaintiff-Appellant,

v.

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan,

Defendant-Appellee.

Supreme Court Case No. 167300-1

Court of Appeals Nos. 361451 & 362515
(Feeney, P.J., and M.J. Kelly and Rick, J.J.)

Court of Claims No. 21-000208-MZ
(Hon. Elizabeth L. Gleicher)

PLAINTIFF-APPELLANT MICHIGAN IMMIGRANT RIGHTS CENTER'S
SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF THE APPLICATION

ORAL ARGUMENT REQUESTED

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Date: April 4, 2025

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The Governor argues the Legislature can and has forbidden the judiciary from halting her present and future unlawful and unconstitutional conduct. In so doing, she abandons the Court of Appeals' reasoning, reverses positions taken throughout this case, and rewrites MIRC's claims to be backward-looking attacks on *Sanchez* rather than addressing what MIRC actually challenges: the Governor's policy of denying workers' compensation claims based on immigration status. This Court should reverse and vindicate the judiciary's constitutional role as a backstop against officials' wrongdoing.

I. MCL 600.6431(1) CANNOT BAR CLAIMS FOR PROSPECTIVE RELIEF AGAINST STATE OFFICERS

a. MCL 600.6431(1) Is An Immunity Statute That Cannot Apply Here

The decision on appeal treated compliance with MCL 600.6431(1) as necessary to bring this case within a waiver of immunity. App'x, at 05a–06a (Opinion of Court of Appeals). Indeed, the Governor repeatedly insisted that MCL 600.6431(1) is *not* a statute of limitations, but instead lifts immunity. The Governor now offers no argument she has immunity in this case. Thus, she concedes MIRC need not satisfy MCL 600.6431(1)'s statutory conditions for a waiver of her (nonexistent) immunity. *See* Pl's Suppl Br 15–28.

As an alternative, the Governor argues MCL 600.6431(1) may be a statute of limitations after all. Def's Suppl Br 15–16. The Governor is estopped from that change in position.[1] And her new argument is wrong. To ask whether a plaintiff satisfied MCL 600.6431(1) is to ask whether the defendant has waived immunity. Because no party now contends the Governor can assert immunity in this case, the Court of Appeals must be reversed.

[1] In case the Governor switches positions again and argues MCL 600.6431(1) is neither an immunity nor a limitations statute but some third thing, she would have no right to proceed under MCR 2.116(C)(7), her basis for requesting summary disposition. *See* Def's Suppl Br 6.

i. The Governor Is Estopped From Arguing MCL 600.6431(1) Is Not An Immunity Statute

The Governor's brief contends MCL 600.6431(1) should bar MIRC's claims not as an expression of sovereign immunity, but as a statute of limitations. Def's Suppl Br 14–17. But earlier in this litigation, the Governor successfully and unequivocally made the exact opposite argument. She is therefore estopped from asserting MCL 600.6431(1) is anything other than an immunity statute.

"[A] party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position." *Lichon v Am Universal Ins Co*, 435 Mich 408, 416–17; 459 NW2d 288 (1990). This rule exists "to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship." *Spohn v Van Dyke Pub Schools*, 296 Mich App 470, 479–80; 822 NW2d 239 (2012) (cleaned up).

The Governor's current position is such "gamesmanship." *Id.* She delayed this case for years by claiming to assert immunity that can be automatically appealed pursuant to MCR 7.202(6)(a)(*v*), while vehemently denying MCL 600.6431(1) is a statute of limitations, which cannot be raised in such an interlocutory appeal.

After losing in the Court of Claims, the Governor sought that appeal as-of-right. *See* Reply App'x, at 050a (Claim of Appeal). MIRC moved to dismiss because under the Court of Appeals' case law pre-*Christie v Wayne State University*, 511 Mich 39; 993 NW2d 203 (2023), "MCL 600.6431(1) . . . d[id] not implicate . . . immunity." Reply App'x, at 057a (Br Supp Mot to Dismiss). The Court of Appeals granted that motion. *See* Reply App'x, at 064a (Order).

The Governor then argued *to this Court* she could appeal as-of-right because noncompliance with MCL 600.6431(1) renders her immune. *See* Reply App'x, at 074a (Def's Appl for Leave to Appeal No 164752). She asserted: "*the* issue being appealed . . . is whether the Court

of Claims' order" denying her relief under MCL 600.6431(1) "denied governmental immunity." Reply App'x, at 096a (Def's Reply Supp Appl for Leave to Appeal, No 164752) (emphasis in original). She went on, "MCL 600.6431(1) is not a statute of limitations," thus the case law on statutes of limitation could "offer[] no meaningful guidance." *Id.* at 102a. Post *Christie*, this Court vacated the Court of Appeals' dismissal. *MIRC v. Whitmer*, 511 Mich. 1017; 991 NW2d 547 (2023).

Before the Court of Appeals the Governor made an identical argument. She stated in "enacting . . . § 6431" the Legislature established conditions for "its waiver of sovereign immunity," and "the notice requirement of § 6431 is not a statute of limitations." Reply App'x, at 123a, 127a (Def's Mich Ct App Br, No 361451). With that background, the Court of Appeals reinstated the appeal as-of-right, holding that "compliance with the notice requirements of MCL 600.6431(1) when they are applicable is mandatory to overcome the state's sovereign immunity." Reply App'x, at 140a (Order). It then ruled on that appeal as-of-right and reversed the Court of Claims. App'x, at 01a (Opinion of Court of Appeals).

Both conditions for judicial estoppel are met. Until now, the Governor unequivocally argued MCL 600.6431(1) is an immunity statute and not a statute of limitations. And the Governor succeeded in that argument. The Governor's new argument that MCL 600.6431(1) need not be an immunity statute is estopped. *Lichon*, 435 Mich at 416–17.

ii. MCL 600.6431(1) Is An Immunity Statute

The Governor's argument that MIRC wrongly assumes "if sovereign immunity does not apply, then compliance with § 6431 is not required," also fails as a matter of law. Def's Suppl Br 15–16. The Governor bases her argument on a stray remark in *Progress Michigan v Attorney General*, 506 Mich 74, 89; 954 NW2d 475 (2020). To the extent that language is given the meaning the Governor ascribes to it, it is pure dicta. As she admits, the next line in *Progress Michigan*

explains that the plaintiff complied with MCL 600.6431(1). Def's Suppl Br 16. Thus, whether or not MCL 600.6431(1) is an expression of immunity did not affect the outcome.

Moreover, this Court subsequently stated in *Christie*: "[W]hen the Legislature enacted the COCA, it expressly conditioned its waiver of the state's sovereign immunity on compliance with the procedures set forth in" MCL 600.6431(1). 511 Mich at 58–59. "[T]he notice provision of the COCA sets forth a general rule that a party must follow . . . if that party is to overcome immunity." *Id.* at 61. If a plaintiff does not "comply with MCL 600.6431 . . . the Legislature has not waived the state's sovereign immunity." *Id.* at 62. For this reason, no "saving construction" of MCL 600.6431 is allowed. *Id.* at 50.

Whatever uncertainty existed five years ago, *Christie* forecloses the Governor's argument that MCL 600.6431(1) is something other than an immunity statute. *See also Flamont v Dep't of Corr*, __ NW3d __, 2024 WL 4428203, at *3–4 (Mich Ct App Oct 4, 2024) (noting *Christie* answered "unresolved questions" over whether MCL 600.6431 is an immunity statute). (Copy attached as Exhibit 1).

* * *

Consistent with *Christie*, the Court of Appeals and the Governor repeatedly stated the reason MIRC needed to comply with MCL 600.6431(1) was to invoke the state's waiver of immunity. But the Governor rightly has no explanation for how she could be entitled to immunity here. This Court should reverse the dangerous precedent below that immunity can prevent claims against government officials to stop their ongoing illegal and unconstitutional conduct.

II. CLAIMS FOR PROSPECTIVE RELIEF ARE NECESSARILY TIMELY

a. Under Ordinary Statute Of Limitations Principles, Claims For Prospective Relief Are Timely

Assuming MCL 600.6431(1) is a statute of limitations rather than an immunity statute, this Court explained in *Taxpayers Allied for Constitutional Taxation v Wayne County*, 450 Mich 119;

537 NW2d 596 (1995), that claims for prospective relief cannot have accrued in the past and thus, even if a statute of limitations applies, the claims are not time-barred. *See* Pl's Suppl Br 33. In fact, underscoring the Governor's about-face, she told this Court a few months ago that the only reason *Taxpayers* did not resolve this case in MIRC's favor is because "unlike a typical statute of limitations," MCL 600.6431(1) must be construed strictly to protect immunity. Def's Opp'n Leave to Appeal 16.

Now, fleeing her immunity argument, the Governor tries to rewrite the statute of limitations precedent. Def's Suppl Br 11–14. Her arguments improperly conflate equitable claims with prospective relief.

Taxpayers explains claims, including declaratory judgment actions, can be either retrospective or prospective, depending on whether they seek relief from past or future harms. 450 Mich at 127–129; *see also Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 454–55; 761 NW2d 846 (2008) (cited by the Governor) (reiterating this aspect of *Taxpayers*). The Governor cites a generic treatise for the proposition that declaratory relief is "inherently prospective." Def's Suppl Br 8 n3. That misstates Michigan law. In Michigan, whether declaratory claims are retrospective or prospective depends on the nature of the underlying "claims for substantive relief," *e.g.*, whether an equivalent injunction would be retrospective or prospective. *Taxpayers*, 450 Mich at 128.

Importantly, contrary to the Governor's presentation, the distinction is not whether the relief is equitable or legal in nature. *See* Def's Suppl Br 11–12. Equitable relief can be retrospective, such as an injunction that effectively seeks to erase old debts, *Taxpayers*, 450 Mich at 127 n9, or to undo 8-year-old land development, *Att'y Gen v Harkins*, 257 Mich App 564, 572; 669 NW2d 296 (2003) (Governor's authority). And legal relief can be prospective, like a petition

for mandamus. *Franchise Realty Interstate Corp v City of Detroit*, 368 Mich 276, 279; 118 NW2d 258 (1962).[2]

Therefore, the Governor's statement that *equitable* claims have been shown to fall within a statute of limitations addresses the wrong question. Def's Suppl Br 12–13. Plaintiffs "may" need to show how claims for *retrospective* equitable relief meet the terms of a statute of limitations. *Id.* However, Michigan law explains it is "unnecessary" to describe a claim for *prospective* relief like MIRC's "in a way that makes it fit the statute" of limitations. *Taxpayers*, 450 Mich at 127.

Confirming this point, *Taxpayers* held the forward-looking declaration the plaintiffs sought to avoid paying an unlawful "tax in the future" was not time-barred. *Id.* at 129. This was so even though their requested retrospective declaration regarding already-paid taxes was untimely. *Id.* 128–29. The gravamen of the relief sought, not its equitable or legal label, determines whether the statute of limitations acts as a bar.

The Governor notes that *Twp of Fraser v Haney*, 509 Mich 18; 983 NW2d 309 (2022), analyzed the time of accrual for a prospective injunctive action. Def's Suppl Br 13–14. But *Haney* explained that where a plaintiff seeks to address present misconduct that produces ongoing and future harms, the wrong constantly accrues. Thus, it held the action to be timely. *Haney*, 509 Mich at 25 & n14. That is just another way of conceptualizing the *Taxpayers* rule that claims for prospective relief are always timely.

The Governor also cites *Terlecki v Stewart*, 278 Mich App 644, 661–62; 754 NW2d 899 (2008). Def's Suppl Br 13. That Court of Appeals decision is no longer good law based on *Haney*

[2] Retrospective equitable relief would fall under MCL 600.6431(1)'s one-year rule. Thus, to the extent one takes it seriously, the Governor's argument that MCL 600.6431(1) must apply here because otherwise not enough claims would fall within that subsection lacks support. *See* Def's Suppl Br 9–10.

and *Sunrise*, *see infra*, which dictate that ongoing misconduct producing recent and future harms—including harms effectively identical to those dismissed in *Terlecki*—are actionable under any statute of limitations.

MIRC seeks prospective relief from future harms caused by the Governor's unlawful workers' compensation policy. Thus, MIRC's claims for declaratory relief "derive from [its prospective] claim for injunctive relief, which is not barred." *Taxpayers*, 450 Mich at 129.

b. The Governor's Textual Arguments That MCL 600.6431(1) Renders MIRC's Claims For Prospective Relief Untimely Are Unpersuasive

The Governor's textual arguments that MIRC must show its forward-looking claims accrued within the year prior to its Complaint fare no better. Def's Suppl Br 8–10.

She first argues that because MCL 600.6419 grants the Court of Claims jurisdiction over MIRC's claims, MIRC must allege harms that arose within one year before its Complaint. Def's Suppl Br 8–10. Of course MCL 600.6419 grants jurisdiction to the Court of Claims, but the existence of jurisdiction does not bear on how to apply MCL 600.6431(1).

The Governor also again quote-mines *Christie*'s language that "all claims against the state are subject to MCL 600.6431(1)'s notice requirements." Def's Suppl Br 9. Yet, the Governor concedes what MIRC already explained: in making this statement *Christie* was addressing MCL 600.6431(1)'s application to different *venues*. *Id.* at 9 n4. *Christie* did not hold MCL 600.6431(1) requires shoehorning claims for prospective relief into that backward-looking statutory notice period. Pl's Suppl Br 19–20.

Moreover, for all her invocations of plain text, the Governor has no response to MIRC's argument that the statute's prohibition on claims filed or noticed more than "1 year *after*" they accrue, *see* MCL 600.6431(1) (emphasis added), means it cannot bar claims based on harms that have yet to occur—*e.g.*, MIRC's claims for prospective relief. *See* Pl's Suppl Br 33–34; *see also*

Taxpayers, 450 Mich at 127 (holding statute of limitations did not bar claim for prospective relief where "[t]he statutory scheme . . . seems to assume that a claim does not or cannot accrue or come into being until the wrong is done.").

Further still, the judiciary's ability to order a stop to officials' unlawful and unconstitutional conduct is core to the tripartite system of government. Pl's Suppl Br 37–40. The Governor's notion the Legislature could impede such review, either through a statute of limitations or statutory immunity, would impermissibly "truncate" rights. *Taxpayers*, 450 Mich at 127.

MCL 600.6431(1) cannot bar MIRC's request for prospective relief because under case law and the statute's text, those claims are necessarily timely.

III. MCL 600.6431(1)'S TEXT DOES NOT APPLY TO SUITS FOR PROSPECTIVE RELIEF AGAINST STATE OFFICERS.

Another reason to hold MCL 600.6431(1) does not bar MIRC's claims, whether it is an immunity statute or otherwise, is that it refers only to claims "against this state." MCL 600.6431(1). The COCA elsewhere distinguishes between "the state" and its "officers," indicating MCL 600.6431(1) applies only to the state, and the Governor cannot claim its protection. *See* Pl's Suppl Br 28–32.

The Governor notes MIRC did not raise this issue in its application for leave to appeal. Def's Suppl Br 17. True. But MCR 7.305(H)(4) provides: "Unless otherwise ordered by the Court, an appeal shall be limited to the issues raised in the application for leave to appeal." This Court directed MIRC to brief "whether MCL 600.6431 applies to claims for prospective relief against state officers." Suppl App'x, at 047a (Order). Moreover, if the Governor wishes this Court to consider her new argument that MCL 600.6431(1) is not an immunity statute, *see supra*, she certainly cannot object to MIRC's pointing out that whether or not MCL 600.6431(1) is an immunity statute, it does not apply to officers.

On the merits, the Governor ignores that if "this state" in MCL 600.6431(1) implicitly includes state officers, then the numerous separate references to the state and its officers throughout the rest of the COCA are superfluous. Pl's Suppl Br 28–30. The Governor's interpretation would render large swaths of the statute meaningless, and so must be rejected.

The Governor's argument that official-capacity suits are always suits "against the state" under MCL 600.6431(1), Def's Suppl Br 18–19, is wrong. That may or may not be true for cases seeking *retrospective* relief—a question this Court need not resolve here. *See* Pl's Suppl Br 32 n8. But under longstanding Michigan law, official-capacity suits for *prospective* relief are *not* suits against the state. *See McDowell v State Hwy Commn'r*, 365 Mich 268, 269–70; 112 NW2d 491 (1961) (providing plaintiffs could not "hold a department [and officer] of the State, and so the State, responsible in damages for a tort," but noting "a court of equity might properly grant" prospective relief); *Thompson v Auditor Gen*, 261 Mich 624, 628–29; 247 NW 360 (1933) (adopting into Michigan law the federal rule that official-capacity suits for prospective relief "are not suits against the state"). Therefore, this Court should conclude that suits for prospective relief against state officers are not within the ambit of MCL 600.6431(1).

IV. MIRC ALLEGED TIMELY ACTIONABLE WRONGS.

Assuming MIRC needs to satisfy MCL 600.6431(1), and to do so it must show the Governor's misconduct produced a new harm within the year prior to the Complaint, MIRC did so. Thus, under any reading of MCL 600.6431(1), MIRC can proceed.

The Governor relies on ignoring MIRC's theory of the case, insisting MIRC's injuries are stale because MIRC is challenging "the Court of Appeals' decision in *Sanchez*." Def's Suppl Br 19. Yet, she repeatedly slips up and characterizes MIRC's claim as being based on her "*Sanchez*-based policy." *Id*. at 22; *see also id.*; *id.* at 23.

This latter framing is correct. MIRC challenges not *Sanchez*, but the Governor's current and future "administrati[on of] Michigan's workers' compensation regime." *E.g.*, App'x, at 09a–014a, ¶¶ 1, 3, 5, 11, 14, 19, 23 (Complaint). And the Governor rightly does not dispute that MIRC alleges new instances of the policy's enforcement that imposed new costs on MIRC within the year prior to the Complaint. App'x, at 026a–027a, ¶¶ 79–82 (Complaint).

These allegations bring the case squarely within *Sunrise Resort Ass'n, Inc v Cheboygan County Road Commission,* 511 Mich 325; 999 NW2d 423 (2023). Pl's Suppl Br 43–44. There, this Court held that if the government constructs a "drainage system," each instance in which that system causes property damage creates an "independent cause of action" that starts the clock anew. *Sunrise*, 511 at 330, 340. Therefore, each time the Governor's system of denying workers' compensation to individuals based on immigration status creates new intakes and costs for MIRC, there is a new actionable wrong.

When the Governor responds to MIRC's actual allegations, she asserts the only relevant "event" is her policy's initial "implementation," not its subsequent applications, so time ran out a year after the policy first produced harm to MIRC. Def's Suppl Br 22. Leaving aside the inconsistency with *Sunrise*, she offers no support for her rule. Moreover, this reading would authorize the state or private actors to persist forever in policies discriminatorily passing over a worker or defrauding consumers, merely because those plaintiffs out of good faith or necessity waited to bring their claims. Pl's Suppl Br 45–46. The Governor's rule is untenable.[3]

V. CONCLUSION

The Court of Appeals should be reversed.

[3] The Governor also argues MIRC would lack standing to challenge an "individual denial of worker's compensation benefits." Def's Suppl Br 23. However, standing is not before this Court. MIRC also has standing under the hypothetical. *See Lansing Schools Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372; 792 NW2d 686 (2010).

Date: April 4, 2025

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CERTIFICATE OF COMPLIANCE & WORD COUNT

I, John C. Philo, certify that the *Plaintiff-Appellant Michigan Immigrant Rights Center's Supplemental Reply Brief In Support Of The Application* complies with the formatting and word limitations of MCR 7.212 and 7.305. This brief uses a 12-point proportional font (Times New Roman), has at least one-inch page margins, and its text is double-spaced, except for quotations and footnotes, which are single-spaced. According to the word count feature of Microsoft Word, the word processing program used to prepare the document, the sections of the brief (including footnotes) not excluded under MCR 7.212 (B)(2) contain 3,177 words.

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Court of Claims No. 21-000208-MZ
(Hon. Elizabeth L. Gleicher)

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2025, I electronically filed the attached *Plaintiff-Appellant Michigan Immigrant Rights Center's Supplemental Reply Brief In Support Of The Application* with the Clerk of the Michigan Supreme Court using the MiFILE system, which will send notification of such filing to all electronic case filing participants and all attorneys for the parties.

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EX. 1

KeyCite Yellow Flag - Negative Treatment
Distinguished by Walton v. Michigan Department of Corrections, Mich.App., December 3, 2024

2024 WL 4428203
Only the Westlaw citation is currently available.
Court of Appeals of Michigan.

Jessica FLAMONT, Plaintiff-Appellee,
v.
DEPARTMENT OF CORRECTIONS, Women's Huron Valley Correctional Facility, and Warden Anthony Stewart, Defendants-Appellants.

No. 367863
|
October 4, 2024, 2:27 PM

Synopsis

Background: Correctional officer brought sex discrimination claims against state Department of Corrections and warden. After case had been stayed and reinstated, Department and warden moved for summary disposition on basis that officer had not filed written notice of intent to file suit with Court of Claims. The Circuit Court, Washtenaw County, denied motion. Department and warden appealed.

Holdings: The Court of Appeals, Borrello, J., held that:

[1] officer failed to file written notice of intent to file suit with Court of Claims within one year of accrual of her claims, warranting dismissal, and

[2] state Supreme Court decision holding that claim notice statute's requirement to file written notice of intent to file suit applied retroactively to officer's claims.

Reversed and remanded with instructions.

West Headnotes (12)

[1] **Appeal and Error** Immunity

Whether governmental immunity applies is reviewed de novo as question of law.

[2] **States** Standard and Scope of Review

Whether compliance with state notice of claim statute is required is issue of statutory interpretation that is reviewed de novo. Mich. Comp. Laws Ann. § 600.6431.

[3] **Appeal and Error** Judicial law

Court of Appeals reviews de novo as matter of law whether judicial decision applies retroactively.

[4] **States** Time for Filing

Correctional officer failed to file with clerk of Court of Claims written notice of intent to file suit against state Department of Corrections within one year of accrual of her claims, which was required under Court of Claims Act (COCA) for waiver of state's sovereign immunity, and, thus, dismissal of her suit against Department and warden alleging claims for sex discrimination in violation of Elliott-Larsen Civil Rights Act was warranted. Mich. Comp. Laws Ann. §§ 37.2101 et seq., 600.6431(1).

1 Case that cites this headnote

[5] **Courts** In general; retroactive or prospective operation

General rule is that judicial decisions are given full retroactive effect.

1 Case that cites this headnote

[6] **Courts** In general; retroactive or prospective operation

Rules determined in opinions that apply retroactively apply to all cases still open on direct review and as to all events, regardless of whether such events predate or postdate court's announcement of rules.

1 Case that cites this headnote

[7] **Courts** In general; retroactive or prospective operation

Not only do rules determined in opinions that apply only prospectively not apply to cases still open on direct review, but rules do not even apply to parties in cases in which rules are declared.

1 Case that cites this headnote

[8] **Courts** In general; retroactive or prospective operation

Rule of law is new for purposes of resolving question of its retroactive application either when established precedent is overruled, or when issue of first impression is decided which was not adumbrated by any earlier appellate decision.

[9] **Courts** In general; retroactive or prospective operation

If court decision does not announce new principle of law, then full retroactivity is favored.

2 Cases that cite this headnote

[10] **Courts** In general; retroactive or prospective operation

First criterion that must be determined in deciding whether judicial decision should receive full retroactive application is whether that decision is establishing new principle of law, either by overruling clear past precedent on which parties have relied, or by deciding issue of first impression where result would have been unforeseeable to parties.

[11] **Courts** In general; retroactive or prospective operation

State Supreme Court decision, which held that statute requiring a claimant suing the state to file written notice of intent to file suit in the Court of Claims within one year of accrual of the claim applied to all claims against state, including those filed in the Circuit Court, applied retroactively to correctional officer's sex discrimination claims against state Department of Corrections and warden; Supreme Court did not announce new rule of law when it overruled Court of Appeals decision, but corrected relatively short-lived misinterpretation of statute's plain language that thwarted legislative intent, and Supreme Court's application of its holding to parties in that case and to parties to another case it decided on same day demonstrated that it viewed its holding as fully retroactive. Mich. Comp. Laws Ann. § 600.6431.

2 Cases that cite this headnote

[12] **Constitutional Law**👈Nature and scope in general
Constitutional Law👈Nature and scope in general

"Judicial inquiry" investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist, and that is its purpose and end; "legislation," on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Washtenaw Circuit Court, LC No. 19-000237-CD

Before: Borrello, P.J., and Murray and Letica, JJ.

Opinion

Borrello, P.J.

***1** In this employment-discrimination action, defendants appeal as of right the trial court's order denying their motion for summary disposition based on governmental immunity. For the reasons set forth in this opinion, we reverse and remand for entry of an order granting summary disposition in favor of defendants.

I. BACKGROUND

Defendant Huron Valley Correctional Facility (HVCF), is a women's correctional facility run by defendant Michigan Department of Corrections (MDOC). Defendant Anthony Steward served as the warden at HVCF. As a result of prior unrelated litigation, the MDOC created several hundred female-only corrections-officer positions; the female-only requirement was considered a "bona fide occupational qualification" in that only women were eligible for those positions.

Plaintiff, who is female, worked as a corrections officer at HVCF. Plaintiff alleged that she was repeatedly required to work excessive mandatory overtime hours without prior notice, which resulted in her working consecutive 16- to 19-hour workdays. She also alleged that similarly situated male corrections officers were not required to work excessive mandatory overtime shifts. Plaintiff asserted that the work schedule required by defendants negatively affected her health in a variety of ways that led to her 2016 resignation, which she characterized as a constructive discharge.

Plaintiff filed her complaint in the Washtenaw Circuit Court in 2019, asserting claims of sex discrimination in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq.* It is undisputed that plaintiff had not filed in the Court of Claims the notice described in MCL 600.6431(1), which states 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 departments, commissions, boards, institutions, arms, or agencies."[1]

In 2023, after the case had been stayed for a period of time and subsequently reinstated, defendants moved for summary disposition under MCR 2.116(C)(7). In their motion, defendants asserted that plaintiff's failure to comply with the requirements of MCL 600.6431 was fatal to her claims because the statutorily required notice was a condition precedent to overcoming governmental immunity, even when the action was filed in the circuit court. Defendants argued that our Supreme Court's decisions in *Christie v Wayne State Univ.*, 511 Mich. 39, 993 N.W.2d 203 (2023), and *Elia Cos., LLC v Univ. of Mich. Regents*, 511 Mich. 66, 993 N.W.2d 392 (2023), applied retroactively and mandated this result.

In *Christie*, our Supreme Court held that "the notice requirements of MCL 600.6431(1) apply to all claims against the state, including those filed in the circuit court ...." *Christie*, 511 Mich. at 45, 993 N.W.2d 203. In doing so, the Supreme Court expressly overruled this Court's contrary holding in *Tyrrell v Univ. of Mich.*, 335 Mich App 254, 966 N.W.2d 219 (2020), that compliance with MCL 600.6431 was not required when proceeding against a state defendant in circuit court. *Id.* at 44-45, 993 N.W.2d 203. Our Supreme Court issued its opinion in *Elia* on the same day that it issued its opinion in *Christie* and applied the holding of *Christie* to resolve the appeal in *Elia*. *Elia*, 511 Mich. at 71-75, 993 N.W.2d 392.

***2** In response to defendants' motion, plaintiff did not claim she filed the notice described in MCL 600.6431(1). Instead, she argued that she was not required to comply with MCL 600.6431 because she did not file her action in the Court of Claims and *Christie* and *Elia* did not have retroactive effect.

The trial court ruled that the holding in *Christie* was not retroactive and denied defendants' motion for summary disposition on that basis. The court explained as follows:

> THE COURT: ... I have consistently ruled over the decades that unless the legislature or the appellate court says it's retroactive I don't read between the lines and I don't -- I don't do that. If they want -- if this on appeal says, no, it should be retroactive, that's not for me to decide.
>
> Therefore, I agree with the plaintiff's position on this and the motion is denied on that basis. I am not giving it retroactive effect unless it is specifically laid out, okay.

This appeal followed.

II. ANALYSIS

On appeal, defendants argue that the trial court erred by ruling that the holding in *Christie* was not retroactive. Defendants further argue that under *Christie*, plaintiff's failure to comply with the requirements of MCL 600.6431(1) bars her claim and that the trial court therefore erred by denying defendants' motion for summary disposition.

[1] [2] [3]This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Ray v Swager*, 501 Mich. 52, 62, 903 N.W.2d 366 (2017). Summary disposition is warranted under MCR 2.116(C)(7) if "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of ... immunity granted by law ...." Whether governmental immunity applies is reviewed de novo as a question of law. *Ray*, 501 Mich. at 61, 903 N.W.2d 366. The question whether compliance with MCL 600.6431 was required is an issue of statutory interpretation that is reviewed de novo. *Christie*, 511 Mich. at 47, 993 N.W.2d 203. We also review de novo as a matter of law whether a judicial decision applies retroactively. *McNeel v Farm Bureau Gen. Ins. Co. of Mich.*, 289 Mich App 76, 94, 795 N.W.2d 205 (2010).

[4]In relevant part, MCL 600.6431(1) states 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 departments, commissions, boards, institutions, arms, or agencies." It is undisputed that petitioner never made such a filing in the office of the clerk of the Court of Claims. Our Supreme Court held in *Christie* that "the notice requirements of MCL 600.6431(1) apply to all claims against the state, including those filed in the circuit court ...." *Christie*, 511 Mich. at 45, 993 N.W.2d 203. The Court repeated that holding in *Elia*, 511 Mich. at 71, 993 N.W.2d 392. In both *Christie* and *Elia*, the Supreme Court ruled that the defendant state entity was entitled to summary disposition because the plaintiff in each particular case had failed to comply with the requirements of MCL 600.6431(1) when filing the respective actions in the circuit court. *Christie*, 511 Mich. at 64-65, 993 N.W.2d 203; *Elia*, 511 Mich. at 71-72, 75, 993 N.W.2d 392.

Accordingly, under *Christie* and *Elia*, plaintiff's claim in this case is barred by her failure to comply with the requirements of MCL 600.6431(1) and defendants are entitled to summary disposition.

***3** However, the decisions in *Christie* and *Elia* were issued while plaintiff's claim was pending in the trial court, and the trial court denied defendants' motion for summary disposition based on its conclusion that the holding in *Christie* was not retroactively applicable to the present matter. The trial court's ruling implicitly extends to the holding in *Elia*. Plaintiff maintains on appeal that the trial court's ruling was correct.

[5] [6] [7]We begin our analysis with the "general rule" that "judicial decisions are given full retroactive effect." *Pohutski v City of Allen Park*, 465 Mich. 675, 695, 641 N.W.2d 219 (2002). "Rules determined in opinions that apply retroactively apply to all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the appellate court's] announcement of the rule[s]." *McNeel*, 289 Mich App at 94, 795 N.W.2d 205 (quotation marks and citation omitted; second alteration in original). Our Supreme Court has indicated that a "more flexible approach" is appropriate if "injustice might result from full retroactivity" and that "a holding that overrules settled precedent *may* properly be limited to prospective application." *Pohutski*, 465 Mich. at 696, 641 N.W.2d 219 (emphasis added). "Rules determined in opinions that apply prospectively only ... not only do not apply to cases still open on direct review, but do not even apply to the

parties in the cases in which the rules are declared." *McNeel*, 289 Mich App at 94, 795 N.W.2d 205.

Our Supreme Court has stated the test in Michigan for resolving the question of a judicial decision's retroactivity as follows:

> [T]here is a "threshold question whether the decision clearly establishe[s] a new principle of law." If a decision establishes a "new principle of law," we then consider three factors: "(1) the purpose to be served by the new rule, (2) the extent of the reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." [*League of Women Voters of Mich. v Secretary of State*, 508 Mich. 520, 565-566, 975 N.W.2d 840 (2022), quoting *Pohutski*, 465 Mich. at 696, [641 N.W.2d 219] (second alteration in original).]

[8] [9] [10]Regarding the threshold question whether a court's decision constitutes a new rule of law, "[a] rule of law is *new* for purposes of resolving the question of its retroactive application ... either when an established precedent is overruled or when an issue of first impression is decided which was not adumbrated by any earlier appellate decision." *League of Women Voters*, 508 Mich. at 566, 975 N.W.2d 840 (ellipsis in original). "If the decision does not announce a new principle of law, then full retroactivity is favored." *Mich. Ed. Employees Mut. Ins. Co. v Morris*, 460 Mich. 180, 190, 596 N.W.2d 142 (1999). Thus, "the first criterion that must be determined in deciding whether a judicial decision should receive full retroactive application is whether that decision is establishing a new principle of law, either by overruling clear past precedent on which the parties have relied or by deciding an issue of first impression where the result would have been unforeseeable to the parties." *Id.*

[11]Our first task is therefore to determine whether *Christie* announced a new rule of law. To do so, we must first discuss this Court's holding in *Tyrrell*.

This Court issued its opinion in *Tyrrell* on December 22, 2020—after plaintiff had already filed the present action. In *Tyrrell*, the plaintiff filed a civil rights action in the circuit court against the University of Michigan and certain employees of the university. *Tyrrell*, 335 Mich App at 258, 966 N.W.2d 219. The defendants moved for summary disposition on the ground that the plaintiff had failed to comply with the requirements in MCL 600.6431(1), which necessitated the dismissal of the plaintiff's claims. *Id.* The trial court denied the defendants' motion, and they appealed. *Id.* This Court stated that the issue presented was "whether a plaintiff who files an action in circuit court against a state defendant is required to comply with MCL 600.6431(1) of the Court of Claims Act (COCA), MCL 600.6401 *et seq.*," which "in turn require[d] ... address[ing] whether compliance with MCL 600.6431(1) is a question of governmental immunity or a question of compliance with the rules for proceeding in the Court of Claims." *Id.* at 257, 966 N.W.2d 219.

***4** The panel noted that these were unresolved questions in this state's jurisprudence. *Id.* at 260, 266, 966 N.W.2d 219. This Court interpreted MCL 600.6401 and held that based on reading the COCA as a whole and the placement of MCL 600.6401 within the statutory scheme, "the Legislature intended for MCL 600.6431 to apply only to claims brought in the Court of Claims." *Id.* at 269, 966 N.W.2d 219. The panel further held that compliance with MCL 600.6431(1) did not implicate governmental immunity unless the Legislature conditioned its consent to be sued on compliance with the COCA. *Id.* at 264, 270-271, 966 N.W.2d 219. Thus, this Court affirmed the trial court's denial of the defendants' motion for summary disposition. *Id.* at 272, 966 N.W.2d 219. The application for leave to appeal to the Michigan Supreme Court was dismissed for being untimely. *Tyrrell v Univ. of Mich.*, 507 Mich. 990, 959 N.W.2d 719 (2021).

In *Christie*, our Supreme Court held that "the Court of Appeals in *Tyrrell* erred by concluding that MCL 600.6431(1)'s notice requirements apply only to claims initiated against the state in the Court of Claims." *Christie*, 511 Mich. at 44, 993 N.W.2d 203. The plaintiff in *Christie* filed a civil rights action against the defendant university in the circuit court. *Id.* at 43, 993 N.W.2d 203. The circuit court denied the defendant's motion for summary disposition that was based on the plaintiff's failure to comply with MCL 600.6431(1). *Id.* at 43-44, 993 N.W.2d 203. This Court affirmed, relying on the holding in *Tyrrell* that a plaintiff is not required to comply with MCL 600.6431 when proceeding against a state defendant in circuit court. *Id.* at 44, 993 N.W.2d 203.

Our Supreme Court reversed and remanded the matter to the circuit court for entry of an order granting summary disposition in the defendant's favor. *Id.* at 45, 993 N.W.2d 203. The Supreme Court acknowledged that the *Tyrrell* panel had addressed an issue of first impression regarding whether MCL 600.6431 applied to actions filed outside the Court of Claims. *Id.* at 51, 993 N.W.2d 203. Nonetheless, the Court explained its holding and reasoning as follows:

> In short, under the unambiguous language of MCL 600.6431, any claim against the state, regardless of where it is filed, must comply with MCL 600.6431(1)'s

> notice requirements, except for claims brought under the [Wrongful Imprisonment Compensation Act] as exempted in MCL 600.6431(5). The notice provision's statutory history supports this conclusion. Accordingly, the Court of Appeals in *Tyrrell* incorrectly read a forum limitation into MCL 600.6431, which, by its express terms, applies without limitation to all claims against state defendants, including those filed in the circuit court. It is undisputed that plaintiff did not file the required notice with the clerk of the Court of Claims. Consequently, plaintiff's failure "to comply strictly with this notice provision warrants dismissal of the claim[s], even if no prejudice resulted." [*Id.* at 57, 993 N.W.2d 203 (citation omitted; second alteration in original).]

Furthermore, the Supreme Court also held that the COCA was "this state's controlling legislative expression of waiver of the state's sovereign immunity from direct action suit against it and its agencies and of their submission to the jurisdiction of a court," which meant that "when the Legislature enacted the COCA, it expressly conditioned its waiver of the state's sovereign immunity on compliance with the procedures set forth in the notice requirement now contained in MCL 600.6431(1)." *Id.* at 58-59, 993 N.W.2d 203.

[12]It is evident from the Supreme Court's reasoning in *Christie* that the Court's decision was based on construing the plain and unambiguous language of MCL 600.6431 to reach a determination that was further supported by the operation of the COCA as a limited waiver of the state's sovereign immunity. See *id.* at 57-59, 993 N.W.2d 203; see also *id.* at 44-45, 993 N.W.2d 203. Our Supreme Court has explained that it does not announce a new rule of law when it overrules a decision of the Court of Appeals that misinterpreted a statute contrary to the statute's plain language, legislative intent, and existing precedent because in that situation, the Supreme Court has "reaffirmed the existing law that was misinterpreted by the Court of Appeals." *Mich. Ed. Employees Mut. Ins. Co.*, 460 Mich. at 196-197, 596 N.W.2d 142.

> ***5** A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. [*Id.* at 196, 596 N.W.2d 142 (quotation marks and citation omitted).]

In *Christie*, our Supreme Court clearly declared the meaning of the law as it existed, based on the unambiguous statutory language, and corrected a relatively short-lived misinterpretation of the law that had "served to thwart the legislative intent and the mandated result." *Id.* at 196-197, 596 N.W.2d 142 (quotation marks and citation omitted). Therefore, because the holding in *Christie* did not constitute a new rule, it has full retroactive effect and therefore applies in the present case. *League of Women Voters*, 508 Mich. at 565-566, 975 N.W.2d 840; *Mich. Ed. Employees Mut. Ins. Co. v Morris*, 460 Mich. at 190, 596 N.W.2d 142. This conclusion is further supported by the fact that our Supreme Court applied its *Christie* holding to the parties in *Christie* and *Elia*, both of which were decided on the same day, see *Christie*, 511 Mich. at 44-45, 993 N.W.2d 203; *Elia*, 511 Mich. at 71-72, 75, 993 N.W.2d 392, thereby demonstrating that the Supreme Court viewed its *Christie* holding as fully retroactive, *McNeel*, 289 Mich App at 94, 795 N.W.2d 205. The trial court erred by failing to give *Christie* retroactive effect. As previously explained, under *Christie*, defendants were entitled to summary disposition.

Plaintiff argues that applying *Christie* retroactively is unconstitutional because doing so impairs her vested right in her cause of action without due process. Plaintiff relies on *In re Certified Questions*, 416 Mich. 558, 331 N.W.2d 456 (1982) and *Morrison v Dickinson*, 217 Mich App 308, 551 N.W.2d 449 (1996). However, both of those cases involved the issue of whether a statute operated retroactively, not a judicial opinion; the test for retroactivity of a statute is different. See *In re Certified Questions*, 416 Mich. at 570-571, 331 N.W.2d 456; *Morrison*, 217 Mich App at 317, 551 N.W.2d 449. Therefore, plaintiff's reliance on these cases is misplaced and plaintiff has not demonstrated that we must reach a different conclusion on the retroactivity of *Christie*.

We reverse for entry of summary disposition for defendant. Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendants having prevailed in full are entitled to costs. MCR 7.219(A).

All Citations

--- N.W.3d ----, 2024 WL 4428203

Footnotes

1 The exception in MCL 600.6431(5) for a "claim for compensation under the wrongful imprisonment compensation act" is inapplicable in the present case.

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