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APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
April 4, 2018 Session Heard at Jackson

No. M2016-01109-SC-R11-CV

[Filed June 22, 2018]

DAVID R. SMITH	)
	)
v.	)
	)
THE TENNESSEE NATIONAL GUARD	)
	)

Appeal by Permission from the Court of Appeals Circuit Court for Davidson County
No. 16C-12 Thomas W. Brothers, Judge

In 2014, the General Assembly enacted a statute waiving Tennessee's sovereign immunity for claims brought against the State pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 to 4335 ("USERRA"). The waiver of sovereign immunity became effective on July 1, 2014, and applied to USERRA claims "accruing on or after" that date. After passage of the statute, the plaintiff brought a USERRA claim against the defendant, an entity of the State, but his claim was based on facts that occurred prior to August 8, 2011. The trial court dismissed the claim, explaining that the claim accrued prior to July 1, 2014, and remained

barred by sovereign immunity. The Court of Appeals reversed, holding that the claim accrued on July 1, 2014, when the plaintiff gained a judicial remedy by the enactment of the statute waiving sovereign immunity. We conclude that the claim accrued prior to July 1, 2014, and remains barred by sovereign immunity. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Reversed; Judgment of the Trial Court Reinstated

CORNELIA A. CLARK, J., delivered the opinion of the Court, in which SHARON G. LEE, HOLLY KIRBY, and ROGER A. PAGE, JJ., joined. JEFFREY S. BIVINS, C.J., not participating.

Herbert H. Slatery III, Attorney General and Reporter; Andrée Blumstein, Solicitor General; and Jay C. Ballard, Deputy Attorney General, for the appellant, The Tennessee National Guard.

Phillip L. Davidson, Brentwood, Tennessee, for the appellee, David R. Smith.

OPINION

I. Factual and Procedural Background[1]

David R. Smith is a former Lieutenant Colonel in the Tennessee National Guard ("the Guard"). The Guard "is a division of the Tennessee Military Department; thus, it is an entity of the State of Tennessee." Smith v. Tenn. Nat'l Guard, 387 S.W.3d 570, 576 (Tenn. Ct. App. 2012), perm. app. denied (Tenn. Nov. 21, 2012) ("Smith I") (citing Tenn. Code Ann. § 58-1-201 et seq.).

Mr. Smith joined the Guard in 1993 as "a traditional guardsman." In February 2002, he was selected for a full-time position in the Active Guard Reserve ("AGR"). Seven years later, in 2009, Mr. Smith applied for senior developmental education at the Naval War College in Washington, D.C., and he was accepted. The Guard required Mr. Smith to leave his full-time AGR position when he began attending the

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[1] This is the third appeal involving these parties and these allegations. See Smith v. Tenn. Nat'l Guard, 387 S.W.3d 570 (Tenn. Ct. App. 2012), perm. app. denied (Tenn. Nov. 21, 2012) ("Smith I"); Smith v. Tenn. Nat'l Guard, No. M2014-02375-COA-R3-CV, 2015 WL 3455448, at *1 (Tenn. Ct. App. May 29, 2015), perm. app. denied (Tenn. Sept. 17, 2015) ("Smith II"); Smith v. Tenn. Nat'l Guard, No. M2016-01109-COA-R3-CV, 2017 WL 1207881, at *1 (Tenn. Ct. App. Mar. 31, 2017), perm. app. granted (Tenn. Aug. 17, 2017) ("Smith III"). This factual summary derives solely from the allegations of the complaint, which are taken as true for purposes of this appeal from the trial court's order granting a motion to dismiss for failure to state a claim. Moore-Pennoyer v. State, 515 S.W.3d 271, 275-76 (Tenn. 2017).

Naval War College on an active duty tour on July 6, 2010.

On April 24, 2011, Mr. Smith wrote the Guard advising that he was ending his tour at the Naval War College and requesting to know his next assignment. Three days later, on April 27, 2011, the Guard informed Mr. Smith that no position was available but that he could obtain "a traditional guardsman's position" on his return. Mr. Smith was not rehired to the AGR and was "separated" from it on July 10, 2011.[2]

On August 8, 2011, Mr. Smith sued the Guard, alleging that it had violated his rights under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301 to 4335 ("USERRA"). Smith I, 387 S.W.3d at 572-73. USERRA is a federal law intended to provide job security for armed services members.[3] USERRA includes four key provisions: (1) "it guarantees returning veterans a right

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[2] Whether Mr. Smith returned to "a traditional guardsman's position" is not entirely clear from the allegations of the complaint

[3] Congress first enacted legislation to protect the employment rights of veterans in 1940, in response to thousands of unemployed World War I veterans marching in the streets of Washington, D.C. in 1933, demanding payments owed them. Cecily Fuhr, Causes of Action for Employment Discrimination Based on Military Service under the Uniformed Services Employment and Reemployment Rights Act (USERRA), in 47 Causes of Action 2d 1 (2011 & May 2018 Supp.) (citing Andrew P. Sparks, Note, From the Desert to the Courtroom: The Uniformed Services Employment and Reemployment Rights Act, 61 Hastings L.J. 773 (2010)). Congress enacted USERRA on October 13, 1994, in response to concerns about veterans' and reservists' employment difficulties after the first Gulf War. Id.

of reemployment after military service"; (2) "it prescribes the position to which such veterans are entitled upon their return"; (3) "it prevents employers from discriminating against returning veterans on account of their military service"; and (4) "it prevents employers from firing without cause any returning veterans within one year of reemployment." Petty v. Metro. Gov't of Nashville-Davidson Cnty., 538 F.3d 431, 439 (6th Cir. 2008) (citations omitted). Mr. Smith alleged that the Guard had violated USERRA by denying him reemployment in the AGR after he returned from his active duty tour at the Naval War College. Smith I, 387 S.W.3d at 573.

The Guard moved to dismiss Mr. Smith's lawsuit for lack of subject matter jurisdiction based on its sovereign immunity as a State entity. Id. The trial court granted the motion to dismiss, and the Court of Appeals affirmed. Id. at 572.

In affirming the dismissal, the Court of Appeals pointed out that, while USERRA authorizes a private person to bring a cause of action in state court "against a state as an employer," USERRA also specifies that jurisdiction in state court for such a cause of action must be "*in accordance with the laws of the State*." Id. at 574 (citing 38 U.S.C. § 4323(b)(2)) (emphasis added). Like courts in other jurisdictions, the Court of Appeals interpreted this language as authorizing a private cause of action against a state employer in state court only if the state has waived sovereign immunity for USERRA claims. Smith I, 387 S.W.3d at 574-75.[4] The

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[4] See also Larkins v. Dep't of Mental Health and Mental Retardation, 806 So. 2d 358, 363 (Ala. 2001) (affirming dismissal

Court of Appeals concluded that Tennessee had not waived sovereign immunity for USERRA claims and affirmed the trial court's dismissal of Mr. Smith's lawsuit. Id. at 576. This Court denied Mr. Smith's application for permission to appeal.

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of the USERRA claim based on sovereign immunity and stating that "Congress's deference to state laws includes a [S]tate's law dealing with its immunity from suit"); Janowski v. Div. of State Police, Dep't of Safety and Homeland Sec., 981 A.2d 1166, 1170-71 (Del. 2009) (interpreting the statutory text "in accordance with the laws of the State" as including "determinations about whether, when, and under what circumstances to waive sovereign immunity explicitly," holding that the Delaware legislature had not explicitly waived its immunity from suits under USERRA, and affirming the trial court's dismissal); Anstadt v. Bd. of Regents, 693 S.E.2d 868, 872 (Ga. 2010) (using a similar analysis to conclude that a USERRA claim against Georgia is only permissible to the extent the state has explicitly waived its sovereign immunity); Clark v. Virginia Dep't of State Police, 793 S.E.2d 1, 7 (Va. 2016) (holding that sovereign immunity barred the plaintiff's USERRA claim in state court).

We note that a USERRA claim may also be brought in federal court by the Attorney General of the United States ("AG"). See 38 U.S.C. § 4323(a)(1), (b)(1); Stoglin v. Merit Sys. Prot. Bd., 640 Fed. Appx. 864, 868 (Fed. Cir. 2016) (noting that "'[e]nforcement of [USERRA] rights with respect to a State or private employer is set out in 38 U.S.C. § 4323, which provides for district court jurisdiction over actions against a state commenced by the United States, and state court jurisdiction over actions against a state commenced by a person."). The AG files the lawsuit in federal court in the name of the United States, but the AG appears and acts as attorney on the veteran's behalf. 38 U.S.C. § 4323(a)(1). In such a case, the AG may seek victim-specific benefits such as "any loss of wages or benefits suffered by reason of such employer's failure to comply" with USERRA. Id. § 4323(d)(1)(B). The recovery is then "held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person." Id. § 4323(d)(2)(B).

Thereafter, in 2014, the General Assembly enacted a statute waiving Tennessee's sovereign immunity for USERRA claims. Tenn. Code. Ann. § 29-20-208 (Supp. 2017).[5] However, the General Assembly specified that the waiver would become effective July 1, 2014, and would apply "to all [USERRA] claims . . . *accruing on or after such date* [July 1, 2014]." See 2014 Tenn. Pub. Acts, ch. 574, § 2 (emphasis added).

Relying on this newly enacted statute, Mr. Smith filed a motion on July 2, 2014, pursuant to Rule 60 of the Tennessee Rules of Civil Procedure, seeking relief from the prior judgment dismissing his USERRA claim. Smith v. Tenn. Nat'l Guard, No. M2014-02375-COA-R3-CV, 2015 WL 3455448, at *2 (Tenn. Ct. App. May 29, 2015), perm. app. denied (Tenn. Sept. 17, 2015) ("Smith II"). The trial court denied relief, explaining that Mr. Smith's "claim was still barred by sovereign immunity because it accrued before July 1, 2014." Id. at *1. The Court of Appeals affirmed, explaining that Mr. Smith had filed a complaint on August 8, 2011, alleging that the Guard "violated USERRA by refusing to rehire him after he returned from active duty." Id. at *3. The Court of Appeals

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[5] Tennessee Code Annotated section 29-20-208 provides:

> Immunity from suit of any governmental entity, or any agency, authority, board, branch, commission, division, entity, subdivision, or department of state government, or any autonomous state agency, authority, board, commission, council, department, office, or institution of higher education, is removed for the purpose of claims against and relief from a governmental entity under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4334.

pointed out that Mr. Smith's filing of this complaint evidenced his awareness "that he had suffered an injury as the result of [the Guard's] conduct" *before* the complaint was filed on August 8, 2011. Id. Therefore, the Court of Appeals explained, it was "undisputed that [Mr. Smith's] cause of action accrued prior to July 1, 2014." Id. This Court denied Mr. Smith's application for permission to appeal.

Not quite four months later, on January 4, 2016, Mr. Smith filed another complaint, for the third time bringing his case before the Circuit Court for Davidson County. In his 2016 complaint, from which the present appeal arises, Mr. Smith alleged the same facts in support of his USERRA claim. In addition, Mr. Smith challenged the constitutionality of Tennessee Code Annotated section 29-20-208, arguing that it violated the Supremacy Clause of the United States Constitution. Specifically, Mr. Smith contended that by limiting the waiver of sovereign immunity to claims accruing after July 1, 2014, the General Assembly had imposed a statute of limitations on USERRA claims in violation of a 2008 federal statute[6] prohibiting the application of statutes of limitation to such claims.

The Guard moved to dismiss Mr. Smith's complaint and also defended the constitutionality of the statute. As grounds for dismissal, the Guard again relied on sovereign immunity, arguing that Mr. Smith's claim

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[6] See 38 U.S.C. § 4327(b) ("If any person seeks to file a complaint or claim with the Secretary, the Merit Systems Protection Board, or a Federal or State court under this chapter alleging a violation of this chapter, *there shall be no limit on the period for filing the complaint or claim.*" (emphasis added)).

accrued before July 1, 2014, the date the waiver of sovereign immunity became effective. The Guard also raised res judicata as a basis for dismissal, pointing to the decisions in Smith I and Smith II. Finally, the Guard denied that Section 29-20-208 imposes a statute of limitations in violation of federal law and argued that it merely specifies the effective date of the waiver of sovereign immunity for USERRA claims.

The trial court rejected Mr. Smith's challenge to the constitutionality of the statute and again concluded that Mr. Smith's claim accrued prior to July 1, 2014, and therefore was barred by sovereign immunity. Accordingly, the trial court again dismissed Mr. Smith's lawsuit based on sovereign immunity.[7] Smith v. Tenn. Nat'l Guard, No. M2016- 01109-COA-R3-CV, 2017 WL 1207881, at *3 (Tenn. Ct. App. Mar. 31, 2017), perm. app. granted (Tenn. Aug. 17, 2017) ("Smith III").

Mr. Smith appealed. In a divided decision, the Court of Appeals reversed. Smith III, 2017 WL 1207881, at *8. Although the Court of Appeals in Smith II had stated that it was "undisputed that [Mr. Smith's] cause of action accrued prior to July 1, 2014," Smith II, 2015

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[7] The trial court declined to base dismissal on the Guard's argument that res judicata barred the lawsuit, explaining in its oral ruling that the prior dismissal of Mr. Smith's lawsuit for lack of subject matter jurisdiction based on sovereign immunity did not constitute a dismissal on the merits under Tennessee law. Smith III, 2017 WL 1207881, at *2-3. See also Tenn. R. Civ. P. 41.02(3); Creech v. Addington, 281 S.W.3d 363, 378 (Tenn. 2009). The Guard has not relied on the law of the case doctrine or issue preclusion in this appeal. Smith III, 2017 WL 1207881, at *4. Thus, we need not address how, if at all, those concepts apply in these circumstances.

WL 3455448, at *3, the majority in Smith III determined that Mr. Smith's cause of action accrued when "he attained the right to sue pursuant to the judicial remedy created by Tennessee Code Annotated section 29-20-208."[8] Smith III, 2017 WL 1207881, at *7. Like the Court of Appeals in Smith II, the dissenting judge would have affirmed the dismissal on the ground that Mr. Smith's USERRA claim accrued in July 2011, long before the July 1, 2014 effective date of the waiver of sovereign immunity. Id. at *8, 10 (McBrayer, J., dissenting).[9]

The Guard filed an application for permission to appeal pursuant to Tennessee Rule of Appellate Procedure 11, arguing that the Court of Appeals misapplied the standards of statutory construction applicable to waivers of sovereign immunity and misinterpreted Tennessee decisions addressing when a claim accrues. We granted the Guard's application.

II. Standard of Review

This appeal arises from the trial court's decision granting the Guard's motion to dismiss Mr. Smith's complaint for failure to state a claim based on sovereign immunity and lack of subject matter jurisdiction. The Guard mounted a facial challenge to

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[8] The majority in Smith III "consider[ed] the accrual issue anew," without reference to Smith II in its substantive analysis, because the parties had not raised res judicata or collateral estoppel before the Court of Appeals. 2017 WL 1207881, at *4.

[9] The dissenting judge made no reference to Smith II, despite reaching a conclusion consistent with it. Smith III, 2017 WL 1207881, at *8-10 (McBrayer, J., dissenting).

subject matter jurisdiction; thus, familiar standards govern our review. Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc., 531 S.W.3d 146, 160 (Tenn. 2017). In particular, the factual allegations of the complaint are taken as true. Brown v. Tenn. Title Loans, Inc., 328 S.W.3d 850, 854-55 (Tenn. 2010). We review de novo the lower court's legal conclusions, including its ruling on the legal sufficiency of the complaint. Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 426 (Tenn. 2011).

De novo review also applies to the questions of statutory construction presented in this appeal, and we afford no presumption of correctness to the conclusions of the courts below. Moreno v. City of Clarksville, 479 S.W.3d 795, 802 (Tenn. 2015).

III. Analysis

A. Sovereign Immunity

The sovereign State of Tennessee is immune from lawsuits "'except as it consents to be sued.'" Stewart v. State, 33 S.W.3d 785, 790 (Tenn. 2000) (quoting Brewington v. Brewington, 387 S.W.2d 777, 779 (Tenn. 1965)). In the context of sovereign immunity, "'[t]he State includes 'the departments, commissions, boards, institutions and municipalities of the State'" such as the Guard. Davidson v. Lewis Bros. Bakery, 227 S.W.3d 17, 19 (Tenn. 2007) (quoting Metro. Gov't of Nashville & Davidson Cnty. v. Allen, 415 S.W.2d 632, 635 (Tenn. 1967)).

Sovereign immunity originated in the common law, but the doctrine is now embodied both in a state constitutional provision and in a statute. Mullins v. State, 320 S.W.3d 273, 278 (Tenn. 2010). Article I,

section 17 of the Tennessee Constitution provides that "[s]uits may be brought against the State in such manner and in such courts as the Legislature may by law direct." Additionally, a statute provides:

> No court in the state shall have any power, jurisdiction or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds or property, and all such suits shall be dismissed as to the state . . . .

Tenn. Code Ann. § 20-13-102(a) (2009). Both provisions clearly reserve to the General Assembly exclusive power to waive Tennessee's sovereign immunity and to prescribe the terms and conditions under which the State may be sued, "'including when, in what forum, and in what manner suit may be brought.'" Sneed v. City of Red Bank, Tenn., 459 S.W.3d 17, 23 (Tenn. 2014) (quoting Cruse v. City of Columbia, 922 S.W.2d 492, 495 (Tenn.1996)); see also Hughes v. Metro. Gov't of Nashville & Davidson Cnty., 340 S.W.3d 352, 360 (Tenn. 2011); Mullins, 320 S.W.3d at 283.

Thus, courts will interpret a statute as waiving the State's sovereign immunity only if the legislation waives sovereign immunity "in 'plain, clear, and unmistakable' terms." Mullins, 320 S.W.3d at 283 (quoting Northland Ins. Co. v. State, 33 S.W.3d 727, 731 (Tenn. 2000)). A "waiver of sovereign immunity must be explicit, not implicit." Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827, 853 (Tenn. 2008). In other words, statutes waiving sovereign immunity must "clearly and unmistakably" express the General Assembly's intent to permit claims against the State.

Davidson, 227 S.W.3d at 19 (quoting Scates v. Bd. of Comm'rs of Union City, 265 S.W.2d 563, 565 (Tenn. 1954)). In determining whether a statute satisfies this standard, we focus "on the actual words chosen and enacted by the legislature." Mullins, 320 S.W.3d at 283. Courts lack authority to abrogate the State's sovereign immunity and must avoid inadvertently broadening the scope of legislation authorizing suits or claims against the State. Hill v. Beeler, 286 S.W.2d 868, 869 (Tenn. 1956).

Here, we have no difficulty in concluding that the General Assembly clearly and unmistakably intended to waive the State's sovereign immunity for USERRA claims by enacting Tennessee Code Annotated section 29-20-208. The statute expressly provides that "immunity from suit . . . is removed" for USERRA claims. Tenn. Code Ann. § 29- 20-208. But the General Assembly also clearly and unmistakably limited the waiver of sovereign immunity by making it "take effect July 1, 2014" and by applying it only to claims "accruing on or after" July 1, 2014. 2014 Tenn. Pub. Acts, ch. 574, § 2. The General Assembly chose not to make the waiver of sovereign immunity retroactively effective or applicable to past events, although it could have done so. See Morris v. State, No. M1999-02714-COA-RM-CV, 2002 WL 31247079, at *1 (Tenn. Ct. App. Oct. 8, 2002) (holding that the General Assembly has the authority to "enact retroactive laws waiving the State's sovereign immunity with regard to past events"). The crucial task then, for purposes of this appeal and the waiver of sovereign immunity, is determining when Mr. Smith's USERRA claim accrued. The Court of Appeals' majority determined that Mr. Smith's claim accrued on July 1, 2014, "when he

attained the right to sue pursuant to the judicial remedy created by Tennessee Code Annotated section 29-20-208." Smith III, 2017 WL 1207881, at *7. We cannot agree and conclude that the Court of Appeals' majority misapplied prior decisions of this Court discussing the concept of accrual.

B. Accrual of a Claim

Courts most often examine the concept of accrual when determining the date on which an applicable statute of limitations begins to run. Redwing v. Catholic Bishop for Diocese of Memphis, 363 S.W.3d 436, 457 (Tenn. 2012). Under the traditional common law rule, a claim accrued "immediately upon the infliction or occurrence of injury and . . . mere ignorance or failure of [a] plaintiff to discover his cause of action or the subsequent resulting damage [did] not toll the statute [of limitations]." Teeters v. Currey, 518 S.W.2d 512, 515-16 (Tenn. 1974). Strictly applying this traditional rule produced injustice because a claim could accrue and be barred by the statute of limitations before a plaintiff had any knowledge of the injury. Id. To ameliorate such an unjust result, "state courts and legislatures adopted what is now known as the 'discovery rule.'" Redwing, 363 S.W.3d at 458. This Court did so in 1974, adopting "the discovery rule in response to the 'harsh and oppressive' results of the traditional accrual rule in circumstances in which the injured party was unaware of the injury." Id. (quoting Teeters, 518 S.W.2d at 516). The Teeters Court held that "[a] cause of action accrues and the statute of limitations commences to run when the patient discovers, or in the exercise of reasonable care and diligence for his own health and welfare, should have

discovered the resulting injury." Teeters, 518 S.W.2d at 517. The Teeters decision was limited to surgical malpractice claims, but later this Court extended the discovery rule to many other types of claims. Redwing, 363 S.W.3d at 458 (citing Justin N. Joy, Comment, Civil Procedure—Pero's Steak & Spaghetti House v. Lee: Tennessee Declines to Extend the Discovery Rule to Claims of Converted Negotiable Instruments, 34 U. Mem. L. Rev. 475, 487 & n. 63 (2004) (cataloging the causes of action to which the discovery rule applies)).

In the years since Teeters, this Court has often discussed how a claim accrues when applying the discovery rule. See, e.g., Sherrill v. Souder, 325 S.W.3d 584, 595 (Tenn. 2010) (holding that a cause of action accrues when the plaintiff discovers both the injury and the "identity of the person or persons whose wrongful conduct caused the injury"); John Kohl & Co. v. Dearborn & Ewing, 977 S.W.2d 528, 532 (Tenn. 1998) (holding that a cause of action accrues when the plaintiff knows or should know that the plaintiff has sustained an injury "as a result of wrongful . . . conduct by the defendant"); Wyatt v. A-Best, Co., 910 S.W.2d 851, 855 (Tenn. 1995) (holding that "a prerequisite to the running of the statute of limitations is [the] plaintiff's reasonable knowledge of the injury, its cause and origin"); Foster v. Harris, 633 S.W.2d 304, 305 (Tenn. 1982) (holding that "no judicial remedy [is] available to [a] plaintiff until he [or she] discover[s], or reasonably should have discovered, (1) the occasion, the manner and means by which a breach of duty occurred that produced his [or her] injury; and (2) the identity of the defendant who breached the duty"); McCroskey v. Bryant Air Conditioning Co., 524 S.W.2d 487, 491 (Tenn. 1975) (holding that "in tort actions . . . the cause

of action accrues . . . when the injury occurs or is discovered, or when in the exercise of reasonable care and diligence, it should have been discovered").

"Under the current discovery rule, a cause of action accrues . . . not only when the plaintiff has actual knowledge of a claim, but also when the plaintiff has actual knowledge of facts sufficient to put a reasonable person on notice that he [or she] has suffered an injury as a result of wrongful conduct." Redwing, 363 S.W.3d at 459 (internal quotations omitted). This definition of accrual has prevailed in Tennessee since at least 1974, when Teeters was decided. Because we presume that the General Assembly knows the state of the law on a subject under consideration at the time it acts, see Hughes, 340 S.W.3d at 363, the General Assembly is presumed to have known of the many decisions of this Court defining accrual when it used that term to limit the waiver of sovereign immunity in Section 29-20-208 to USERRA claims accruing on or after July 1, 2014. We must, therefore, interpret the term "accruing" as used in the waiver of sovereign immunity consistently with these prior decisions to avoid inappropriately expanding the waiver beyond its intended scope. Therefore, to decide whether Mr. Smith's claim accrued before, on, or after July 1, 2014, we need only determine when Mr. Smith actually knew he had suffered an injury as a result of the Guard's allegedly wrongful conduct. The answer to this question is abundantly clear. As the Court of Appeals itself stated in Smith II, it is undisputed that Mr. Smith had actual knowledge that he had suffered an injury as a result of the Guard's allegedly wrongful conduct sometime before August 8, 2011, when he first filed a complaint alleging a USERRA claim. 2015 WL 3455448, at *3.

Mr. Smith's claim accrued, therefore, long before July 1, 2014, and remains barred by sovereign immunity, as the trial court determined, because Section 29-20-208 limited the waiver of sovereign immunity to USERRA claims *accruing* on or after July 1, 2014.

In so holding, we decline to adopt the Court of Appeals' majority's interpretation of the waiver of sovereign immunity. Doing so would inappropriately extend the scope of the waiver to encompass every claim that has arisen since USERRA was enacted in 1994, in contravention of the well-settled rule "that statutes permitting suits against the State must be strictly construed." Moreno, 479 S.W.3d at 810 (quoting Auto. Sales Co. v. Johnson, 122 S.W.2d 453, 455 (Tenn. 1938)). The Court of Appeals' majority's interpretation would also render meaningless the words "accruing on or after" July 1, 2014, which is a pitfall courts must avoid when construing statutes. Leab v. S & H Mining Co., 76 S.W.3d 344, 349 n.3 (Tenn. 2002) ("[W]e must avoid constructions which would render portions of the statute meaningless or superfluous."); see also Kiser v. Wolfe, 353 S.W.3d 741, 750–51 (Tenn. 2011) (quoting and citing Leab). Finally, our research has revealed no authority in this State holding that enactment of a statute waiving sovereign immunity alters the date a claim accrues, and several other states have held that enactment of a statute waiving sovereign immunity does *not* alter the date a claim accrues. See Grantham v. Miss. Dep't of Corr., 522 So. 2d 219, 222-23 (Miss. 1988) (interpreting a statute waiving sovereign immunity for "claims that accrue on or after July 1, 1985" as inapplicable to a lawsuit stemming from a February 12, 1985 shooting because the shooting occurred and the claim accrued before July 1, 1985);

Bd. of Regents v. Oglesby, 591 S.E.2d 417, 421-22 (Ga. Ct. App. 2003) (concluding that the negligence cause of action was barred because it accrued long before passage of the statutory waiver of sovereign immunity); State v. Williamson Polishing & Plating Co., 384 N.E.2d 1114, 1115 (Ind. Ct. App. 1979) (holding that a claim accrued and became barred by the applicable statute of limitations before the State waived sovereign immunity for the claim and stating that the waiver of sovereign immunity was not "intended to resuscitate tort claims which were otherwise barred by the statute of limitations"). In erroneously concluding that the waiver of sovereign immunity triggered anew the accrual of Mr. Smith's claim, the Court of Appeals' majority relied on the following language from a 1995 decision of this Court, "a cause of action in tort does not accrue until a *judicial remedy* is available." Wyatt, 910 S.W.2d at 855 (citing Potts v. Celotex Corp., 796 S.W.2d 678, 681 (Tenn. 1990); Foster, 633 S.W.2d at 305) (emphasis added). The Court of Appeals' majority defined "judicial remedy" as "a right to sue." Smith III, 2017 WL 1207881, at *7. The Court of Appeals' majority failed to utilize the following definition of "judicial remedy" that the Wyatt Court itself provided:

> *A judicial remedy is available when (1) a breach of a legally recognized duty owed to [a] plaintiff by [a] defendant (2) causes [a] plaintiff legally cognizable damage.* A breach of a legally cognizable duty occurs when [a] plaintiff discovers or reasonably should have discovered, (1) the occasion, the manner and means by which a breach of duty occurred that produced . . . injury; and (2) the identity of the defendant who breached the duty. Legally

> cognizable damages occur when [a] plaintiff discovers facts which would support an action for tort against the tortfeasor.

Wyatt, 910 S.W.2d at 855 (emphasis added) (internal citations and quotation marks omitted). The Wyatt Court used "judicial remedy" to mean, "[q]uite simply, [that] a plaintiff must have discovered the existence of facts which would support an action in tort against the tortfeasor" and "[s]uch facts include not only the existence of an injury, but the tortious origin of the injury." Id. (internal citations and quotation marks omitted). The Wyatt Court's definition of "judicial remedy" is entirely consistent with other decisions of this Court, already cited herein, discussing the concept of accrual. Applying that definition, we have no hesitation in concluding that the Court of Appeals' majority erred in determining that Mr. Smith's claim accrued on or after July 1, 2014. As already explained, Mr. Smith knew of his alleged injury and USERRA claim against the Guard sometime before August 8, 2011, the date he filed his initial complaint alleging a USERRA claim. Thus, Mr. Smith's claim accrued prior to July 1, 2014, and remains barred by sovereign immunity.

IV. Conclusion

For the reasons stated herein, the judgment of the Court of Appeals is reversed. The judgment of the trial court dismissing this action is reinstated. Costs of this appeal are taxed to David R. Smith, for which execution may issue if necessary.

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CORNELIA A. CLARK, JUSTICE

APPENDIX B

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 22, 2017 Session

No. M2016-01109-COA-R3-CV

[Filed March 31, 2017]

DAVID R. SMITH	)
	)
v.	)
	)
THE TENNESSEE NATIONAL GUARD	)
	)

Direct Appeal from the Circuit Court
for Davidson County
No. 16C-12 Thomas W. Brothers, Judge

This case involves a military service member's claim against the Tennessee National Guard pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq*., and Tennessee Code Annotated section 29-20-208. The trial court dismissed the complaint for failure to state a claim. We reverse and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

BRANDON O. GIBSON, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., joined, and W. NEAL MCBRAYER, J., dissented.

Phillip Leon Davidson, Brentwood, Tennessee, for the appellant, David R. Smith.

Herbert H. Slatery III, Attorney General and Reporter, Andrée Blumstein, Solicitor General, and Taylor William Jenkins, Assistant Attorney General, Nashville, Tennessee, for the appellee, The Tennessee National Guard.

OPINION

I. FACTS & PROCEDURAL HISTORY

This is the third appeal before this Court involving these parties. According to the complaint, Plaintiff David Smith is a former lieutenant-colonel in the Tennessee National Guard. For a period, Smith left the Tennessee National Guard to attend the Naval War College on an active duty tour. In 2011, Smith sought to return to the Tennessee National Guard but was allegedly only offered a traditional guardsman's position. Smith "separated from" the Tennessee National Guard on July 10, 2011.

Smith filed a lawsuit in the circuit court of Davidson County pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq.* ("USERRA"), which forbids employment discrimination on the basis of membership in the armed forces. "USERRA creates a private cause of action in favor of a service-connected employee who the employer has refused to rehire." *Smith v. Tenn. Nat. Guard*, 387 S.W.3d 570, 574 (Tenn. Ct. App. 2012) ("*Smith I*"). The trial court dismissed the lawsuit for lack of subject matter jurisdiction on the basis of sovereign immunity, and this Court affirmed. *Id.* at

572. We explained that USERRA performs several key functions:

> (1) it guarantees returning veterans a right of re-employment after military service, 38 U.S.C. § 4312; (2) it prescribes the position to which such veterans are entitled upon their return, 38 U.S.C. § 4313; (3) it prevents employers from discriminating against returning veterans on account of their military service, 38 U.S.C. § 4311; and (4) it prevents employers from firing without cause any returning veterans within one year of reemployment, 38 U.S.C. § 4316.

Id. at 574 (footnote omitted). However, for actions filed by individuals *against a state* as an employer, USERRA provides that "the action may be brought in a State court of competent jurisdiction *in accordance with the laws of the State*." 38 U.S.C. § 4323(b)(2) (emphasis added). In other words, "for an individual to sustain an action against a state pursuant to USERRA, the action must be permitted by state law." *Smith I*, 387 S.W.3d at 574.

The Tennessee National Guard is a division of the Tennessee Military Department and "an entity of the State of Tennessee." *Id.* at 576 (citing Tenn. Code Ann. § 58-1-201). Article I, section 17, of the Tennessee Constitution provides that "[s]uits may be brought against the State in such manner and in such courts as the Legislature may by law direct." As a result, "no civil action against the State may be sustained absent express authorization from the Tennessee General Assembly." *Smith I*, 387 S.W.3d at 575. Because the Tennessee General Assembly had not expressly waived the State's sovereign immunity for claims under

USERRA, we concluded that the Tennessee National Guard was immune from USERRA claims and affirmed dismissal of Smith's claim. *Id.* at 576.

Shortly after we issued that opinion, effective July 1, 2014, the Tennessee General Assembly adopted Tennessee Code Annotated section 29-20-208, entitled "Uniformed Services Employment and Reemployment Rights Act of 1994," which provides:

> Immunity from suit of any governmental entity, or any agency, authority, board, branch, commission, division, entity, subdivision, or department of state government, or any autonomous state agency, authority, board, commission, council, department, office, or institution of higher education, is removed for the purpose of claims against and relief from a governmental entity under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4334.

See 2014 Tenn. Pub. Acts, c. 574. Relying on the new statute, Smith filed a Rule 60 motion seeking to have his original lawsuit reinstated. The trial court denied the Rule 60 motion, finding that Smith's claim was still barred by sovereign immunity because it accrued prior to July 1, 2014. On appeal, this Court affirmed the trial court's decision. *Smith v. Tenn. Nat'l Guard*, No. M2014-02375-COA-R3-CV, 2015 WL 3455448, at *2 (Tenn. Ct. App. May 29, 2015), *perm. app. denied* (Tenn. Sept. 17, 2015) ("*Smith II*"). We acknowledged the passage of Tennessee Code Annotated section 29-20-208 but also recognized that the public act provided that it was to take effect on July 1, 2014, and "'apply to all claims against a governmental entity

under [USERRA] *accruing on or after such date*.'" *Id.* (quoting 2014 Tenn. Pub. Acts, c. 574, § 2) (emphasis added). We rejected Smith's argument that his cause of action did not accrue before July 1, 2014. Citing the discovery rule, we explained that "a cause of action accrues when the plaintiff knows or, in the exercise of reasonable care and diligence, should have known that an injury has been sustained as the result of wrongful conduct by the defendant." *Id.* at *3. We concluded that Smith was aware that he had suffered an injury as a result of the Tennessee National Guard's conduct by the time he filed his original complaint in 2011, and therefore, his cause of action accrued in 2011, prior to July 1, 2014, and was barred by the doctrine of sovereign immunity. *Id.*

On January 4, 2016, Smith initiated the case before us by filing a new complaint in the circuit court for Davidson County. He asserted, again, that the Tennessee National Guard's failure to rehire him in 2011 violated USERRA and Tennessee Code Annotated section 29-20-208. Smith also asserted that Tennessee Code Annotated section 29-20-208 is unconstitutional because it allegedly violates the Supremacy Clause and conflicts with USERRA by applying "a statute of limitations" to USERRA claims.

The Tennessee National Guard filed a motion to dismiss. First, it argued that the case should be dismissed based on res judicata. Alternatively, it argued that the case should be dismissed for lack of subject matter jurisdiction based on sovereign immunity, claiming that Smith's USERRA cause of action accrued in 2011. It also denied that Tennessee

Code Annotated section 29-20-208 contained a statute of limitations or violated the Supremacy Clause.

Smith filed a response, arguing that the present suit was not barred by res judicata because his previous case was dismissed for lack of subject matter jurisdiction rather than resolved on the merits. Smith also argued that his cause of action did not accrue in 2011 because he had no "right to sue" at that time. He suggested that his "right to sue" did not exist, and his USERRA claim did not accrue, until July 1, 2014, when section 29-20-208 became effective. He also maintained that section 29-20-208 is unconstitutional because it contains what he described as a time limit on filing a USERRA claim.

On April 28, 2016, the circuit court entered an order granting the Tennessee National Guard's motion to dismiss. The trial court found that res judicata was inapplicable and did not bar this lawsuit. However, the court again concluded that Smith's cause of action accrued before July 1, 2014, and therefore, his claim was subject to dismissal. The trial court also found that Tennessee Code Annotated section 29-20-208 is constitutional. Smith timely filed a notice of appeal.

II. ISSUES PRESENTED

Smith presents the following issues, as slightly reworded, for review on appeal:

1. Whether the trial court erred in holding that Tennessee Code Annotated section 29-20-208 is constitutional; and

> 2. Whether the trial court erred in holding that Smith's cause of action accrued prior to July 1, 2014.

For the following reasons, we reverse and remand for further proceedings.

III. DISCUSSION

A. Constitutionality

At the outset, we address Smith's contention that Tennessee Code Annotated section 29-20-208 is unconstitutional. Specifically, Smith argues that section 29-20-208 sets an impermissible time limit on USERRA claims and is therefore unconstitutional in violation of the Supremacy Clause. He argues that Congress intended USERRA to "cover the field" in the area of protecting service members' employment rights. Smith claims that section 29-20-208 conflicts with and is preempted by the following USERRA provision:

> (b) Inapplicability of statutes of limitations. -- If any person seeks to file a complaint or claim with the Secretary, the Merit Systems Protection Board, or a Federal or State court under this chapter alleging a violation of this chapter, there shall be no limit on the period for filing the complaint or claim.

38 U.S.C. § 4327(b).

"[T]he doctrine of preemption is rooted in the Supremacy Clause of the United States Constitution." *Berent v. CMH Homes, Inc.*, 466 S.W.3d 740, 748 (Tenn. 2015). "As 'the supreme law of the land,' federal law sometimes preempts, or supplants, otherwise permissible state laws, rendering them inert and

ineffectual." *Id.* (citing *Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595, 605 (Tenn. 2013)).

The doctrine of field preemption applies "when a state attempts to regulate conduct 'in a field that Congress intends the federal government to occupy exclusively.'" *Cadence Bank, N.A. v. The Alpha Trust*, 473 S.W.3d 756, 765 (Tenn. Ct. App. 2015) (quoting *Coker v. Purdue Pharma Co.*, No. W2005-02525-COA-R3-CV, 2006 WL 3438082, at *5 n.8 (Tenn. Ct. App. Nov. 30, 2006)). "Field preemption occurs when federal regulation of a field is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Lake v. Memphis Landsmen, LLC*, 405 S.W.3d 47, 56 (Tenn. 2013) (quoting *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 854 (Tenn. 2010)). We do not draw that inference here. USERRA expressly provides that an individual's USERRA action against a State employer may be brought in state court "in accordance with the laws of the State." 38 U.S.C.A. § 4323(b)(2).

Additionally, a state law may be preempted under the doctrine of conflict preemption to the extent that the state law actually conflicts with federal law and "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Berent*, 466 S.W.3d at 748 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989)). However, we discern no actual conflict between the aforementioned USERRA provision and Tennessee Code Annotated section 29-20-208. The USERRA provision prohibits placing a "limit on the *period for filing* the complaint or claim." 38 U.S.C. § 4327(b) (emphasis added). Pursuant

to section 29-20-208, sovereign immunity is waived in Tennessee for "claims against a governmental entity under [USERRA] accruing on or after" July 1, 2014. 2014 Tenn. Pub. Acts 574, § 2. This language does not place an impermissible limit on "the period for filing" such a claim when immunity is removed. *See* 38 U.S.C. § 4327(b). Therefore, it does not conflict with USERRA. We agree with the trial court's finding that Tennessee Code Annotated section 29-20-208 does not violate the Supremacy Clause.

B. Accrual

Next, we consider Smith's argument that the trial court erred in concluding that his USERRA claim accrued in 2011. We note that in our second *Smith* opinion, involving Smith's Rule 60 motion, we concluded that his claim accrued in 2011 because he had knowledge of it by that time. *Smith II*, 2015 WL 3455448, at *3. However, the parties raise no issue on appeal regarding the applicability of res judicata or collateral estoppel. Therefore, we consider the accrual issue anew.

In this appeal, Smith raises an issue that this Court did not expressly analyze in our previous opinion. He argues that his USERRA claim did not accrue in 2011 because he had no legally recognized "right to sue" and no judicial remedy prior to the passage of Tennessee Code Annotated section 29-20-208. He contends that his right to sue the Tennessee National Guard pursuant to USERRA did not exist under Tennessee law until July 1, 2014, and therefore his USERRA cause of action did not accrue until that date.

We note at the outset that the Tennessee General Assembly was authorized to waive sovereign immunity with regard to past events. *See Morris v. State*, No. M1999-02714-COA-RM-CV, 2002 WL 31247079, at *4 (Tenn. Ct. App. Oct. 8, 2002) ("A state may enact laws waiving or impairing its own rights, and may even impose on itself new liabilities with respect to transactions already past.") (citations omitted). The general assembly was also authorized to determine the effective date of its Act. *Id.* at *4 n.10 (citing Tenn. Const. art. II, § 20). We therefore focus on the particular language used by the general assembly.[1]

Tennessee Code Annotated section 29-20-208 applies "to all claims against a governmental entity under [USERRA] *accruing* on or after [July 1, 2014]." 2014 Tenn. Pub. Acts 574, § 2 (emphasis added). Neither the statute nor the public act defines how to measure the concept of accrual for purposes of section 29-20-208. Generally, the concept of accrual relates to the date on which a statute of limitations begins to run. *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 457 (Tenn. 2012). Under the traditional accrual rule, "a cause of action accrues and the applicable statute of limitations begins to run 'when the plaintiff has a cause of action and the right to sue.'" *Id.* (quoting *Armistead v. Clarksville-Montgomery Cnty. Sch. Sys.*, 437 S.W.2d

[1] For instance, *Morris* involved a waiver of sovereign immunity for retaliatory discharge claims, and the public act stated that it would apply "to all cases *filed* with the Claims Commission *on or after* July 1, 1992, pending on appeal at the time of passage of this act." 2002 WL 31247079, at *2 (citing Act of Mar. 22, 1999, ch. 54, § 2, 1999 Tenn. Pub. Acts 110, 110) (emphasis added).

527, 528-29 (Tenn. 1969)). Historically, the statute of limitations began to run even though the person entitled to an action had no knowledge of his right to sue or the facts out of which the right arose. *Id.* Today, by adoption of the "discovery rule," a cause of action accrues "when the plaintiff knows, or in the exercise of reasonable care and diligence should know, that an injury has been sustained." *Wyatt v. A-Best, Co*., 910 S.W.2d 851, 854 (Tenn. 1995). "*Additionally*," though, "a cause of action in tort does not accrue until a judicial remedy is available." *Id.* at 855 (emphasis added).

Tennessee courts have consistently held that a cause of action in tort does not accrue or exist "until a judicial remedy is available" to the plaintiff. *Terry v. Niblack*, 979 S.W.2d 583, 586 (Tenn. 1998) (citing *Wyatt v. A-Best, Co.* 910 S.W.2d 851, 855 (Tenn. 1995)); *Potts v. Celotex Corp.*, 796 S.W.2d 678, 681 (Tenn. 1990); *Foster v. Harris*, 633 S.W.2d 304, 305 (Tenn. 1982). As the Tennessee Supreme Court explained in *Wyatt*, "'it has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before that cause of action exists, *i.e.*, before a judicial remedy is available to the plaintiff.'" *Wyatt*, 910 S.W.2d at 855 (quoting *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting)). Thus, for a tort action,[2] the statute of limitations commences when the plaintiff knew or should have known that "an actionable injury has occurred." *Id.* at 857. "An

[2] The United States Supreme Court has described a USERRA claim as "a federal tort" and applied principles of general tort law when construing USERRA. *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011).

actionable injury is one caused by the breach of a legally recognized duty *and* one that results in legally cognizable damage." *Id.* In other words, "the accrual of the cause of action depends on when the plaintiff has suffered a legally cognizable injury." *Shell v. State*, 893 S.W.2d 416, 423 (Tenn. 1995). *Black's Law Dictionary* defines the term "cognizable" as "[c]apable of being known or recognized" or "[c]apable of being judicially tried or examined before a designated tribunal; within the court's jurisdiction." *Black's Law Dictionary* (10th ed. 2014). "'A cause of action accrues when a suit may be maintained upon it.'" *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487, 490 (Tenn. 1975) (quoting *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 697 (Tenn. 1974) (J. Fones, dissenting)).

The Tennessee Supreme Court's recent decision in *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 891 (Tenn. 2011), is particularly instructive. *Lind* involved a purchaser who filed a products liability suit against a seller in 2007. *Id.* In 2009, the purchaser again sued the seller, this time alleging strict liability. *Id.* The seller filed a motion to dismiss contending that the suit was barred by the statute of limitations. *Id.* The trial court denied the motion but granted an interlocutory appeal. *Id.* The case eventually made its way to the Tennessee Supreme Court. Under the Tennessee Products Liability Act, the seller of the product could not be held to strict liability in tort unless one or more statutory conditions was satisfied. *Id.* at 896. One of those conditions was if the manufacturer was judicially declared insolvent, which occurred in *Lind* after the 2007 lawsuit. *Id.* Still, the defendant contended that because the plaintiff-purchaser knew or should have known of the product defect when he originally filed

suit in 2007, then the 2009 suit was time-barred. *Id.* The court disagreed. The supreme court explained that the Tennessee Products Liability Act governed those limited instances in which a seller could be sued in strict liability in tort, and in the absence of the specified circumstances, the plaintiff could not sue the seller in strict liability. *Id.* at 898-99. The court's discussion of the concept of accrual is helpful:

> [T]his Court, while observing that "the phrase 'cause of action' can, at times, be difficult to define," has held that "a common thread among the definitions ... is that a 'cause of action' is associated with a right of one party to sue another." *Shelby Cnty. Health Care Corp. v. Nationwide Mut. Ins. Co.*, 325 S.W.3d 88, 96 (Tenn. 2010) (citation omitted); *see also* 1 Am.Jur.2d *Actions* § 1 (2005) ("Although it has been said that the term 'cause of action' has different meanings in different contexts, a 'cause of action' generally is understood as a set of facts which gives rise to a right to seek a remedy."). Pursuant to Tennessee Code Annotated section 29-28-106(b) [of the Tennessee Products Liability Act], the right of a claimant to assert a claim for strict liability against a seller does not arise until the manufacturer has been judicially declared insolvent. . . . And while it is true that a tort claim is said to accrue "when the plaintiff knows, or in the exercise of reasonable care and diligence should know, that an injury has been sustained," *Wyatt v. A–Best, Co.*, 910 S.W.2d 851, 854 (Tenn. 1995), we cannot ignore the fact that, under the terms of the statute, a plaintiff does not have the right to sue a seller in strict

liability until the manufacturer is judicially declared insolvent. It logically follows that the limitations period applicable to a cause of action does not begin until the cause of action itself accrues. See 18 Tenn. Jur. *Limitation of Actions* § 19 (2005) ("It is a general rule that the statute of limitations begins to run as soon as there is a right of action ...."); *id.* § 20 ("The statutes of limitations do not begin to run in favor of or against a party until the accrual of a right of action in favor of or against him."); *see also Vason v. Nickey*, 438 F.2d 242, 247 (6th Cir. 1971); *State ex rel. Cardin v. McClellan*, 113 Tenn. 616, 85 S.W. 267, 270 (1905) ("[N]o time runs to the plaintiff until he has the right to sue[. T]he statute of limitation[s] does not begin to run until that time[, as i]f the rule [were] otherwise, meritorious actions might be barred before the plaintiff had the right to bring his suit. This would work gross injustice."). . . . [I]t is our view that until the judicial declaration of insolvency is made, or until one of the other two exceptions contained in Tennessee Code Annotated section 29-28-106(b) is met, a claimant has no cause of action against a seller in strict liability pursuant to section 29-28-106(b).

When the Plaintiff initially filed his suit in 2007, the truck's manufacturer, Chrysler, had not yet been judicially declared insolvent. The Plaintiff's cause of action in strict liability against the Defendant did not accrue until this declaration occurred. Because the Plaintiff "commenced" his suit against the Defendant by

> filing a complaint within one year of Chrysler's insolvency, see Tenn. R. Civ. P. 3, his strict liability claim against the Defendant was asserted in a timely manner.

Lind, 356 S.W.3d at 900-01 (footnotes omitted). In sum, the supreme court concluded that the plaintiff could proceed on his strict liability claim "because that cause of action did not accrue until the manufacturer was judicially declared insolvent." *Id.* at 891.

The Tennessee Supreme Court's decision in *Gibson v. Swanson Plating & Mach. of Kentucky, Inc.*, 819 S.W.2d 796, 796-98 (Tenn. 1991), is also useful. The question before the court was whether the one-year statute of limitations for a worker's compensation claim against the Second Injury Fund began to run on the date of the employee's injury or on the date of adjudication of a permanent partial disability award. *Id.* at 797. The defendant argued that the statute began to run once the employee knew or had reason to know that a compensable injury had been sustained. *Id.* The court disagreed, explaining:

> [L]ogic would seem to dictate that an employee cannot be held to have knowledge of a claim against the Second Injury Fund until that claim actually arises—which in this case was not until the first permanent disability was adjudicated. Moreover, this logical proposition is consistent with our prior rulings on the accrual of a right of action. Tennessee law recognizes that, ordinarily, a statute of limitations begins to run when a plaintiff has a cause of action and can bring suit. *Armistead v. Clarksville–Montgomery Co. School System*, 222 Tenn. 486,

> 437 S.W.2d 527, 528-29 (1969); *Henwood v. McCallum & Robinson, Inc.*, 179 Tenn. 531, 167 S.W.2d 981, 982 (1943). Likewise, federal courts construing Tennessee law have held that a cause of action does not accrue until a suit can be maintained. *Hodge v. Service Machine Co.*, 438 F.2d 347, 349 (6th Cir.1971); *Collier v. Goessling*, 160 F. 604, 611 (6th Cir.1908), cert. den., 215 U.S. 596, 30 S.Ct. 399, 54 L.Ed. 342 (1909). . . .
>
> Applying these authorities to the facts in this case, we conclude that prior to entry of the initial judgment regarding the plaintiff's disability, no successful claim against the Fund was possible. Because an action against the Fund could not have been maintained, dismissal would have been appropriate on the ground of prematurity. The statute could not, therefore, begin to run before adjudication of a first injury.

Id. at 797-98.

We now turn to the facts of the case before us. As we noted in our first *Smith* opinion, USERRA "creates a private cause of action" in favor of a service-connected employee whom an employer has refused to rehire. *Smith I*, 387 S.W.3d at 574. However, for actions filed by individuals *against a state* as an employer, USERRA provides that "the action may be brought in a State court of competent jurisdiction *in accordance with the laws of the State*." 38 U.S.C. § 4323(b)(2). In other words, "for an individual to sustain an action against a state pursuant to USERRA, the action must be permitted by state law." *Smith I*, 387 S.W.3d at 574. Pursuant to the doctrine of sovereign immunity, "suit

'may not be brought against a governmental entity unless that governmental entity has consented to be sued.'" *Moreno v. City of Clarksville*, 479 S.W.3d 795, 809 (Tenn. 2015) (quoting *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 14 (Tenn. 1997)). Because the Tennessee General Assembly had not expressly waived the state's sovereign immunity for claims under USERRA prior to the passage of Tennessee Code Annotated section 29-20-208, the Tennessee National Guard was immune from USERRA claims when Smith filed his original lawsuit, and it was, appropriately, dismissed for lack of subject matter jurisdiction. *Smith I*, 387 S.W. 3d at 576.

Now, Tennessee Code Annotated section 29-20-208 authorizes USERRA claims against the State of Tennessee and applies "to all claims against a governmental entity under [USERRA] accruing on or after [July 1, 2014]." 2014 Tenn. Pub. Acts 574, § 2. We agree with Smith that under the circumstances of this case, his USERRA claim against the Tennessee National Guard did not accrue until July 1, 2014. Until then, he had no cause of action and no right to sue. Smith had no judicial remedy against the Tennessee National Guard pursuant to USERRA prior to the passage of section 29-20-208. Because of sovereign immunity, the wrong he allegedly suffered was not legally cognizable, and he had no right to bring suit for redress. *Compare Windsor v. DeKalb Cnty. Bd. of Educ.*, No. M2007-00968-COA-R3-CV, 2008 WL 802465, at *5 (Tenn. Ct. App. Mar. 25, 2008) (stating that the Tennessee Tenured Teacher Act, like the Tennessee Governmental Tort Liability Act, "creates a right of action that did not otherwise exist" and provides "the right to sue"); *Pearson v. Vencor Nursing*

Ctr. Ltd. P'ship, No. W2003-02135-COA-R3-CV, 2004 WL 1606975, at *3 (Tenn. Ct. App. July 16, 2004) (explaining that the GTLA granted the plaintiff "the right to sue" the defendant governmental entity); *Williams v. Memphis Light, Gas & Water Div.*, 773 S.W.2d 522, 523 (Tenn. Ct. App. 1988) (recognizing that the GTLA "created a new liability" and "extend[ed] a new right to bring suit"); *Franklin v. State*, No. 02A01-9106-BC-00113, 1992 WL 97079, at *3 (Tenn. Ct. App. May 12, 1992) (concluding that a claimant had no "right to sue" the State in circuit court, rather than through the Tennessee Claims Administration Act, because "the right to bring an action does not exist" unless the Act's conditions precedent are strictly followed).

We respectfully disagree with the dissent's suggestion that our interpretation of the term "accruing" renders the phrase "on or after" meaningless. In our view, the public chapter provided the new statute's effective date and then specified that it would apply to "all claims against a governmental entity under [USERRA] accruing on or after [July 1, 2014." The dissent agrees that sovereign immunity is waived by section 29-20-208 to some degree, but we do not read "accruing on or after [July 1, 2014]" as a clear indication of the legislature's intent "to place some limit on its waiver of sovereign immunity," as the dissent does. The words chosen by the legislature do not necessarily provide a limitation on the reach of the statute.

The dissent effectively reads the public chapter as stating that the statute will apply only to events or incidents *occurring* on or after July 1, 2014. We see two

problems with that assertion. First, the general assembly could have easily specified that the statute applied to "cases filed" after July 1, 2014, or some similar language, if that was its intention. Instead, the legislature chose to apply the statute to "claims against a governmental entity under [USERRA] *accruing*" either on or after its effective date. (emphasis added). Second, giving effect to the phrase "on or after July 1, 2014" in the way suggested by the dissent essentially strips "accruing" of its meaning. We are required to presume "that the General Assembly knows the 'state of the law.'" *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010) (quoting *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 683 (Tenn. 2005). Thus, we are required to presume that the general assembly knew the Tennessee Supreme Court's definition of "accrual" when it enacted section 29-20-208 and we are, therefore, unwilling to hold that section 29-20-208 applies to "claims accruing under USERRA, *without reference to State law*, on or after July 1, 2014," as the dissent proposes. (Emphasis added).

In sum, Smith's cause of action accrued when he attained the right to sue pursuant to the judicial remedy created by Tennessee Code Annotated section 29-20-208. *See Compozit Constr. Corp. v. J.B. Gibbs & Son Constr. Co.*, No. M2006-00329-COA-R3-CV, 2006 WL 3071242, at *2 (Tenn. Ct. App. Oct. 27, 2006) ("a cause of action in tort is non-existent until a judicial remedy is available to the plaintiff"). Consequently, we reverse the trial court's order granting the motion to dismiss filed by the Tennessee National Guard.

V. CONCLUSION

For the aforementioned reasons, the decision of the circuit court is hereby reversed and remanded for further proceedings. Costs of this appeal are taxed to the appellee, the Tennessee National Guard.

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BRANDON O. GIBSON, JUDGE

W. NEAL MCBRAYER, J., dissenting.

This appeal turns on whether the State of Tennessee waived sovereign immunity with regard to a past event.[1] Because in this instance I conclude that it did not, I respectfully dissent.

According to the complaint, the past event occurred on July 10, 2011, when David R. Smith "separated from" the Tennessee National Guard. Prior to that, Smith left full-time Tennessee National Guard duty to attend the Naval War College, which required a tour of active military service. As his active duty tour was ending, Smith attempted to rejoin the Tennessee National Guard in a full-time position but was told there was no position available for him.

In August of 2011, Smith filed suit claiming the Tennessee National Guard violated the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). 38 U.S.C.A. §§ 4301–4335 (2014). USERRA "prohibit[s] discrimination against persons because of their service in the uniformed services." *Id.* § 4301(a)(3). The trial court dismissed the case for lack of subject matter jurisdiction on the basis of sovereign immunity, and we affirmed the trial court's decision on appeal. *Smith v. Tenn. Nat'l Guard*, 387 S.W.3d 570 (Tenn. Ct. App. 2012).

On January 4, 2016, Smith filed a new suit against the Tennessee National Guard based again on his July 2011 separation from the Guard. In the interim

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[1] I fully concur in the majority's conclusion that Tennessee Code Annotated § 29-20-208 does not violate the Supremacy Clause of the United States Constitution.

between the dismissal of his first suit and the filing of the current suit, the Tennessee General Assembly enacted Tennessee Code Annotated § 29-20-208, waiving sovereign immunity for "claims against and relief from a governmental entity" under USERRA. 2014 Tenn. Pub. Acts 229 (ch. 574).

Tennessee Code Annotated § 29-20-208 does not specifically indicate whether it waives sovereign immunity for USERRA claims arising from events prior to its enactment. For that, one must look to effective date of the enacting legislation, Public Chapter 574, enacted by the 108th General Assembly. Public Chapter 574 provides in section 2 as follows: "This act shall take effect July 1, 2014, the public welfare requiring it, and shall apply to all claims against a governmental entity under [USERRA] accruing on or after such date." *Id.* § 2.

"Every application of a text to particular circumstances entails interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 53 (2012) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). When called upon to answer a question of statutory interpretation, the goal is to "carry out legislative intent without broadening or restricting the statute beyond its intended scope." *Lind v. Beamon Dodge, Inc.*, 356 S.W.3d 889, 895 (Tenn. 2011). One starts by looking to the language of the statute and, if it is unambiguous, applying the plain meaning and looking no further. *Thurmond v. Mid-Cumberland Infectious Disease Consultants, PLC*, 433 S.W.3d 512, 517 (Tenn. 2014); *State v. Hawkins*, 406 S.W.3d 121, 131 (Tenn. 2013). In doing so, a "forced interpretation that would limit or expand the statute's

application" must be avoided. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004).

In addition to these well-known principles of statutory interpretation, one must also be mindful of the fact that the statute involved relates to the State's sovereign immunity. Waiver of sovereign immunity does not occur by happenstance or inadvertently. "[T]he State cannot be subjected to litigation at the suit of an individual unless there is a statute clearly and unmistakably disclosing an intent upon the part of the Legislature to permit such litigation." *Scates v. Bd. of Comm'rs of Union City*, 265 S.W.2d 563, 565 (Tenn. 1954); *see also Northland Ins. Co. v. State*, 33 S.W.3d 727, 731 (Tenn. 2000) ("[L]egislation authorizing suits against the state must provide for the state's consent in 'plain, clear, and unmistakable' terms." (quoting *State ex rel. Allen v. Cook*, 106 S.W.2d 858, 861 (1937))).

The majority concludes that the Legislature expressed a clear and unmistakable intent to waive sovereign immunity for past violations of USERRA by its use of the word "accruing" in section 2 of Public Chapter 574. As the majority points out, a USERRA claim is a federal tort claim, and "Tennessee courts have consistently held that a cause of action in tort does not accrue or exist 'until a judicial remedy is available' to the plaintiff." *Ante*, at 7 (quoting *Wyatt v. A-Best, Co.*, 910 S.W.2d 851, 855 (Tenn. 1995)). Consequently, Smith's USERRA claim against the Tennessee National Guard did not accrue until July 1, 2014, because, until then, he had no right to sue the Guard.

I find this reasoning circular. And while I acknowledge that the most common definition of the

word "accrue" in the context of the law is "[t]o come into existence as an enforceable claim or right," Black's Law Dictionary 25 (10th ed. 2014), the word can also mean "to arise."[2] *Id.*

The majority's interpretation also seems to ignore the context in which the word "accruing" appears. *See In re Estate of Tanner*, 295 S.W.3d 610, 625 n.13 (Tenn. 2009) ("Any canon of statutory construction, if applied mechanically and without attention to context, may lead to an incorrect result."); *see also* Scalia & Garner, *supra*, at 56 ("[W]ords are given meaning by their context."). Our Supreme Court instructs that "it is improper to take a word or a few words from its context and, with them isolated, attempt to determine their meaning." *Eastman Chem. Co.*, 151 S.W.3d at 507. In section 2 of Public Chapter 574, the word "accruing" is followed by the words "on or after." The use of the phrase "on or after" suggests that the Legislature did intend to place some limit on its waiver of sovereign immunity. However, the majority's interpretation would place no limits on the waiver, extending it to events occurring both prior to and after the enactment of Tennessee Code Annotated § 29-20-208.

Finally, the majority's interpretation renders the words "on or after" meaningless. If the Legislature intended to use the word "accruing" in the sense of a

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[2] In fairness, although the words "accrue" and "arise" are sometimes used interchangeably, in the context of a cause of action, they may distinguish two different principles. "*Arise* may refer to the onset of the underlying wrong (e.g., exposure to asbestos), whereas *accrue* may refer to the ripeness of the claim (e.g., contraction of asbestosis or discovery of the disease)." Bryan A. Garner, *A Dictionary of Modern Legal Usage* 16 (2d ed. 1995).

legally enforceable claim, one must assume, contrary to Tennessee Supreme Court precedent, that the Legislature did not use the words "on or after" purposely. *See Eastman Chem. Co.*, 151 S.W.3d at 507 ("[I]t should be assumed that the legislature used each word purposely and that those words convey some intent and have a meaning and a purpose."); *see also* Scalia & Garner, *supra*, at 174 ("If possible, every word and every provision is to be given effect . . . . None should be ignored."). In the context of a waiver of sovereign immunity, I am unwilling to render the phrase "on or after" surplusage.

I interpret the State's waiver of sovereign immunity to extend to claims accruing under USERRA, without reference to State law, on or after July 1, 2014. Such an interpretation defines the word "accruing" in context and has the further salutary effect of giving all the words in the Public Chapter meaning. As alleged in Smith's complaint, "the incident for his cause of action took place in July 2011." Therefore, I would affirm the decision of the trial court dismissing Smith's complaint for lack of subject matter jurisdiction.

_____

W. NEAL MCBRAYER, JUDGE

APPENDIX C

IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

CASE NO: 11C3080
JURY DEMAND

[Filed December 19, 2011]

DAVID R. SMITH	)
Plaintiff	)
	)
v.	)
	)
THE TENNESSEE NATIONAL GUARD	)
Defendant	)
	)

ORDER ON DEFENDANT'S MOTION TO DISMISS

Defendant has filed a Motion to Dismiss arguing that this Court is without jurisdiction to adjudicate Plaintiff's claims under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § § 4301, *et seq.*, because the State has sovereign immunity from such suits. After hearing arguments from the parties on Dec. 9, 2011, this Court concurs with Defendant. Accordingly, for good cause shown, the Defendant's Motion to Dismiss

is hereby granted, and the case is dismissed without prejudice. Costs are taxed to Plaintiff.

IT IS SO ORDERED.

/s/_____
JUDGE BROTHERS

This the _____ of _____, 2011

APPROVED FOR ENTRY:

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[*Certificate of Service Omitted in Printing of this Appendix*]