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STATE OF MICHIGAN
IN THE SUPREME COURT

THE WALT DISNEY COMPANY,

Plaintiff–Appellee,

v

RACHAEL EUBANKS, in her capacity as THE TREASURER FOR THE STATE OF MICHIGAN,

Defendant–Appellant.
_____/

Supreme Court No. 165392

Court of Appeals No. 360291

Oakland Circuit Court No. 2021-189464–CZ

REPLY BRIEF OF APPELLANT RACHAEL EUBANKS, STATE TREASURER

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INTRODUCTION

It is never a good idea to allow the fox to guard the hen house. Nor is it a good idea to allow the regulated to dictate how they are regulated. The decision below permits holders of unclaimed property to dictate what records are subject to audit, how long the audit takes, and how much time has run off the clock for purposes of the statute of limitations. The longer an audit takes, the more unclaimed property will now fall outside the shelter of the State's perpetual custody. Rather than abandoned property being held by the State, where a rightful claimant may go to seek its return, that abandoned property stays with the private party (a bank, former employer, business, etc.), which may or may not return the property to the rightful owner. The private holder may or may not continue to exist such that the true owner may find and attempt to claim the property in the future.

As highlighted by Amicus, the Court of Appeals' decision is the first of its kind nationwide holding that examinations are not "actions or proceedings" within the meaning of Michigan's Uniform Unclaimed Property Act (UUPA), MCL 567.221 *et seq*. Michigan adopted the language for its statute of limitations from the uniform Act, so multiple other States' respective acts have the same language.

The Court of Appeals' decision eliminates the utility of unclaimed property audits and the multiple statutes governing them, and it forces the Treasurer to file preemptive lawsuits to perform her administrative enforcement responsibilities. While it is unsurprising that the Walt Disney Company (Disney) agrees with the Court of Appeals, the decision is clearly erroneous, inconsistent with the rest of the UUPA, and this Court should grant leave and reverse.

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ARGUMENT

I. This Case has public interest because the Court of Appeals' decision renders the audit process nugatory.

Disney concedes the Treasurer's point regarding the evisceration of the audit process. (Appellee's Br, pp 7-8.) It now asserts that the audit should be done first prior to a lawsuit, and it intentionally omits the central point repeatedly raised by the Treasurer: by conducting an audit first rather than a preemptory lawsuit, periods subject to review are continually rolling out of statute while the audit is underway. The statute requires a holder to retain records for a statutorily prescribed period. MCL 567.252. And the UUPA tasks the Treasurer with enforcing the Act. The Legislature, not the Treasurer, made the choice of how long records are required to be maintained. MCL 567.252.

If the Treasurer seeks to determine whether a holder has complied with that provision, the Treasurer will need to review the records for that period. Disney is openly arguing that holders no longer have a duty to comply with the outer scope of the record retention requirements because any audit determination would necessarily be rendered beyond the time the Treasurer could file a lawsuit. Moreover, the longer a holder can delay the audit's finality, the more properties become outside the scope of the audit. This result is clearly not the intent of the UUPA because such an understanding of the Act permits the holder to dictate the scope of the audit, its duration, and the records subject to review. It also promotes delay, or it necessitates hurried review at the expense of cooperation and accuracy.

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As indicated by Amicus, this case does have significant public interest, because, as Amicus fears, this case will be used to serve as a blueprint in national litigation to challenge other States' examinations. (Amicus Br, p ix.) The implications of these decisions extend beyond the boundaries of Michigan and into every State that has adopted the uniform Act.

II. The Court of Appeals' decision is clearly erroneous.

The Court of Appeals agreed with Disney. Disney asserts (1) the Treasurer must file a lawsuit to compel escheatment, (2) the audit process is not an enforcement mechanism, and (3) the Legislature intended this reading, despite providing an entire administrative hearing process to review examination determinations, as well as permitting holders to appeal those decisions to a circuit court. (Appellee's Br, pp 10–18.)

By amending the UUPA and adding an entire administrative review process of examinations, as well as providing a clear pathway for holders to appeal those decisions to a circuit court at various stages, the Legislature indicates clearly that it understood the examination process to be an enforcement tool, which meets the definition of an "action or proceeding." See MCL 567.251a; see also 2015 PA 242 (creating the streamlined audit process and limiting the time to commence an "action or proceeding").

Indeed, in amending the UUPA, specifically the statute of limitations for streamlined audits, the Legislature made the amendment retroactive to "audits in progress" but not to "contested determinations" already in litigation. 2015 PA 242,

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enacting section. A contested determination is an examination determination challenged by the holder. MCL 567.251a. The Court of Appeals flips this process on its head, making the Treasurer file suit before undertaking her administrative audit duties, rather than the holder filing suit if it disagrees with the Treasurer's audit or resulting decision. The lower Court clearly erred, and this Court should grant leave and reverse.

A. An examination determination is an administrative decision.

Disney asserts that the examination determination has no effect on its duty to report and remit property. (Appellee's Br, pp 16-18.) The Court of Appeals did not squarely address the issue. However, the importance of this point is that the Legislature placed the burden on holders to appeal and contest those decisions. MCL 567.251a. And Disney exercised that appeal in this case. If the Treasurer must file a lawsuit regardless, then the entire statutory scheme lacks any usefulness or meaning because, as here, the Treasurer has not yet filed a lawsuit, and according to the Court of Appeals, the statute of limitations is still running. The clear import from the legislative scheme is that the examination determination is designed to be adjudicatory in nature. This result cannot be achieved if the Treasurer remains obligated to file a lawsuit, first, before commencing an audit. There is no point in permitting an appeal of something that has no effect or finality.

The Court of Appeals' decision is clearly erroneous because it renders the statutory process for appealing audits nugatory. This Court should grant leave and reverse.

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CONCLUSION AND RELIEF REQUESTED

Accordingly, for the reasons stated above, the State Treasurer respectfully asks that this Court grant the application for leave to appeal and reverse the Court of Appeals.

Respectfully submitted,

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WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rule 7.305(E) because, excluding the part of the document exempted, this **reply brief at the application stage** contains no more than 3,200 words. This document contains 790 words.

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