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State of Michigan
In the Supreme Court

SUSAN CHRISTIE,

Plaintiff–Appellee,

v.

WAYNE STATE UNIVERSITY,

Defendant–Appellant.

Supreme Court No. 162706

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

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

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APPENDIX TO THE SUPPLEMENTAL BRIEF FOR ORAL ARGUMENT ON THE APPLICATION BY WAYNE STATE UNIVERSITY

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STATE OF MICHIGAN

COURT OF APPEALS

SUSAN CHRISTIE,

Plaintiff-Appellee,

v

WAYNE STATE UNIVERSITY,

Defendant-Appellant.

UNPUBLISHED
January 28, 2021

No. 350321
Wayne Circuit Court
LC No. 19-004888-CD

Before: STEPHENS, P.J., and SERVITTO and LETICA, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying its motion for summary disposition submitted under MCR 2.116(C)(7). We affirm.

I. BACKGROUND

This appeal arises out of allegations of age and disability discrimination made by plaintiff, a former employee of defendant. Plaintiff was hired by defendant in 1974 as an office assistant and eventually became an office services supervisor at defendant's College of Pharmacy and Health Services. Plaintiff took a medical leave in February 2017 and returned to work on May 1, 2017.

After plaintiff's return from medical leave, plaintiff was allegedly asked by her supervisors "how old she was" and "when she intended to retire." Plaintiff's supervisors also "had several conversations in her presence asking about the ages of employees." According to plaintiff, after 40 plus years of receiving excellent performance evaluations, she received her first negative performance review on September 22, 2017, and was terminated on November 27, 2017.

On April 4, 2019, plaintiff filed a complaint against defendant in Wayne Circuit Court. In the complaint, plaintiff alleged defendant violated the Elliott-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101 *et seq.*, and the Persons With Disabilities Civil Rights Act ("PWDCRA," together with the ELCRA, the "Acts"), MCL 37.1101 *et seq.*

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In lieu of answering the complaint, defendant filed a motion for summary disposition citing MCR 2.116(C)(7). In its motion, defendant argued that plaintiff was required to either file a verified complaint with the Court of Claims or file a notice of intent with the Court of Claims within one year of the accrual of plaintiff's claims. Because plaintiff did neither within the one-year time period, defendant asserted plaintiff's claims were barred by governmental immunity.

The trial court disagreed with defendant's arguments and denied defendant's motion for summary disposition, reasoning that the procedures set forth in the Court of Claims Act, MCL 600.6401 *et seq.*, only applied to cases filed in the Court of Claims. This appeal followed.

II. STANDARD OF REVIEW

This Court "review[s] de novo a trial court's decision to grant or deny a motion for summary disposition under MCR 2.116(C)(7)." *Galea v FCA US LLC*, 323 Mich App 360, 368; 917 NW2d 694 (2018). "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Id*. (quotation marks and citation omitted). A movant under MCR 2.116(C)(7) is not, however, required to file supportive material, and the opposing party need not reply with supportive material. "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id*. (quotation marks and citation omitted).

This Court also reviews questions involving statutory interpretation de novo. *Lear Corp v Dep't of Treasury*, 299 Mich App 533, 536; 831 NW2d 255 (2013). Lastly, this Court reviews de novo the question of whether it has jurisdiction to hear an appeal. *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009).

III. DISCUSSION

A. JURISDICTION

We first address plaintiff's assertion that this Court lacks jurisdiction to hear defendant's appeal because the order appealed is not a final order under MCR 7.202(6)(a)(v). Plaintiff raised the same argument in her earlier motion to dismiss for lack of jurisdiction, which this Court denied. See *Christie v Wayne State Univ*, unpublished order of the Court of Appeals, entered November 25, 2019 (Docket No. 350321). Plaintiff's brief does not raise any new arguments in support of her assertion that this Court lacks jurisdiction.

Under MCR 7.202(6)(a)(v), a "final order"—for purposes of this Court's jurisdiction under MCR 7.203(A)(1)—includes "an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) . . . ." At the time this Court denied plaintiff's motion to dismiss, this Court had already held that the state's "assertion that [a] plaintiff failed to comply with MCL 600.6431(1) . . . constitute[s] a claim that [the state] [i]s entitled to governmental immunity" for purposes of MCR 7.202(6)(a)(v). *Progress Mich v Attorney General*, 324 Mich App 659, 666; 922 NW2d 654 (2018), rev'd ___ Mich ___; ___ NW2d ___ (2020) (Docket No. 158151). Our Supreme Court reversed this Court's decision in *Progress Mich*, though the reversal was on other grounds and the Supreme Court explicitly declined to express an opinion on the jurisdictional issue. *Progress Mich v Attorney General*, ___ Mich ___; ___ NW2d ___ (2020) (Docket No. 158151); slip op at 8, n 8 (*Progress* II).

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More recently, this Court, in *Tyrrell v Univ of Michigan*, __ Mich App __; __NW2d__ (2020) (Docket No. 349020), determined that a plaintiff's failure to comply with MCL 600.6431 when proceeding against a state defendant in the circuit court does not implicate governmental immunity such that a trial court's denial of a state defendant's summary disposition motion brought under MCR 2.116(C)(7) is not appealable as of right. We elect, however, to treat this appeal as though we had granted leave.

B. EFFECT OF MCL 600.6431

Turning to the merits of the appeal, defendant argues the trial court erred because under MCL 600.6431, plaintiff was required to file a notice of intent to sue with the Court of Claims, even though plaintiff brought her claims in circuit court. According to defendant, compliance with MCL 600.6431 is a condition precedent to suing it; thus, if the statute is not followed, the lawsuit must be dismissed. We disagree.

"When interpreting statutes, the primary goal of the judiciary is to ascertain and give effect to the intent of the Legislature." *Haynes v Beulah*, 308 Mich App 465, 468; 865 NW2d 923 (2014). "In the absence of ambiguities, judicial construction is neither necessary nor permitted." *Lear Corp*, 299 Mich App at 537 (quotation marks and citation omitted). "However, if the intent of the Legislature is not clear, courts must interpret statutes in a way that gives effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Haynes*, 308 Mich App at 468 (quotation marks and citation omitted). "Judicial interpretation of statutes should construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature." *Id*. (quotation marks and citation omitted).

This Court begins any statutory analyses with the words of the statute itself. *Dillard v Schlussel*, 308 Mich App 429, 445; 865 NW2d 648 (2014). MCL 600.6431(1) states, in relevant part:

> Except as otherwise provided in this section, 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.

This Court recently addressed the application of the above to matters where a plaintiff has sued a state defendant for violation of the PWDCRA in the circuit court—the very issue raised by defendant here. In *Tyrrell*, __ Mich App __ (2020), the plaintiff filed a complaint against the state defendants in circuit court alleging discrimination and retaliation in violation of the PWDCRA. The defendants moved for summary disposition under MCR 2.116(C)(4) and (7), arguing that, in order to maintain her claim against a state university and its employees, plaintiff had to comply with the requirements in MCL 600.6431(1) and, because she did not, dismissal of her claims was required. *Id*. at __; slip op at 1. The trial court, and this Court, disagreed.

The *Tyrrell* Court noted that the original Michigan rule was that the state was immune from "all suits except to the extent that it consented to be sued in its courts." *Id*. at __; slip op at 3. The Court further noted that the legislature can abrogate the state's immunity and has, in fact, expressly

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done so with respect to claims brought under the PWDCRA. *Id*. In *Doe v Dep't of Transp*, 324 Mich App 226; 919 NW2d 670 (2018), this Court also determined that the Legislature waived the state's immunity in actions brought under the ELCRA.

The *Tyrrell* Court opined that, consistent with *Fairley v Dep't of Corrections*, 497 Mich 290, 297; 871 NW2d 129 (2015), MCL 600.6431 does not *confer* governmental immunity; rather, "it establishes conditions precedent for avoiding the governmental immunity conferred by the [Government Tort Liability Act]." *Tyrrell*, __Mich App__; slip op 3. The state defendants in *Tyrrell*, as does the state defendant here, then argued that they were nevertheless immune from suit in both the circuit court and the Court of Claims because the plaintiff failed to comply with the conditions precedent set forth in MCL 600.6431. *Id*.

The *Tyrrell* Court determined that MCL 600.6431 does not necessarily implicate governmental immunity and that "[r]eading the COCA [Court of Claims Act] as a whole and considering MCL 600.6431's placement in the statutory scheme suggests that the Legislature intended for MCL 600.6431 to apply only to claims brought in the Court of Claims." *Id*. at __; slip op 4, 6. The Court also held that MCL 600.6431 is limited to claims brought in the Court of Claims:

> The Legislature in the PWDCRA expressly consented to suit, see *In re Bradley Estate*, 494 Mich [367, 393 n 60]; 835 NW2d 545 [(2013)], but did not condition that consent on compliance with MCL 600.6431. Yet MCL 600.6431 *does* create a condition precedent for bringing a claim against certain state defendants. See *Fairley*, 497 Mich at 292 []. It does not, however, confer governmental immunity. See *id.* at 292 []. Then what does compliance with MCL 600.6431 implicate? Absent the Legislature conditioning its consent to be sued on compliance with the COCA, see, e.g. *id.* at 297 [], compliance with the COCA, including MCL 600.6431, is "a question of compliance with the rules of the forum," *Progress II*, – — Mich at ——, —— NW2d —— (slip op at 10), meaning that MCL 600.6431 requires compliance only for those claims brought against state defendants *in the Court of Claims*. [*Tyrrell*, __Mich App__; slip op at 7]

Thus, the Tyrrell Court held that "absent the Legislature conditioning its consent to suit on compliance with the COCA, a plaintiff properly bringing a claim in circuit court against the state or a state defendant to which MCL 600.6431 applies is not required to comply with MCL 600.6431 for his or her claim to proceed in that court." *Id*. at __; slip op at 7.

Given the conclusions in *Tyrrell* and its clear and direct application to the matter before this Court, defendant here was not entitled to governmental immunity from suit based on the claim that plaintiff failed to comply with MCL 600.6431. See MCR 7.215(J)(1). The trial court thus properly denied defendant's motion for summary disposition.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Deborah A. Servitto
/s/ Anica Letica

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

SUSAN CHRISTIE,

Plaintiff, Case No. 19-004888-CD

v. Hon. David J. Allen

WAYNE STATE UNIVERSITY,

Defendant.
_____/

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_____/

ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY DISPOSITION
PURSUANT TO MCR 2.116(C)(7)

At a session of said Court held in the Circuit Court
For the County of Wayne, State of Michigan

on 8/9/2019

PRESENT: HON. David J. Allen
Circuit Court Judge

For the reasons stated on the record on August 1, 2019, it is hereby ordered that

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defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(7), is denied.

/s/ David J. Allen
Circuit Court Judge

SO ORDERED.

APPROVED AS TO FORM ONLY:

Jennifer L. Lord (P46912)
Attorney for Plaintiff

Daniel Tukel with permission by JLL
Daniel B. Tukel (P34978)
Attorney for Defendant

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REGISTER OF ACTIONS

CASE NO. 19-004888-CD

PARTY INFORMATION

Defendant	**Wayne State University**	**Lead Attorneys** **Daniel B. Tukel** *Retained* (313) 225-7047(W)
Plaintiff	**Christie, Susan**	**Jennifer L. Lord** *Retained* (248) 398-9800(W)

EVENTS & ORDERS OF THE COURT

OTHER EVENTS AND HEARINGS

04/04/2019	**Complaint, Filed**
04/04/2019	**Service Review Scheduled**
04/04/2019	**Status Conference Scheduled**
04/04/2019	Case Filing and Jury Trial Fee - Paid
04/16/2019	Service of Complaint, filed
04/16/2019	Proof of Service, Filed
05/29/2019	Motion for Summary Judgment/Disposition, Filed
05/29/2019	Notice of Hearing, Filed
05/29/2019	Proof of Service, Filed
05/30/2019	Praecipe, Filed (Judicial Officer: Allen, David J.)
07/08/2019	**Status Conference** (8:00 AM) (Judicial Officer Allen, David J.) *07/05/2019 Reset by Court to 07/08/2019* Result: Reviewed by Court
07/08/2019	Status Conference Scheduling Order, Signed and Filed
07/25/2019	Brief, Filed
07/25/2019	Exhibit, Filed
07/25/2019	Exhibit, Filed
07/25/2019	Proof of Service, Filed
07/25/2019	Exhibit, Filed
07/29/2019	Proof of Service, Filed
07/29/2019	Reply to Brief, Filed
08/01/2019	**Motion Hearing** (9:00 AM) (Judicial Officer Allen, David J.) Result: Held
08/01/2019	**Motion Denied, Order to Follow** (Judicial Officer: Allen, David J.)
08/08/2019	Notice of Presentment
08/08/2019	Proof of Service, Filed
08/09/2019	Proof of Service, Filed
08/10/2019	Order Denying Motion, Signed and Filed
08/12/2019	Miscellaneous Pleadings, Filed
08/12/2019	Proof of Service, Filed
08/27/2019	Claim of Appeal, Filed
08/27/2019	Proof of Service, Filed
10/04/2019	Transcript, Filed
10/16/2019	Proof of Service, Filed
10/16/2019	Claim of Appeal, Filed
11/27/2019	**Case Evaluation - Employment**
11/27/2019	Miscellaneous Pleadings, Filed
11/27/2019	Proof of Service, Filed
02/19/2020	**Closed/Final - Removal to Federal Court** (Judicial Officer: Allen, David J.)
03/09/2020	*CANCELED* **Settlement Conference** (9:00 AM) (Judicial Officer Allen, David J.) *Dismiss Hearing or Injunction*
01/28/2021	Higher Court Order/Decision Received by Circuit Court

FINANCIAL INFORMATION

	Plaintiff Christie, Susan			
	Total Financial Assessment			330.00
	Total Payments and Credits			330.00
	Balance Due as of 03/10/2021			**0.**
04/04/2019	Transaction Assessment			260.00
04/04/2019	eFiling	Receipt # 2019-28190	Pitt McGehee Palmer & Rivers PC	(260.00)
05/29/2019	Transaction Assessment			20.00
05/29/2019	eFiling	Receipt # 2019-44327	Butzel Long	(20.00)
08/27/2019	Transaction Assessment			250.00
08/27/2019	eFiling	Receipt # 2019-69258	Butzel Long	(25.00)

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

SUSAN CHRISTIE,

Plaintiff,

v CASE NO: 19-004888-CD

WAYNE STATE UNIVERSITY,

Defendant.

_ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _/

MOTION HEARING

Before the HON. DAVID J. ALLEN, Circuit Judge,

Detroit, Michigan on Thursday, August 1, 2019

APPEARANCES:

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None called

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EXHIBITS

None marked

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Detroit, Michigan

Thursday, August 1, 2019

(9:07 a.m.)

-- -- --

THE COURT: All right, calling Case 19-004888-CD, Susan Christie v Wayne State University.

Your appearance, please.

MS. LORD: Good morning, Your Honor, Jennifer Lord on behalf of the Plaintiff Susan Christie.

THE COURT: Good morning, welcome.

MR. TUKEL: Daniel Tukel on behalf of Defendant Wayne State University.

THE COURT: Good morning.

Going to hand you something right here.

MR. TUKEL: Yes.

THE COURT: Grab that.

Can you open that up and show me the court rule that says that this notice provision is applicable to the circuit court, I didn't see that rule in there.

MR. TUKEL: I don't think there's a court rule that specifically says that, Your Honor, I'm relying on the statutory language and the Court's interpretations of that language.

THE COURT: So does the statute say that the circuit court must follow the Notice of Intent issue?

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MR. TUKEL: It doesn't use that language, what it says is that no claims against the state may be maintained unless those procedures, either the filing in Court of Claims --

THE COURT: So it's a procedural matter, right?

MR. TUKEL: It is a procedural matter.

THE COURT: And you'd agree that the Supreme Court promulgates that book right there, right, I mean the court rules?

MR. TUKEL: Yes, I do.

THE COURT: So has to Supreme Court made a rule that I'm missing here that says that she has to file a Notice of Intent?

MR. TUKEL: No, I don't think the Supreme Court has said that, I think the court rules, I think the Legislature has said that in the statute itself.

THE COURT: Did the Supreme Court past or was there a case that I missed that said that claims entered in the circuit court have to have a Notice of Intent?

MR. TUKEL: I don't think the Court, the cases said it precisely that way, I think the Hawthorne-Burdine case is the closest case.

THE COURT: They didn't say it that way, well you don't want me to make up rules do you?

MR. TUKEL: No, no, I'm not asking the Court to

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break new ground here.

THE COURT: I'm not making law, we're not lawmakers, right?

MR. TUKEL: I completely agree with that, Your Honor.

THE COURT: Robert says we call balls and strikes.

MR. TUKEL: That's right and I'm asking the Court to simply --

THE COURT: So if I call balls and strikes --

Can I have that back?

MR. TUKEL: Sure.

THE COURT: I call, I mean the umpire's got a rule book and I got a rule book, and I don't see the rule you're asking me in this rule book.

MR. TUKEL: Well I think the rule that I'm asking you to rely on is in the Michigan code and it's the Court of Claims Act that specifically says no claim.

The Legislature certainly could've used language that says no claim filed or transferred to the Court of Claims can proceed unless these are filed, but it didn't use that language.

THE COURT: The Legislature also could've said that any case filed in the circuit court must follow the Notice of Intent.

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MR. TUKEL: It could've said that.

THE COURT: They didn't say that.

MR. TUKEL: No, but I don't think that additional language is necessary when the language of the statute is clear and ambiguous on its face. And no claim I would suggest should be interpreted to mean no claim, not simply no claim that's in this court.

The Michigan Supreme Court and the Michigan Court of Appeals has made clear repeatedly that the notice filing requirement is strictly construed. It has said that it doesn't matter if there's actual notice, it doesn't matter if there's no prejudice, it is strictly construed.

And what I'm suggesting simply is that the language that says no claim means no claim.

THE COURT: So the only two cases we really have on point is Karnows (ph) which is, I think Stecklehoff, right?

MR. TUKEL: Stekloff (ph), yes.

THE COURT: Stekloff.

And then the Hawthorn-Burdine which is the one you're relying on which is in the Court of Claims, right.

Are those the only two that really drilled down on this issue?

MR. TUKEL: Well I would suggest that the, I know that Plaintiff's attempted to distinguish it, I would say

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that the Deitert case which is a Washtenaw County Circuit Court case is also one point.

And if the Court were to find that none of those cases are on point, clearly the Stekloff opinion and the Washtenaw County Circuit Court opinion are not binding on this Court.

And if the Court were to find that Hawthorn-Burdine is extinguishable, I think that the cases cited by Plaintiff's counsel are also distinguishable because those all argued about whether there was exclusive Court of Claims jurisdiction, which I am not arguing here, then you're left with the clear language of the statute.

And if everything else falls away that language is clear and unambiguous, it's a fundamental principal of statutory construction that when it's clear and unambiguous it's interpreted according to its ordinary meaning and every word given affect.

And I would simply argue that no claim means no claim.

THE COURT: So how about that, Ms. Lord, I mean the Legislature did say that these cases against the, you know, the state entity they need a Notice of Intent, right?

MS. LORD: In certain cases. Elliot Larsen and The Persons With Disability Civil Rights Act are carved out because there's a right to trial by Jury in those cases.

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THE COURT: I think maybe your phone is interrupting.

So why not just file the Notice of Intent and cover your base, why the big deal?

MS. LORD: Because we never intended to be in the Court of Claims.

Let's say Ms. Christie was only seeking equitable relief, we may want to be in the Court of Claims and in which case we would need to file their procedures.

But to drill down on the point that you are making no case with any binding precedent, Hawthorne-Burdine was unpublished, has ever said that a plaintiff in a statutory civil rights claim must jump through extra hoops, the Court of Claims hoops before proceeding in circuit court. There's simply no binding precedence.

THE COURT: Is anything on appeal anywhere, I don't, we didn't find anything, but.

MR. TUKEL: Yes, there is. For one the Deitert case itself is now on apparel.

THE COURT: That's the Washtenaw County case.

MR. TUKEL: Washtenaw County case.

There's another --

THE COURT: So that's a case filed in Washtenaw, no Notice of Intent, you argued the case I assume?

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MS. LORD: Yes, I did. Summary disposition granted and --

THE COURT: Granted on this issue.

MR. TUKEL: On this issue and that is now on appeal.

THE COURT: Plaintiff took it up.

MR. TUKEL: Correct. And I believe there's another University of Michigan case I believe also out of Washtenaw County that's on appeal that's an issue.

MS. LORD: I have to push back on Deitert. I attached the plaintiff's response brief to that case, the plaintiff essentially conceded that the Court of Claims rules applied. I mean the plaintiff made an error and didn't switch back.

THE COURT: So it's being litigating in the Court of Appeals then.

MS. LORD: I don't know how it could be, because there was a Motion for Reconsideration that was filed and denied. I'm not sure, but the issue before this --

THE COURT: Well let's ask Mr. Tukel, he was there.

MS. LORD: Right, but the issue before this Court is not in play in Deitert. They're arguing that the harsh and unreasonable consequences exception to the Court of Claims Act gives them some relief.

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They're not saying the Plaintiff doesn't have to file a Notice of Intent period.

MR. TUKEL: All I know, Your Honor, so far is that there's been a Notice of Appeal filed. There hasn't been any briefing, I don't know what Plaintiff's arguments in Deitert are going to be.

THE COURT: But is that the essence, is she saying the essence that they conceded the Notice of Intent?

MR. TUKEL: Well they certainly didn't exclusively concede it, they did make arguments that the harsh and unreasonable doctrine should be an exception and that it wasn't raised as an affirmative defense.

And I would say in response to Ms. Lord's argument that if there's no binding precedent that says you must file the Notice of Intent even in a circuit court matter, there's also no binding precedent that says you don't have to.

The cases that are cited by Plaintiff were both cases that argued about exclusive Court of Claims jurisdiction and those arguments were based on the claim that there's no right to a Jury trial for an Elliott Larsen claim against a state entity.

We're not making either of those arguments.

And I, you asked the question why not just file it and in fact that's what many plaintiff attorneys are

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doing now to avoid this issue and it's a --

THE COURT: File it and then still file in the circuit court if that's where you're choosing to file.

MR. TUKEL: That's exactly right, yeah. It's not a statute of limitations issue if you file the notice timely. You can wait 3 years to file your claim, that's what many people are doing now to avoid the issue.

The Courts have said that this is a matter of ordinary diligence that's not overly burdensome, it's simply a procedural requirement. And normally there would be immunity against the state, cases have been very clear that when the Legislature waives that immunity it can set conditions for the waiver.

In this case one of those conditions is the filing of the notice and if that condition isn't applied, the waiver falls away and you're left with immunity.

MS. LORD: What Mr. Tukel is failing to mention is that the Elliott Larsen Civil Rights Act and the Persons With Disability Civil Rights Acts, in those causes of action the Legislature already abrogated immunity for those claims.

And so this isn't even properly a (C)(7) motion because there is no immunity for those claims period.

MR. TUKEL: Well I would agree that, Your Honor, that it waived immunity as to the filing of the claim and

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where it could be filed. It didn't waive the other conditions precedent to waive immunity, one of which is the notice filing requirements.

THE COURT: All right. Last word, anything?

MS. LORD: Last point Tarnow (ph) got it right, the Court of Claims Act rules apply only in the Court of Claims.

THE COURT: All right. Well the Court's had an opportunity to review the briefs, certainly an interesting issue and the Court's entertained oral argument and the Court adopts the reasoning of Judge Tarnow, which make sense.

This Court's got to follow the rules and the rules I got to follow are sitting in the book I just handed Mr. Tukel, as well as the caselaw directly on point which there doesn't appear to be any.

What the rules are on the Court of Claims are the rules in the Court of Claims. This case isn't in the Court of Claims, I'm not in the Court of Claims. I'm not in the federal court or any other court, I'm in this court following these rules.

And the Court adopts the language of Judge Tarnow that Defendant improperly construes 600.6431 in a vacuum, that section is a specific provision within the Court of Claims Act set forth in Chapter 40 or 64 of the Revised

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Judicature Act.

The Court, and I'm still quoting, needs only its common sense to deduce that the Court of Claims Act sets forth the applicable procedures for cases litigated in the Court of Claims, not in every other court across the state of Michigan.

Accordingly this Court is not convinced that the statutory notice requirements in the Court of Claims Act applies here since it is the sole province of the Legislature to determine whether the Act's notice requirements applied to claims brought in circuit court and this Court must adhere to the strict control of that statute.

And if the statute doesn't specifically explicitly address this issue the Court does not have the authority to amend the requirements.

Plaintiff's failure to comply with 600.6431(1) does not preclude her from pursuing her claim in this court, for those reasons and as more fully set forth in the Plaintiff's briefing the Court respectfully denies the motion.

And I assume you folks are litigating otherwise this matter, you're on track and I don't know.

Are you going to be taking this up on interlocutory, don't know just yet or?

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MR. TUKEL: I don't know yet, it's certainly a possibility.

THE COURT: All right.

MR. TUKEL: I have to talk to my client.

THE COURT: If that's the case we probably need to have a conference to see what that means for this litigation if anything --

MS. LORD: Okay.

MR. TUKEL: Understood.

THE COURT: -- so you guys can know where I'm at, all right.

MR. TUKEL: Okay, submit an order.

MS. LORD: Thank you, Judge.

THE COURT: You'll submit an order?

MS. LORD: Yes.

THE COURT: Denied for the reasons stated on the record.

MS. LORD: Correct.

THE COURT: All right.

MS. LORD: Thank you.

(At 9:18 a.m. this hearing was concluded)

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CERTIFICATE OF COURT REPORTER

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

I, Reba Hooper, CSMR-6917, Official Court Reporter acting in and for the Third Judicial Circuit, State of Michigan, do hereby certify that the foregoing pages 1 through 15 was reduced to typewritten form and comprise a true rendition of the proceedings taken by means of video recordation without the benefit of a court reporter present during the proceedings in the above-entitled matter on August 1, 2019.

I further certify that I will assume no responsibility for any events that occurred during the above proceedings for any inaudible responses by any party or parties that are not discernable on the video of the proceedings.

September 30, 2019

Reba Hooper
Reba Hooper CSMR-6917
Official Court Reporter

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4-4-2019

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

SUSAN CHRISTIE,

Plaintiff,

v. Case No. 19 004888 CD

WAYNE STATE UNIVERSITY,

Defendant.

_____/

PITT, McGEHEE, PALMER & RIVERS
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_____/

COMPLAINT AND DEMAND FOR TRIAL BY JURY

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this Complaint pending in this Court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a Judge.

/s/ Jennifer L. Lord

NOW COMES Plaintiff Susan Christie, by her attorneys, PITT, McGEHEE, PALMER & RIVERS, and for her Complaint states as follows:

1. Plaintiff Susan Christie ("Christie"), formerly a Supervisor acting as an Assistant to the Deans of the Wayne State University Eugene Applebaum College of Pharmacy

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and Health Services (WSU), was terminated on November 27, 2017.

2. Christie began working for Wayne State University on March 11, 1974 and had served WSU with dedication for 43 years when WSU fired her.

3. Christie was born on February 7, 1955 and was 63 years old when WSU fired her.

4. Christie brings this action because WSU terminated her because of her age, disability, and in retaliation for taking a Family and Medical Leave Act leave.

JURISDICTION, PARTIES, AND VENUE

5. Christie is a citizen of the United States and resides in Macomb County, Michigan.

6. The Board of Governors for Wayne State University is a constitutional agency of the State of Michigan and operates the Eugene Applebaum College of Pharmacy and Health Services.

7. Venue in this court is proper because the University is located in Wayne County. All of the events giving rise to this cause of action occurred in Wayne County.

8. This court has jurisdiction over WSU under the Elliott Larsen Civil Rights Act ("ELCRA") MCL 37.2101 *et. seq.* and the Michigan Persons With Disabilities Civil Rights Act ("PWDCRA"), M.C.L. § 37.1101, *et. seq.* because WSU is an employer under the ELCRA and the PWDCRA.

9. The amount in controversy exceeds $25,000.

STATEMENT OF FACTS

10. Christie began her employment with WSU on March 11, 1974. She was first employed as an Office Assistant.

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11. She was last employed in November 2017 as an Office Services Supervisor in the Dean's office of the Eugene Applebaum College of Pharmacy and Health Services.

12. Christie consistently received excellent performance evaluations during her long tenure until she returned to work after a medical leave in 2017.

13. Christie's final performance evaluation issued in 2017 was excellent and Christie was awarded a merit increase.

14. Christie's right index finger was partially amputated in 1976 after an injury.

15. Over the years, Christie had several surgeries on the impacted hand.

16. In 2015, she was diagnosed with degenerative arthritis in her hand and learned that she needed surgery to fuse the bones together.

17. Christie postponed the surgery because a new Dean was slated to arrive in January of 2016 and she wanted to ensure that she was acclimated to her position before Christie undertook a medical leave.

18. In February 2017, Christie began a medical leave to undergo hand surgery.

19. Christie returned to work on May 1, 2017.

20. Upon her return, Christie's supervisors had several conversations in her presence asking about the ages of employees.

21. Her supervisors asked Christie how old she was.

22. Between May 2017 and her termination in November 2017, Christie's supervisors repeatedly asked when she intended to retire.

23. On September 22, 2017, WSU issued Christie an unsatisfactory work performance notification; the first she had ever received in 43 years of employment.

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24. WSU fired Christie on November 27, 2017, claiming that her services were no longer required.

COUNT I
AGE DISCRIMINATION IN VIOLATION OF THE ELCRA

25. Christie incorporates the preceding paragraphs by reference.

26. At all relevant times, Christie was an employee and WSU was an employer as defined by the ELCRA.

27. Under the ELCRA, WSU was obligated to refrain from discriminating against Christie because of her age.

28. In violation of this statutory obligation, respondent discriminated against Christie because of her age.

29. WSU's reasons for its disciplinary action and Christie's termination are a pretext for age discrimination.

30. WSU has replaced Christie with a significantly younger individual.

31. WSU has a pattern and practice of terminating older employees to replace them with younger individuals.

32. As a direct and proximate result of the violation of Christie's civil rights, Christie has and will continue to experience lost earnings and benefits; Christie has and will continue to experience emotional distress, humiliation, loss of reputation, and mental anguish.

COUNT II
DISABILITY DISCRIMINATION IN VIOLATION OF THE MPWDCRA

33. Christie incorporates the preceding paragraphs by reference.

34. At all relevant times, Christie was an employee and WSU was an employer as

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defined by the MPWDCRA.

35. Christie was a qualified individual with a disability and/or perceived disability and/or was perceived by WSU as having a disability that substantially limited her in one or more major life activities.

36. Under the MPWDCRA, WSU was obligated to refrain from discriminating against Christie because of her disability or because WSU perceived Christies as having a disability.

37. Christie's degenerative arthritis is a disability for purposes of the MPWDCRA because they substantially limited her in major life activities.

38. As demonstrated by her many successful years of employment at WSU, Christie was fully qualified for her position in employment with or without reasonable accommodation.

39. WSU was motivated to remove Christie from employment because of her medical condition, or because she had a history of this condition, or was regarded as being disabled because of this condition.

40. As a direct and proximate result of the violation of Christie's civil rights, Christie has and will continue to experience lost earnings and benefits; Christie has and will continue to experience emotional distress, humiliation, loss of reputation, and mental anguish.

Accordingly, Christie requests:

A. An Order of the Court awarding her Compensatory damages;

B. An Order of the Court awarding her reasonable attorney fees and costs of litigation; and

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C. An Order of the Court granting her such other relief as the Court deems appropriate.

PITT, McGEHEE, PALMER, & RIVERS, P.C.

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Dated: April 4, 2019

DEMAND FOR JURY TRIAL

Plaintiff Susan Christie, by her attorneys, PITT, McGEHEE, PALMER & RIVERS, makes a formal demand for a trial by jury of the facts and issues involved in this matter and states that the jury fee has been paid.

PITT, McGEHEE, PALMER, & RIVERS, P.C.

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Dated: April 4, 2019

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BUTZEL LONG, A PROFESSIONAL CORPORATION, ATTORNEYS AND COUNSELORS

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

SUSAN CHRISTIE,

Plaintiff, Case No. 19-004888-CD

v. Hon. David J. Allen

WAYNE STATE UNIVERSITY,

Defendant.
/

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/

DEFENDANT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7)

Defendant Wayne State University (hereafter "defendant" or "the University") moves this Court for summary disposition and in support thereof states as follows:

1) Plaintiff is a former employee of the University, where she worked as an Assistant to the Deans of the School of Pharmacy.

2) Plaintiff's two count Complaint alleges age discrimination in violation of the Elliott-Larsen Civil Rights Act ("ELCRA") and disability discrimination in violation of Michigan's Persons With Disabilities Civil Rights Act ("PWDCRA").

3) The Court of Claims Act, MCL 600.6431(1), provides that a mandatory condition precedent to filing a claim against a state instrumentality such as the University, is

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to file a Notice Of Intent with the Michigan Court of Claims Clerk. That requirement applies even when there is concurrent jurisdiction allowing pursuit of the claim itself in a court other than the Court of Claims.

4) Plaintiff did not, prior to filing her Complaint, file the required notice of intention to file a claim with the Clerk of the Michigan Court of Claims, and the time to do so has expired.

5) Plaintiff's failure to comply with the statutory notice filing requirement bars her action.

6) Concurrence in the relief requested was sought on May 16, 2019, but was declined, thereby making it necessary to bring this motion on for hearing.

Wherefore, defendant requests that its motion for summary disposition be granted.

BUTZEL LONG

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DATED: May 29, 2019

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7)

Statement of Facts And Procedural Background

Plaintiff Susan Christie is a former employee of defendant Wayne State University, where she worked as an Assistant to the Deans of the University's College of Pharmacy. (Complaint, ¶1). Her employment was terminated on November 27, 2017, more than one year ago. (Complaint, ¶1). Plaintiff alleges that the University violated the ELCRA and the PWDCRA by terminating her employment because of her age and disability.

Plaintiff's termination was unrelated to her age or alleged disability, but the substance of her claims is not the issue in this Motion. It is undisputed that plaintiff never filed a Notice of Intent to file her claims with the Clerk of the Court of Claims, which is a statutory condition precedent to her ability to bring those claims against the University. That failure bars her claims and entitles defendant to summary disposition.

ARGUMENT

Plaintiff's Failure To Comply With The Statutory Requirement Of Filing A Notice Of Intent In The Court of Claims Bars Her Claims

The Michigan Court of Claims Act, MCLA 600.6431(1), provides that:

> No claim may be maintained against the state unless the claimant, within 1 year after such 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 the state or any of its departments, commissions, boards, institutions, arms or agencies ... which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

Thus, to comply with the Act in order to pursue a claim against the state a plaintiff must do

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one of two things within one year of the claim accruing: 1) file a verified Complaint with the Clerk of the Court of Claims, or 2) file a verified Notice of Intent to file a claim with the Clerk of the Court of Claims.[1]

If statutory language is clear, it must be afforded its ordinary meaning and no further judicial interpretation is permitted. *Jordan v Jarvis*, 200 Mich App 445, 451 (1993). "This task begins by examining the language of the statute itself. The words of a statute provide 'the most reliable evidence of its intent...' When the legislature has clearly expressed its intent in the language of the statute, no further construction is required or permitted." *McCahan v Brennan*, 492 Mich 730, 735 (2012)(footnote/cite omitted). The language of the statute, providing that 'no claim may be maintained against the state" unless the filing requirements are met, is clear and unambiguous on its face. According to the clear language of the statute, compliance with the notice requirements set forth in MCL § 600.6431(1) is an unambiguous condition precedent to filing a lawsuit against the state. *Rusha v Dep't of Corrections*, 307 Mich App 300, 306 (2014); *McCahan* 492 Mich at 736-737. *See also, Hawthorne-Burdine v Oakland University,* unpublished opinion of the Michigan Court of Appeals, entered April 17, 2018 (Docket Nos. 338605 and 339188)(Attached as exhibit A), *lv den – Mich.* – (No. 157848, October 30, 2018).

Where a plaintiff fails to timely file either a Complaint or a Notice of Intent with the Court of Claims clerk, her action against the state is barred. "[T]he failure to file a compliant claim or notice of intent to file a claim against the state within the relevant time

[1] The time period for filing a complaint or notice of intent with the Clerk of the Court of Claims is shortened to six months for claims of property damage or personal injury. MCLA 600.6431(3).

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periods designated in either subsection (1) or (3) will trigger the state's prohibition that '[n]o claim may be maintained against the state...'." *McCahan,* 492 Mich at 742. "While this result may be harsh, requiring a plaintiff to provide notice is 'a reasonable' and 'minimal' burden that a plaintiff must meet to advise the state of potential claims." *Cowan v State of Michigan,* unpublished opinion of the Michigan Court of Appeals dated May 22, 2018 (Docket No. 339618)(attached as exhibit B), citing *Rusha,* 307 Mich App at 313.

The Notice of Intent filing requirement is strictly construed. Because the Notice filing is strictly construed the Michigan Supreme Court rejected an argument that the Notice requirement was waived in the absence of actual prejudice. "[A] claimant's failure to comply strictly with this notice provision warrants dismissal of the claim, even if no prejudice resulted. *Rusha,* 307 Mich App at 307, *citing McCahan,* 492 Mich at 746-747." (*Hawthorne-Burdine*, opinion at p. 4) *See also, Progress Michigan v Attorney General*, 324 Mich App 655, 659 (2018):

> It is a clearly established principle that "when the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain requirements," that those requirements are strictly construed as written. (citing *McCahan,* 492 Mich at 746).

In fact, the Michigan Supreme Court so strictly construed the Notice filing requirement that it upheld dismissal of a claim because of the failure to file the statutory notice, despite the undisputed fact that ***actual*** notice had been provided within the notice period. *McCahan v Brennan*, 492 Mich at 730.

The statutory notice requirement of the Court of Claims Act applies here because it is well settled that Wayne State University is an arm of the state for purposes of the Court of Claims Act. Wayne State University is a constitutionally created State University. (*See,*

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Michigan Constitution, Article 8, §§4 and 5). Such constitutionally created State universities are instrumentalities of the State. *See, e.g., Rainey v Wayne State University*, 26 F Supp 2d 973, 975 – 976 (ED Mich 1998); *Tran v Wayne State University*, No. 95-72662, 1996 U.S.Dist.LEXIS 5528 (ED Mich Mar. 20, 1996), *aff'd*, 110 F3d 65 (6th Cir 1997), *cert denied*, – U.S. – , 118 S Ct 162, 139 L Ed 2d 107 (1997) (District Court and Court of Appeals decisions attached as exhibit C).

The state and its instrumentalities would typically be immune from suit. And while that immunity can be voluntarily waived, the legislature can set conditions for that waiver.

> Generally, governmental agencies in Michigan are statutorily immune from tort liability. However, because the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed. One such condition on the right to sue the state is the notice provision of the Court of Claims Act..." *McCahan*, 492 Mich at 736 (cites omitted).

The notice requirement "is an unambiguous 'condition precedent to sue the state...'" *Rusha*, 307 Mich App at 307, citing *McCahan*. When a litigant does not comply with the statutory conditions required to waive immunity, immunity applies. But whether it is considered an immunity defense or simply a statutory bar to the claim, the result is the same; the claim must be dismissed. Accordingly, plaintiff was required to file, within one year of her claim accruing, either a verified Notice of Intention to file a claim against the University with the Court of Claims Clerk, or a verified written claim with the Court of Claims. MCL § 600.6431(1).

For purposes of the Act, plaintiff's claims accrued no later than the time of termination of her employment from the University on November 27, 2017. MCL § 600.5827; *Beal v. Office of Retirement Services*, unpublished opinion of the Michigan Court

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of Appeals issued March 8, 2016 (Docket No. 324980) (attached as exhibit D)("[A] claim accrues 'at the time that the wrong upon which the claim is based was done regardless of the time when damage results'," cite omitted). Plaintiff therefore had until no later than November 27, 2018, to satisfy one of the two statutory requirement options set forth in § 6431(1).

Plaintiff here did neither. Plaintiff's complaint was filed in the Wayne County Circuit Court, not in the Court of Claims. Therefore, it is undisputed that she did not satisfy the requirements of the first option, filing a verified Complaint in the Court of Claims. It is also undisputed that plaintiff has never filed a Notice of Intention to file a claim with the Clerk of the Court of Claims, and therefore also did not satisfy the requirement of the second option. Plaintiff's failure to comply with § 6431(1) constitutes an absolute bar to her ELCRA and PWDCRA claims against the University, and such claims should be dismissed.

It is important to note what defendant is ***not*** arguing. Defendant is not arguing that there is exclusive Court of Claims jurisdiction over plaintiff's claims. The Circuit Courts have concurrent jurisdiction over statutory discrimination claims. Defendant is not arguing that plaintiff is not entitled to a jury trial for her statutory discrimination claims. And defendant is not arguing that plaintiff's claims are barred by the statute of limitations.

Rather, defendant is arguing that pursuant to the Court of Claims Act ***all*** claims against the state are subject to the statutory notice filing requirements; requirements that it is undisputed plaintiff did not meet. That is true even though it was permissible for plaintiff to file her claims in the Circuit Court, permissible to include a jury demand and although filed within the statute of limitations,

The Michigan Court of Appeals addressed this very issue in *Hawthorne-Burdine v*

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Oakland University, (attached as exhibit A). That case involved a consolidated appeal of two related cases filed by the plaintiff. In the first case, just as here, plaintiff sued her employer in Circuit Court for discrimination claims under the ELCRA and PWDCRA. In the second case she sued several individuals in the Court of Claims alleging tort claims of defamation, false light invasion of privacy and intentional infliction of emotional distress.

In the Court of Claims suit, plaintiff filed the required statutory notice of intent under the Court of Claims Act. However, in her circuit court employment discrimination lawsuit, she did not file in the Court of Claims a notice of her intent to sue. The Oakland County Circuit Court case was transferred to the Court of Claims and consolidated with the plaintiff's pending tort claims. The Court of Claims subsequently granted summary disposition and dismissed all claims, including the statutory discrimination claims.

The Michigan Court of Appeals affirmed the dismissal. With regard to dismissal of the circuit court discrimination claims, the Court noted, as set forth above, that the notice provision of MCL 600.6431 is a mandatory condition precedent on the right to sue the state. (Opinion at p. 4). Moreover, the court noted that as a statutory requirement the notice provision is to be strictly construed, and a failure to comply mandates dismissal regardless of whether the failure resulted in actual prejudice. *Id.*

While Ms. Hawthorne-Burdine conceded that she had not met the notice filing requirements of MCL 600.6431(1) with regard to her circuit court discrimination claims, she argued that those requirements should not be applied to her statutory discrimination claims, filed in Circuit Court. The Court of Appeals easily disposed of that argument, stating:

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> Plaintiff does not dispute that she failed to comply with MCL 600.6431(1). Rather, she asserts that MCL 600.6431(1) should not be applied to civil rights violations. However, the Legislature clearly intended for MCL 600.6431(1) to apply regardless of the type of claim being brought. MCL 600.6431(1)(a) makes no distinction among types of claims subject to the jurisdiction of the Court of Claims... Nor does MCL 600.6431(1) distinguish between claims that are subject to its notice requirements, providing broadly that "*[n]o claim* may be maintained against the state unless" the claimant complies with the provision. Therefore, according to its unambiguous language, MCL 600.6431(1) applied to plaintiff's discrimination claims. (*Hawthorne-Burdine*, at p. 4, emphasis in original).

Although unpublished, *Hawthorne-Burdine* is squarely on point with this case, and therefore should be persuasive. Moreover, the reasoning in *Hawthorne-Burdine* was based on established and well-settled rules of statutory construction, and on the clear and unambiguous statutory language of the Court of Claims Act.

Other circuit courts have followed *Hawthorne-Burdine*. For example, in *Deitert v The University of Michigan*, the Washtenaw County Circuit Court dismissed a plaintiff's PWDCRA claim, which was filed in circuit court without having filed a Notice of Intent with the Court of Claims Clerk. In granting the University's Motion for Summary Disposition the court stated:

> [T]he Court finds that plaintiff's failure to file a Notice of Intent with the Clerk of the Court of Claims, as required by the Court of Claims Act, MCL 600.6431, bars her claim under the Persons With Disabilities Civil Rights Act... (Order granting defendant's motion for summary disposition attached as exhibit E).

All the relevant facts here are indistinguishable from those in *Hawthorne-Burdine*. The Court of Claims Act requires the filing, within one year of the claim accruing, of a Notice of Intent with the Clerk of the Court of Claims for ***all*** claims against the University as an instrumentality of the state. This is true even where, as here, plaintiff was permitted to file her claims in circuit court. As set forth above, it is undisputed that plaintiff failed to

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comply with this mandatory notice requirement of § 6431. That failure bars her claims and entitles defendant to dismissal.

Defendant anticipates that plaintiff will cite the Court to *Doe v Department of Transportation*, 324 Mich App 226 (2016), *lv den* 503 Mich 876 (2018). While that is a published decision, it is distinguishable from this situation and is not a basis to deny defendant's motion. In *Doe* plaintiff filed an ELCRA claim in circuit court, which included a jury demand. Defendant filed a notice transferring the matter to the Court of Claims, and at the same time moved that court for summary disposition "because plaintiff failed to comply with the requirements for filing in the Court of Claims." 324 Mich App at 228. Plaintiff filed an emergency motion to transfer the case back to the circuit court. Plaintiff's argument was that because of the jury trial request, there was not exclusive Court of Claims jurisdiction. Defendant argued that plaintiff was not entitled to a jury trial for an ELCRA claim against a state defendant.

Both plaintiff's motion to transfer back and defendant's response were based on arguments regarding whether there was exclusive Court of Claims jurisdiction over the statutory discrimination claim. "Defendant argues that the Court of Claims erred by transferring the case back to the circuit court because the Court of Claims had exclusive jurisdiction." *Id* at 229. Thus, defendant's transfer to the Court of Claims, and plaintiff's motion seeking transfer back to circuit court were both based on an argument regarding exclusive Court of Claims jurisdiction. And the issue of whether there was exclusive Court of Claims jurisdiction centered on arguments as to whether there was a right to a jury trial for a state ELCRA defendant – and ***not*** on a failure to file the Court of Claims Notice.

Here, defendant is not arguing that there is exclusive Court of Claims jurisdiction

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nor is it arguing that plaintiff is not entitled to a jury trial. Rather, the University's argument is that while it is permissible to file the claim in circuit court, because of concurrent jurisdiction, and to include a jury demand, the Court of Claims Act still requires the timely filing of a Notice of Intent. The *Doe* Court never addressed that issue because it was apparently not raised by the parties. "Accordingly, because plaintiff was entitled to a jury trial against defendant in her action under the ELCRA, the Court of Claims had concurrent jurisdiction with the circuit court by virtue of MCL 600.6421(1). Therefore, the Court of Claims did not err by transferring the case back to the circuit court." *Id* at 238-239. The footnote to that quote, in which the court indicated that "defendant's argument that plaintiff did not follow the procedures necessary to proceed in the Court of Claims is moot," is clearly an indication that defendant's summary disposition motion arguing for exclusive Court of Claims jurisdiction was moot. The issue of exclusive Court of Claims jurisdiction, resting on whether there was a right to a jury trial, was the explicit basis for defendant's motion in *Doe*. The Notice requirement was never mentioned by the Court of Appeals.

Tellingly, the *Doe* Court never cited *Hawthorne-Burdine*, which had been decided earlier. But the failure to do so is understandable given that *Doe* involved issues of exclusive Court of Claims jurisdiction and the right to a jury trial while *Hawthorne-Burdine* involved the issue of Court of Claims Notice. *Doe* is inapplicable. The situation here is analogous to *Hawthorne-Burdine*, and summary disposition is appropriate.

RELIEF REQUESTED

Wherefore, for the reasons argued above, defendant respectfully requests that its

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BUTZEL LONG, A PROFESSIONAL CORPORATION, ATTORNEYS AND COUNSELORS

motion for summary disposition be granted.

BUTZEL LONG

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DATED: May 29, 2019

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BUTZEL LONG, A PROFESSIONAL CORPORATION, ATTORNEYS AND COUNSELORS

Certificate of Service

I, Daniel B. Tukel, hereby certify that on May 29, 2019, I caused a true and correct copy of the foregoing document, Defendant's Motion for Summary Disposition pursuant to MCR. 2.116(C)(7) and Brief in Support to be filed and served electronically via the ECF system upon counsel of record.

BUTZEL LONG

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

SUSAN CHRISTIE,

Plaintiff,

v.

Case No. 19-004888-CD
Honorable David J. Allen

WAYNE STATE UNIVERSITY,

Defendant.

_____/

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PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7)

NOW COMES Plaintiff, Susan Christie, by his attorneys, PITT, McGEHEE, PALMER & RIVERS and states her Response to Defendant's Motion for Summary Disposition Pursuant to MCR 2.116(C)(7) as follows:

1. Admit.

2. Admit.

3. Deny for the reasons outlined in Plaintiff's brief.

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4. Plaintiff admits that she did not file a notice of intention to file a claim with the Court of Claims but denies that it is required for claims brought under the ELCRA and MPWDCRA.

5. Deny.

6. Plaintiff admits that defendant sought concurrence.

PITT, McGEHEE, PALMER, & RIVERS, P.C.

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Dated: July 25, 2019

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

SUSAN CHRISTIE,

Plaintiff,

v.

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WAYNE STATE UNIVERSITY,

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PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7)

INTRODUCTION

This case alleges that Defendant Wayne State University terminated Plaintiff Susan Christie ("Christie") in violation of the Elliott Larsen Civil Rights Act and the Michigan Persons with Disabilities Civil Rights Act. Christie was 63 years old and had worked for Wayne State for 43 years when Wayne State fired her on November 27, 2017. Christie was last employed as an Office Services Supervisor in the Dean's office of the Eugene Applebaum College of Pharmacy and Health Services.

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Christie's work performance was outstanding. She consistently received excellent performance evaluations. Her final performance evaluation in 2017 was excellent and she received a merit increase. All was well with her employment until Christie took a Family and Medical Act leave in February of 2017. She had degenerative arthritis in her hand and needed bone fusion surgery. She returned from leave on May 1, 2017. Upon her return from leave, Christie's supervisors had several conversations in her presence asking about the ages of employees. Her supervisors asked how old she was. Between her return from medical leave and her termination, Christie's supervisors repeatedly asked when she would retire. In September 2017, Wayne State issued an unsatisfactory work performance notification. It was the first discipline that Christie had received in 43 years of employment. Wayne State fired Christie on November 27, 2017, falsely claiming that her services were no longer required.

STANDARD OF REVIEW

Defendant bring its motion pursuant to MCR 2.116(C)(7). When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff. *Maiden v. Rozwood,* 461 Mich 109, 118 (1999). If a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. *Dextrom v. Wexford Co.*, 287 Mich. App. 406, 428-29 (2010).

Defendant did not cite the standard of review in its Motion to Dismiss nor does it identify which portion of the rule it believes applies. As a preliminary matter, MCR 2.116 (C)(7) does not provide the basis for dismissal as Defendant argues. MCR 2.116 (C)(7) authorizes "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because

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of a release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate of litigate in another forum, infancy of other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.[1]" None of these scenarios apply here. The closest is immunity. However, "The Legislature waived the state's immunity from jury trial in actions brought pursuant to the ELCRA.[2]" *Doe vs Department of Transportation*, 324 Mich App 226, 237 (2018) (leave to appeal denied, 503 Mich 876 (October 2, 2018). Thus, MCR 2.116 (C)(7) does not provide a vehicle to dismiss Christie's complaint.

ARGUMENT

1. PLAINTIFF DID NOT FILE HER COMPLAINT IN THE COURT OF CLAIMS AND IS THEREFORE NOT SUBJECT TO THE COURT OF CLAIMS ACT'S PROCEDURAL RULES.

Until July 8, 2019, no Court had squarely addressed the issue of whether the Court of Claims Rules apply to cases litigated outside of the Court of Claims. In *Steckloff v Wayne State University*, Case no. 18-13230, the Defendant filed a motion to dismiss because the plaintiff filed her disability discrimination lawsuit in Wayne County Circuit Court without first filing a notice of intent with the Court of Claims.[3] Judge Tarnow denied Wayne State's motion to dismiss (Exhibit 1).

---

[1] Defendant concedes that it is not arguing that plaintiff's claims are barred by the statute of limitations. Defendant's brief at p. 7.

[2] Defendant is a political subdivision of the State. "[T]he legislature expressly applied the act to the state by including the state and its political subdivisions in the definition of person." *Doe* quoting *Anzaldua v Band*, 457 Mich 530, 551 (1998).

[3] Steckloff filed her disability discrimination claim in Wayne County Circuit Court. Defendant removed the case to Federal Court because in addition to claims under the PWDCRA, plaintiff filed a claim under the Rehabilitation Act, 29 USC § 794.

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There, as in here, Defendant relied heavily upon the unpublished *Hawthorne-Burdine v Oakland University* (Defendant's Ex. A). *Hawthorne-Burdine* is not binding precedent and is factually and procedurally different. In *Hawthorne-Burdine*, there is no indication that the plaintiff requested a jury trial. Christie has requested a trial by jury. *Hawthorne-Burdine's* case was transferred to the Court of Claims. Finally, prior to filing in State Court, the plaintiff in *Hawthorne-Burdine* filed a complaint in federal court where she represented herself and was likely unaware of basic civil procedure. *Hawthorne-Burdine v Oakland Univ.*, 158 F Supp 3d 586 (E.D. Mich. 2016).

Christie filed her complaint in Wayne County Circuit Court, the case was never transferred to the Court of Claims, and the Court of Claims never exercised jurisdiction over the case.

In *Steckloff*, Judge Tarnow stated "Defendant's position overlooks the critical fact that *Hawthorne-Burdine* was litigated in the Court of Claims, where the Court of Claims Act and § 600.6431 (1) therein, are applicable. This case, on the other hand, which was originally filed in the Wayne County Circuit Court, does not involve the Court of Claims." Similarly, Christie did not file in the Court of Claims and this case has never involved the Court of Claims. The Court found that "Defendant improperly construes § 600.6431 (1) in a vacuum. Section 600.6431 is a specific provision within the Court of Claims Act set forth in Chapter 64 of the Revised Judicature Act of 1961. The Court need only its common sense to deduce that the *Court of Claims Act* sets forth the applicable procedures for cases litigated in the *Court of Claims*, not in every other court across the state of Michigan" (emphasis in original).

Christie *could* have filed her complaint in the Court of Claims, but she did not. The Court of Claims rules do not apply and Defendant's motion should be dismissed.

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2. THE LEGISLATURE DEFINED STATE AGENCIES AS AN EMPLOYER UNDER THE ELCRA AND PWDCRA AND PROSCRIBED THE CIRCUIT COURT AS HAVING JURISDICTION

The legislature expressly included state agencies as employers. ELCRA includes in its definition an employer "an individual, agent, association, corporation, joint apprenticeship committee....the state or a political subdivision of the state of an agency of the state.." MCL 37.2103 (g). Likewise, the PWDCRA defines an employer as "a person who has 1 or more employees...and includes and agent of that person. MCL 37.1201(b). Further, "person" includes, among many other things, "this state, or any other legal, commercial, or governmental entity or agency. MCL 37.1103 (g). Venue in circuit court is authorized by both the ELCRA and the PWDCRA. The ELCRA states "[a]n action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complain is filed, resides or has his principal place of business. MCL 37.2801 (2). The PWDCRA contains identical language at MCLA 37.1606 (2).

Nothing in the ELCRA or the PWDCRA indicates that the state shall be treated differently from any other employer. And nothing in either Act indicates that a plaintiff must jump through extra hoops to assert their rights under these statutes.

3. ADDITIONAL AUTHORITY SUPPORTS DENIAL OF DEFENDANT'S MOTION

Following the unpublished *Hawthorne-Burdine* decision, the Court of Appeals issued a published opinion rejecting an argument similar to defendant's in this case. In *Doe vs Department of Transportation*, 324 Mich. App. 226 (2018) the plaintiff filed a complaint in Ingham County Circuit Court alleging sexual harassment and retaliation in violation of the ELCRA. The Defendant transferred the case to the Court of Claims and filed a motion to

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dismiss because the plaintiff did not comply with the requirements for filing in the Court of Claims. Plaintiff filed an emergency motion to transfer the case back to circuit court, arguing that the jury trial exception in MCL 600.6421 (1) applies. The Court of Claims transferred the case back to the circuit court, noting that because a plaintiff has a right to a jury trial under the ELCRA, the Court of Claims and the circuit court have concurrent jurisdiction. Defendant appealed, arguing that the Court of Claims had exclusive jurisdiction. The Court of Appeals disagreed holding that the Court of Claims did not err by transferring the case back to the circuit court. The Court stated "[b]ecause the Court of Claims properly transferred the case back to the circuit court, defendant's argument that plaintiff did not follow the procedures necessary to proceed in the Court of Claims is moot and this Court need not address it." *Doe* at 239. The Michigan Supreme Court denied leave to appeal. *Doe vs Department of Transportation*, 503 Mich 876 (October 2, 2018). While the procedural posture of the case was different, it stands to reason that if a plaintiff was truly required to file a notice with the Court of Claims to pursue a discrimination claim in circuit court that the Court of Appeals would have ruled differently or the Michigan Supreme Court would have granted leave.

In February of 2019, the Court of Appeals addressed the same issue in *Carter v Michigan State Police*, 2019 WL 846106 (Ex 2). Plaintiff filed a complaint in Wayne County Circuit Court alleging that defendant discriminated against him in violation of the ELCRA. As in *Doe*, the defendants transferred the case to the Court of Claims, then moved for dismissal of the case because plaintiff did not file a notice of intent under the Court of Claims Act. Plaintiff moved to have his case transferred back to the circuit court and the Court of Claims granted that motion. Defendants appealed. The Court found that the Court of Claims notice provision did not apply once the case was back in circuit court. "Indeed, defendants fail to

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provide any legal analysis or reasoning with respect to the question of MCL 600.6431(1)'s continuing relevance or application in light of the procedural posture of the case." *Id* at *3.

Simply put, the *Court of Claims Act* applies only to cases in the *Court of Claims*.

4. DEFENDANT'S AUTHORITY IS LEGALLY AND FACTUALLY DISTINGUISHABLE

Defendant relies on *Deitert v The University of Michigan* to support its argument that Christie's claims must be dismissed because she did not file a notice of intent to sue with the Court of Claims (Defendant's Ex E). In *Deitert*, the plaintiff accepted the false premise that she needed to file a notice with the Court of Claims prior to bringing suit. The plaintiff then argued that the "harsh and unreasonable circumstances" doctrine excused her failure to file the notice. Plaintiff also claimed that defendant failed to assert this affirmative defense in a timely manner (Ex 3). Because *Deitert* did not consider the issue before this Court, it offers no guidance. Defendant cites but does not analyze the unpublished decisions in *Cowan v State of Michigan Department of Corrections* (Defendant's Ex. B) and *Beal v Office of Retirement Systems* (Defendant's Ex D). Both of these cases involve plaintiffs who filed their claims in the *Court of Claims* and failed to do so in a timely manner. Judge Tarnow noted that [t]he fact that nearly every case which cites to § 600.6431 (1) has been litigated in the Court of Claims undercuts Defendant's argument for its broad-sweeping application (Ex 1 at 6).

CONCLUSION

Defendant is attempting to superimpose the procedural rules of the Court of Claims on the Circuit Courts. The Circuit Courts have their own rules of procedure. As Judge Tarnow noted, the Defendant improperly construes the Court of Claims rules in a vacuum. They were never intended to impose restrictions on any court except the Court of Claims. Thus, Christie respectfully requests this Honorable Court deny defendant's motion.

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Dated: July 24, 2019

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the Wayne County Circuit Court through the MIFile filing system and that all parties listed on the pleadings were served via the e-filing system on July 25, 2019.

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BUTZEL LONG, A PROFESSIONAL CORPORATION, ATTORNEYS AND COUNSELORS

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

SUSAN CHRISTIE,

Plaintiff, Case No. 19-004888-CD

v. Hon. David J. Allen

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Defendant.
_____/

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DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7)

Plaintiff argues that because she chose not to file her Complaint in the Court of Claims – a court which has concurrent jurisdiction over her PWDCRA and ELCRA claims – but instead chose to bring it in this Court – another Court which has concurrent jurisdiction over the claims – the Notice provision of the Court of Claims Act does not apply. That argument is directly contrary to the clear and unambiguous language of the Court of Claims Act, which provides, in relevant part, that "***No claim*** may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims … a written notice of intention to file a claim against the state or any of its

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departments … MCLA 600.6431(1)(emphasis added).[1] Clear and unambiguous statutory language is not subject to further interpretation, but is applied as written, and every word given effect. *Oppenhuizen v. Zeeland*, 101 Mich. App. 40, 49 (1980), quoted in *Rusha v. Department of Corrections*, 307 Mich. App. 300, 304 (2014).

Plaintiff concedes that Wayne State University is a political subdivision of the State. (Response, fn. 2). By its clear language the Notice filing requirement applies to ***all claims*** against the state and its political subdivisions, not merely, as plaintiff argues, to all claims filed or pending in the Court of Claims. Had the legislature intended to limit the broad language requiring the Notice filing, only to cases filed or pending the Court of Claims, it could have done so. It did not. The statutory language should be applied as written.

The University, as an instrumentality of the state, would typically be immune from suit. Defendant is not arguing that it is absolutely immune from the claims plaintiff brings. But it cannot be disputed that when the state voluntarily waives its immunity the legislature can set conditions for that waiver. It did so in the Court of Claims Act, allowing claims to be brought but setting the notice provision as a condition precedent. *McCahan, v. Brennan*, 492 Mich. 730, 736 (2012).

Plaintiff is correct that defendant's motion is brought under the immunity provision of MCR 2.116(C)(7). But defendant's argument is not that immunity is an absolute bar against all such claims against it. Rather, the argument is that immunity is waived only if a plaintiff complies with the conditions the legislature set for that waiver. If

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[1] Plaintiff's position would lead to an anomalous result, in which a case for which there was concurrent jurisdiction which plaintiff chose to file in the Court of Claims would be subject to a number of procedural requirements (such as the Notice filing requirement), while the same case filed in circuit court would be subject to no such requirements. Statutes must be interpreted to avoid absurd results. *Rafferty v Markovitz*, 461 Mich 265, 270 (1999).

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those conditions precedent to suit are not satisfied there is no waiver and the immunity which would otherwise be in effect absent waiver remains. Plaintiff's admitted failure to file a Notice means that she has not met the condition necessary for the waiver of immunity, and therefore immunity still applies.

The cases cited by plaintiff are all distinguishable and inapplicable, because they were all based on claims that the Court of Claims had exclusive jurisdiction over ELCRA claims because there was no right to a jury trial. Defendant here is making no such claim. Defendant acknowledges that plaintiff has a right to a jury trial and that because she asserts that right there is concurrent jurisdiction in this Court. The fatal weakness in plaintiff's argument is this: the argument that defendant argues that even when concurrent jurisdiction allows an ELCRA claim to be brought in Circuit Court, the Notice requirement of the Court of Claims Act still applies and defendant's argument, which is based on the clear and unambiguous language of MCLA 600.6431 was not made or was not pursued in any of the Michigan Court of Appeals cases cited by plaintiff.

In *Doe v Department of Transportation*, relied upon by plaintiff, Doe filed an ELCRA claim in circuit court, which included a jury demand. Defendant filed a notice transferring the matter to the Court of Claims. That transfer was based on defendant's position that there was exclusive Court of Claims jurisdiction, a position defendant is not taking here. "Defendant argues that the Court of Claims erred by transferring the case back to the circuit court because the Court of Claims had exclusive jurisdiction." *Id* at 229. In fact, defendant's transfer of the matter to the Court of Claims in *Doe* was dependent on such an argument, because such a transfer is permissible only when the Court of Claims has exclusive jurisdiction. MCLA 600.6404(3) and 600.6419(1).

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Defendant in *Doe* argued that plaintiff was not entitled to a jury trial for an ELCRA claim against a state defendant, rendering Court of Claims jurisdiction exclusive. The Court rejected that argument, finding that there was not exclusive Court of Claims jurisdiction since plaintiff had a right to a jury trial under ELCRA. Therefore, the Court affirmed the lower court's transfer back to circuit court.

Defendant in *Doe* argued that the case was improperly filed in circuit court and that the circuit court lacked jurisdiction. The defendant never argued that even if a case was properly filed in circuit court because of a jury demand and concurrent jurisdiction, the Notice requirement still applied, and the *Doe* Court never considered or decided that issue. Because defendant here is not arguing exclusive Court of Claims jurisdiction or that plaintiff is not entitled to a jury trial, *Doe* is simply inapplicable.

The same is true of *Carter v Michigan State Police*, an unpublished opinion cited by plaintiff. There plaintiff filed an ELCRA claim in circuit court and defendant transferred the case to the Court of Claims. Again, that transfer was based on the position that there was no right to a jury trial for an ELCRA claim against the state, and therefore Court of Claims jurisdiction was exclusive. "Defendants first argue that the state has sovereign immunity from trial by jury under the ELCRA. Defendants present this argument in an effort to keep the case within the exclusive jurisdiction of the Court of Claims." (*Carter* opinion, p. 1). Relying on *Doe*, the Court of Appeals found that there was a right to a jury trial, that therefore Court of Claims jurisdiction was not exclusive, and that the Court of Claims properly transferred the case back to circuit court.

While defendant in *Carter* argued that summary disposition should have been granted based on the failure to file a Notice of Intent with the Court of Claims, that

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argument had been found to be moot and on appeal the mootness argument was not addressed and therefore never considered by the Court of Appeals. "The Court of Claims found that the argument was moot, and defendants fail to address the mootness ruling." (*Carter*, p. 2). The Court of Appeals did not decide that issue because the failure of defendant to address it on appeal effectively waived the argument. Neither of these cases, upon which plaintiff relies, squarely considered or addressed the issue of whether an ELCRA or PWDCRA case which included a jury demand, and therefore was permissibly filed in Circuit Court because of concurrent jurisdiction, must still comply with the Notice filing requirement of the Court of Claims Act.

The most analogous case in *Hawthorne-Burdine*, cited in defendant's original brief. There the Court of Appeals squarely found that the failure to comply with the Notice filing requirement of the Court of Claims Act, barred her ELCRA claim. While it was the Court of Claims which issued that holding, affirmed by the Court of Appeals, the case had originally been filed in a circuit court.[2]

Defendant contends that the clear and unambiguous language of the Act, requiring such notice in all claims against a state instrumentality such as the University, must be applied as written. Consistent appellate authority provides that the Notice requirement is to be strictly construed. Consistent appellate authority provides that while immunity would normally bar entirely claims against the state, if such immunity is waived the legislature can establish conditions for that waiver. Failure to satisfy those conditions for waiver leaves in place the immunity that would otherwise apply. By failing to file the Notice of Intent,

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[2] If the Court should decline to follow *Hawthorne-Burdine*, given that the cases cited by plaintiff are distinguishable, the Court is left with the clear and unambiguous language of the statute, which states that the Notice filing requirement applies to all claims against a state instrumentality.

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plaintiff failed to satisfy a condition for applicability of waiver of immunity. Accordingly immunity still applies, and defendant is entitled to summary disposition pursuant to MCR 2.116(C)(7).

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DATED: July 29, 2019

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Certificate of Service

I hereby certify that on July 29, 2019, I electronically filed the foregoing paper, Defendant's Reply Brief In Support of Motion for Partial Dismissal Pursuant to F.R.Civ.P. 12(c), with the Clerk of the Court using the ECF system which will send notification of such filing to:

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STATE OF MICHIGAN

COURT OF APPEALS

LORI L. STONE,

Plaintiff-Appellant,

v

DEPARTMENT OF MICHIGAN STATE POLICE,

Defendant-Appellee.

UNPUBLISHED
July 8, 2014

No. 314848
Court of Claims
LC No. 10-000033-MZ

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals by right from an order of the Court of Claims granting defendant's motion for summary disposition under MCR 2.116(C)(7) (governmental immunity). We reverse.

I. BACKGROUND

On May 19, 2007, plaintiff, while in her vehicle, was separately struck by two Michigan State Police officers. Plaintiff filed a Verified Complaint against defendant on May 11, 2010, claiming defendant was responsible for the auto negligence of its officers. The complaint also averred that plaintiff filed a Notice of Intention to File a Claim ("the Notice") on or about November 15, 2007. Defendant filed its answer and affirmative defenses July 30, 2010.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7) on November 21, 2012, and arguments were heard December 5, 2012. Defendant argued plaintiff's Notice of Intention to File a Claim was defective for failure to comply with the notice provisions of the Court of Claims Act MCL 600.6401 et seq. Defendant asserted that the phrase "verified before an officer authorized to administer oaths" meant the required use of a jurat to show verification before an officer authorized to administer oaths. Plaintiff countered by urging a focus on the meaning of the term "verified" in the phrase "verified before an officer authorized to administer oaths" and argued that verification did not require the use of a notary jurat but should be understood in terms of MCR 2.114 in the absence of a statutory definition. Plaintiff asserted that if the Legislature had intended to require a notary seal or affidavit it would have used those words but, it did not. Further, that plaintiff's counsel was a notary and that the document was signed in front of him thus, satisfying the requirement that the Notice be signed in front of an officer authorized to administer oaths. Defendant responded that MCR 2.114 did not apply to cure the defective Notice because the Notice was not dated as MCR 2.114 required and

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there was otherwise a statute, MCL 600.6431, which was clear as to the Notice requirements. Defendant contended that even if plaintiff's attorney was a notary, there was no evidence from the "four corners" of the Notice that it was signed and verified before an officer authorized to administer oaths.

The Court of Claims agreed with defendant that an attorney was not a person authorized to administer oaths and that plaintiff's attorney status as a notary was not evident from the "four corners" of the Notice. The court also determined that MCR 2.114 did not apply because the statute stated "[e]xcept where otherwise specifically provided by rule or statute, a document need not be verified or accompanied by an affidavit" and MCL 600.6431 was a statute that "otherwise" provided that the Notice needed to be verified. Further MCR 2.114(B) required a date and signature and the Notice here was not signed. Lastly, the court acknowledged that it found plaintiff's notice was not verified in compliance with MCL 600.6431 for the reasons specifically stated in defendant's reply brief. Defendant's reply brief additionally argued that the meaning of "verified before an officer authorized to administer oaths" should require the Notice "to be in the form of a notarized affidavit." The court therefore, adopted defendant's argument that plaintiff's Notice should have contained a notary jurat in order to fulfill the requirement of MCL 600.6431 that it be "verified before an officer authorized to administer oaths."

II. NOTICE OF INTENTION TO FILE A CLAIM IN THE COURT OF CLAIMS

A. THE PRECEDENTIAL VALUE OF *ROWLAND* AND *MCCAHAN*

This Court's analysis must begin with the cases of *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), and *McCahan v Brennan*, 492 Mich 730; 822 NW2d 747 (2012). In both cases the plaintiffs were involved in an automobile collision with government owned vehicles and filed notices under MCL 600.6431 to apprise the government of their intent to file suit and seek damages for personal injury and property damage. In both *Rowland* and *McCahan* the issue was the timeliness of the plaintiffs' filing of their verified notice of intent to file a claim with the Clerk of the Court of Claims. *McCahan*, 492 Mich at 734. In each case notice was filed beyond the statutory allowed six month deadline.

In *Rowland*, our Supreme Court determined that the judiciary could not add an "actual prejudice" requirement to the notice provisions of MCL 600.6431 as a precondition to the state enforcing compliance with the statute. The Supreme Court reiterated the core holding from *Rowland* in its opinion in *McCahan*, "that such statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate." *McCahan*, 492 Mich at 733. It went further and clarified in *McCahan* that "*Rowland* applies to all such statutory notice or filing provisions, including" MCL 600.6431. *Id*.

Unlike *Rowland* and *McCahan*, the instant case does not involve an issue of timeliness. The holdings of both cases are still instructive in the regard that this Court is not to add to the specific notice and filing provisions of the statute when addressing whether plaintiff's Notice complied with the provisions of MCL 600.6431.

B. STATUTORY INTERPRETATION OF MCL 600.6431

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Generally, in Michigan, governmental agencies cannot be sued for tort liability absent a statutory exception. See MCL 691.1401 et seq. Here, plaintiff's complaint alleged defendant was liable under the motor vehicle exception, MCL 691.1405, which provides that

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner[.][1]

As part of her suit plaintiff was also required to follow the notice and filing provisions of the Court of Claims Act, MCL 600.6401 et seq., in order to validate her claim. Specifically, MCL 600.6431 required plaintiff to file a Notice of Intention to File a Claim with the Clerk of the Court of Claims. MCL 600.6431 sets forth the provisions to be followed for filing a Notice of Intention to File a Claim in the Court of Claims.

> 600.6431. Notice of intention to file claim, contents, time, verification, copies
>
> (1) No claim may be maintained against the state unless the claimant, within 1 year after such 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 the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
>
> (2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.
>
> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

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[1] See also MCL 600.6475 ("In all actions brought in the court of claims against the state to recover damages resulting from the negligent operation by an officer, agent or employee of the state of a motor vehicle . . . of which the state is owner, the fact that the state, in the ownership or operation of such motor vehicle or aircraft, was engaged in a governmental function shall not be a defense to such action.")

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Plaintiff submitted for this Court's review, a copy of her Notice of Intent to File a Claim and a certified letter from the Ingham County Court of Claims. The Notice designated the Michigan State Police as the department plaintiff filed her claim against. It also stated the time, May 19, 2007, and the place, at the intersection of M-52 and Werkner Road, Chelsea, Michigan, where the claim arose. The Notice further alleged damages plaintiff sought to recover by her claim. The Notice ended with the declaration: "I declare that the statements above are true to the best of my information, knowledge, and belief" which was followed by the signatures of the plaintiff, the salutation 'Respectfully submitted,' and the signature of her attorney. The Notice had a section titled "Dated:" but, there was no date next to it. The front page of the Notice also contained a "FILED" date stamp from the Ingham County Court of Claims for November 15, 2007. The accompanying certified letter from the Ingham County Court of Claims was dated November 20, 2007. It acknowledged receipt of plaintiff's Notice of Intention to File a Claim in the Court of Claims, confirmed that the Notice was filed on November 15, 2007, assigned a notice number, and indicated that copies were forwarded to an assistant attorney general and the Michigan State Police Department. Given the contents of the Notice, both parties agree that all conditions of MCL 600.6431 have been satisfied save one.

Our interpretation of any statutory language always begins with the objective of discerning the Legislature's intent. "This task begins by examining the language of the statute itself. The words of a statute provide 'the most reliable evidence of its intent....' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576; 101 S Ct 2524; 69 L Ed2d 246 (1981).

The issue before this Court is whether plaintiff complied with the provision that her Notice be "verified by the claimant before an officer authorized to administer oaths." MCL 600.6431(1). Because the statute provided no definition of the word "verified" nor the phrase "an officer authorized to administer oaths," for guidance, both parties looked elsewhere for definitions and examples that supported their positions. Plaintiff's counsel urged the trial court to adopt the definition of verification contained in MCR 2.114(B) and to except that plaintiff verified the information before him and that his status as attorney and notary made him an officer authorized to administer oaths.

1. The Authorization Requirement

Plaintiff's counsel argues that his status as attorney and notary made him "an officer authorized to administer oaths." We disagree.

The trial court was correct in concluding that plaintiff's attorney was not an officer authorized to administer oaths. Other than the instance where a particular officer is required, MCL 600.1440 only lists a justice, a judge, a clerk of a court, or a notary public as persons who may administer oaths. An attorney is not amongst those persons listed. Plaintiff also cites no statute specifically granting authority to attorneys, who are not notary publics, to administer oaths. Accepting as true that plaintiff's attorney was also a notary public, plaintiff's attorney failed to comply with the Michigan Notary Public Act, MCL 55.261 et seq. When a notary

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public performs a notarial act[2], he is required to "print, type, stamp, or otherwise imprint mechanically or electronically" a notary jurat[3]. MCL 55.287(2). While no specific form is required, a jurat must convey all of the following information:

> (a) The name of the notary public exactly as it appears on his or her application for commission as a notary public.
>
> (b) The statement: "Notary public, State of Michigan, County of _____.".
>
> (c) The statement: "My commission expires _____.".
>
> (d) If performing a notarial act in a county other than the county of commission, the statement: "Acting in the County of _____.".
>
> (e) The date the notarial act was performed. [MCL 55.287(e).]

The fact that none of this information appeared on plaintiff's Notice is evidence that plaintiff's attorney was not acting in his notarial capacity.

Defendant, on the other hand, argues that proper authorization of a Notice by "an officer authorized to administer oaths" requires a notary jurat be displayed on the face of the Notice. Again, we disagree. We find that the trial court erred in concluding that plaintiff's Notice required a notary jurat in order to fulfill the condition of verification under MCL 600.6431. A "jurat" is "[a] certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made." *Black's Law Dictionary* (8th ed). A Notice is neither an affidavit nor a deposition. The statute also neither states that a jurat is required nor that an affidavit must accompany the Notice. In accordance with the holdings of *Rowland* and *McCahan*, this Court will not add further requirements to the notice provisions of MCL 600.6431. The statute only requires verification on the part of the claimant and that the claimant performs the act of verification before an officer authorized to administer oaths.

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[2] ""Notarial act" means any act that a notary public commissioned in this state is authorized to perform including, but not limited to, the taking of an acknowledgment, the administration of an oath or affirmation, the taking of a verification upon oath or affirmation, and the witnessing or attesting a signature performed in compliance with this act and the uniform recognition of acknowledgments act, 1969 PA 57, MCL 565.261 to 565.270." MCL 55.265(d).

[3] A "jurat" is defined as "a certification by a notary public that a signer, whose identity is personally known to the notary public or proven on the basis of satisfactory evidence, has made in the presence of the notary public a voluntary signature and taken an oath or affirmation vouching for the truthfulness of the signed record." MCL 55.265(a).

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2. The Verification Requirement

Plaintiff argues the definition of verification contained in MCR 2.114(B) should be used to interpret the meaning of verification in MCL 600.6431. We disagree.

The trial court correctly determined that MCR 2.114 is inapplicable here. MCR 2.114(A) clearly states that the rule applies to "all pleadings, motions, affidavits, and other papers provided for by these rules." The Notice of Intention to File a Claim is a document exclusive to the procedural requirements of the Court of Claims Act and not provided for in the Michigan Court Rules. The Court of Claims only enables the Michigan Court Rules to apply in the instance of pleadings, and therefore, does not apply to notices. MCL 600.6434. Further MCR 2.114's section on "Verification" states that "[e]xcept when otherwise specifically provided by rule or statute, a document need not be verified or accompanied by an affidavit." Not only do we have a statute here, MCL 600.6431, that specifically provides that the document must be verified, we also have instruction on how it must be verified. The requirement for verification under MCL 600.6431 is clearly different than that in MCR 2.114(B). MCR 2.114 gives the choice of verification by oath or declaration and does not require an officer authorized to administer oaths to be involved. The "[e]xcept when otherwise specifically provided by rule or statute" language in MCR 2.114(B)(1) demonstrates that MCR 2.114 is to be followed in the absence of a statute on point. To follow MCR 2.114 in this case would make the language "before an officer authorized to administer oaths" nugatory which works against the goal of statutory interpretation to give effect to every word in the statute. See *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 53; 760 NW2d 811 (2008) ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute.")

"[V]erification is a certification of truth." *Jackson v City of Detroit Bd of Ed*, 18 Mich App 73, 80; 170 NW2d 489 (1969). It is also defined as "[a] formal declaration made in the presence of an authorized officer, such as a notary public, . . . whereby one swears to the truth of the statements in the document." *Black's Law Dictionary* (9th ed.)[4] Here, plaintiff's signature would suffice when under the declaration: "I declare that the statements above are true to the best of my information, knowledge, and belief" if verification alone and nothing more were required; however, MCL 600.6431 does require more. Effective verification under MCL 600.6431 is plaintiff certifying the truth of the document and doing so under oath. The statute implies that the claimant must also take an oath because of the requirement that her verification occur before an officer authorized to administer oaths. An oath is "an external pledge or asseveration made in verification of statements made, or to be made, coupled with an appeal to a sacred or venerated object, in evidence of the serious and reverent state of mind of the party, or with an invocation to a supreme being to witness the words of the party, and to visit him with punishment if they be

[4] "Undefined words are to be given meaning as understood in common language, considering the text and the subject matter in which they are used." *People v Lanzo Const Co*, 272 Mich App 470, 473–474; 726 NW2d 746 (2006).

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false." *June v School Dist No 11, Southfield Tp*, 283 Mich 533, 537; 278 NW 676 (1938) (citation omitted).

Plaintiff's attorney submitted his own affidavit to this Court and argues that the affidavit cures the defect of failing to have a jurat or its equivalent on the face of the notice. We note that plaintiff's affidavit was executed some five years after the incident which gave rise to plaintiff's claim. Defendant does not contest that the attorney was in fact a notary at the time the plaintiff signed the notice. The defendant also does not contest that the plaintiff averred that the facts in the affidavit were true. The affidavit indicates that the plaintiff's attorney inquired as to the truthfulness of matters in the notice. The statute does not prescribe the kind of inquiry that must be made nor does any language in the statute require that evidence of the oath or affirmance be on the face of the notice.

Most importantly any error here was procedural not substantive. In *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208; 840 NW2d 730 (2013) the following was held with regard to statutory notice provisions in medical malpractice actions:

> It has essentially always been the rule in Michigan that defendants must "apprise the plaintiff of the nature of the defense relied upon, so that he might be prepared to meet, and to avoid surprise on the trial." Today, pursuant to MCR 2.111(F), a defendant waives any affirmative defenses not set forth in the defendant's first responsive pleading. An affirmative defense presumes liability and accepts a plaintiff's prima facie case, but asserts that the defendant is not liable for other reasons not set forth in the plaintiff's pleadings. We hold that failure to comply with purely procedural prerequisites for commencing a medical malpractice action is therefore an affirmative defense that must be raised or waived pursuant to MCR 2.111(F). [*Id*. at 212-213 (citations omitted).]

As in *Tyra*, the instant case involves plaintiff's failure to comply with purely procedural prerequisites for commencing a cause of action. Therefore, we conclude that defendant was required to raise the defense of non-compliance with the statutory notice provision as an affirmative defense and because it failed to do so, the defense is waived.

Reversed and remanded for further proceedings consistent with this opinion.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Cynthia Diane Stephens

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STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY HAWTHORNE-BURDINE, Plaintiff-Appellant, v OAKLAND UNIVERSITY, Defendant-Appellee.	UNPUBLISHED April 17, 2018 No. 338605 Court of Claims LC No. 17-000048-MZ

DOROTHY HAWTHORNE-BURDINE, Plaintiff-Appellant, v OAKLAND UNIVERSITY, Defendant-Appellee.	No. 339188 Court of Claims LC No. 17-000010-MZ

Before: SERVITTO, P.J., and MARKEY and O'CONNELL, JJ.

PER CURIAM.

In these consolidated[1] appeals, plaintiff appeals as of right two orders of the Court of Claims granting summary disposition in favor of defendant, plaintiff's former employer. In Docket No. 338605, the Court of Claims granted defendant summary disposition under MCR 2.116(C)(7) on the ground of governmental immunity in plaintiff's action alleging libel and related claims arising from an article written by freelance journalist Eric Freedman[2] summarizing

[1] *Hawthorne-Burdine v Oakland Univ*, unpublished order of the Court of Appeals, entered August 7, 2017 (Docket Nos. 338605 and 339188).

[2] Plaintiff brought a separate action raising similar claims against Freedman, who is not a party to either of these consolidated appeals.

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the dismissal of plaintiff's lawsuit against defendant in federal court. In Docket No. 339188, the Court of Claims granted defendant summary disposition under MCR 2.116(C)(7) in plaintiff's employment discrimination action on the ground that plaintiff failed to comply with MCL 600.6431, the notice provision of the Court of Claims Act, MCL 600.6401 *et seq*. We affirm in both appeals.

I. BACKGROUND FACTS

Plaintiff was an associate professor of nursing for defendant. Plaintiff alleges that, during the 2013-2014 school years, the last of her four-year contract with defendant, defendant ordered that she be removed from campus and that she undergo independent medical examinations.[3] Defendant's "Behavioral Concerns Committee" had apparently determined that plaintiff posed a "safety threat" on the basis of an audio recording of her made by one of her students. Defendant terminated plaintiff's employment effective August 2014, the date that her employment contract expired. In September 2015, plaintiff brought suit against defendant and others in federal district court, raising various discrimination claims. In January 2016, the federal court dismissed all of plaintiff's claims.[4] In February 2016, Freedman published an article summarizing the federal court's decision. The article, "Judge Sides with Oakland University in Bias Suit," appeared on two websites. Freedman stated in an affidavit that this "short case summary" was based solely on the federal court's decision.

II. PROCEDURAL HISTORY

In Docket No. 339188, in January 2017, plaintiff filed a complaint in Oakland Circuit Court against defendant, alleging numerous violations of the Civil Rights Act (CRA), MCL 37.2101 *et seq*., and the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*. The case was transferred to the Court of Claims, where defendant moved for summary disposition on the ground that plaintiff failed to file a written claim or notice of intent to file a claim with the Court of Claims clerk within one year after her claims accrued, as required by MCL 600.6431(1). The Court of Claims agreed and granted summary disposition on that basis. Rejecting plaintiff's assertion that, given the nature of her claims, MCL 600.6431 should not apply, the court concluded that MCL 600.6431 applies regardless of the type of claim being brought.

In Docket No. 338605, in March 2017, plaintiff filed a complaint against defendant in the Court of Claims alleging libel, false light invasion of privacy, and intentional infliction of emotional distress. The basis of these claims was plaintiff's assertion that defendant had contributed false information to Freedman for use in his article. Defendant asserted that it had

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[3] Because the Court of Claims in both cases granted summary disposition under MCR 2.116(C)(7), we will accept plaintiff's well-pleaded allegations as true for purposes of this appeal, except as contradicted by the evidence. *Pierce v Lansing*, 265 Mich App 174, 177; 694 NW2d 65 (2005).

[4] *Hawthorne-Burdine v Oakland Univ*, 158 F Supp 3d 586 (ED Mich, 2016).

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no involvement in Freedman's article and sought summary disposition of plaintiff's tort claims on governmental immunity grounds. In response, plaintiff maintained that her compliance with the Court of Claims notice provision effectuated a waiver of governmental immunity. Plaintiff also disputed Freedman's assertion that his article derived solely from the federal court's opinion. The Court of Claims granted defendant summary disposition on the basis of governmental immunity. The court, noting that the alleged torts arose from defendant's conduct in the federal court proceedings, concluded that the allegedly tortious acts arose out of defendant's exercise of a governmental function, i.e., the general activity of "being sued." The court rejected plaintiff's assertion that compliance with the notice provision in MCL 600.6431 constitutes a waiver of governmental immunity; rather, the court observed, the notice provision establishes "a condition precedent for avoiding governmental immunity, but it neither confers nor displaces governmental immunity."

III. ANALYSIS

We review de novo a grant of summary disposition. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 142; 683 NW2d 745 (2004). When reviewing a motion for summary disposition under MCR 2.116(C)(7), "[a]ll well-pleaded allegations are viewed in the light most favorable to the nonmoving party unless documentary evidence is provided that contradicts them." *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 309; 901 NW2d 577 (2017). "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide." *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008). "But when a relevant factual dispute does exist, summary disposition is not appropriate." *Moraccini v Sterling Heights*, 296 Mich App 387, 391; 822 NW2d 799 (2012).

We also review de novo, as a matter of statutory interpretation, whether plaintiff provided sufficient notice of her claims under MCL 600.6431. See *McCahan v Brennan*, 492 Mich 730, 735-736; 822 NW2d 747 (2012). Likewise, "[t]he applicability of governmental immunity is a question of law that is reviewed de novo." *Ray v Swager*, 501 Mich 52, 61; 903 NW2d 366 (2017).

The foundational principles of statutory interpretation are well established:

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent. [*Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013) (citations omitted).]

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In Docket No. 339188, plaintiff argues that the Court of Claims erred in granting defendant summary disposition for her failure to file a notice of her claim pursuant to MCL 600.6431. We disagree.

Under the Court of Claims Act, Chapter 64 of the Revised Judicature Act (RJA), MCL 600.6401 *et seq.*, the Court of Claims generally has exclusive jurisdiction "[t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers . . . ." MCL 600.6419(1)(a). MCL 600.6431 sets forth "conditions precedent to pursuing a claim against the state." *Fairley v Dep't of Corrections*, 497 Mich 290, 292; 871 NW2d 129 (2015). "One such condition on the right to sue the state is the notice provision," *McCahan*, 492 Mich at 736, which provides, in relevant part:

> No claim may be maintained against the state unless the claimant, within 1 year after such 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 the state or any of its departments, commissions, boards, institutions,[5] arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths. [MCL 600.6431(1).]

"[A] claimant's failure to comply strictly with this notice provision warrants dismissal of the claim, even if no prejudice resulted." *Rusha v Dep't of Corrections*, 307 Mich App 300, 307; 859 NW2d 735 (2014), citing *McCahan*, 492 Mich at 746-747.

Plaintiff does not dispute that she failed to comply with MCL 600.6431(1).[6] Rather, she asserts that MCL 600.6431(1) should not be applied to civil rights violations. However, the Legislature clearly intended for MCL 600.6431(1) to apply regardless of the type of claim being brought. MCL 600.6419(1)(a) makes no distinction among types of claims subject to the jurisdiction of the Court of Claims; rather, it grants the Court of Claims jurisdiction to "[t]o hear and determine *any* claim . . . against the state or any of its departments . . . ." (Emphasis added.) Nor does MCL 600.6431(1) distinguish between claims that are subject to its notice requirements, providing broadly that "[*n*]*o claim* may be maintained against the state unless" the claimant complies with the provision. (Emphasis added.) Therefore, according to its unambiguous language, MCL 600.6431(1) applies to plaintiff's discrimination claims. See also *Rusha*, 307 Mich App at 307-313 (applying the notice requirement in MCL 600.6431(3) to the plaintiff's claim of cruel or unusual punishment under the Michigan Constitution, and noting that

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[5] Defendant is "a state institution." MCL 390.151.

[6] Nor does plaintiff dispute that her employment discrimination claims accrued, at the latest, when she was terminated from her position in August 2014. Therefore, her January 2017 complaint was untimely under MCL 600.6431(1).

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the notice-of-claim requirement was "only a minimal procedural burden" that "in no way abrogate[d] the substantive constitutional protection" that the plaintiff asserted).

Contrary to plaintiff's assertion otherwise, the Supremacy Clause of the United States Constitution does not bar application of MCL 600.6431(1) to plaintiff's claims. "The Supremacy Clause of the United States Constitution, US Const, art VI, cl 2, 'invalidates state laws that interfere with, or are contrary to, federal law.' " *Neal v Detroit Receiving Hosp*, 319 Mich App 557, 567; 903 NW2d 832 (2017) (citation omitted). In *Felder v Casey*, 487 US 131, 134, 141, 150-153; 108 S Ct 2302; 101 L Ed 2d 123 (1988), the United States Supreme Court, applying the Supremacy Clause, determined that a Wisconsin statute requiring notice to a state or local governmental entity or officer before bringing suit was inapplicable to "federal civil rights actions brought in state court under 42 USC 1983,"[7] in part because the burden imposed by the notice requirement was "inconsistent in both design and effect with the compensatory aims of the federal civil rights laws." The Court concluded that "[p]rinciples of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the *federal* right when that right is asserted in state court." *Felder*, 487 US at 153 (emphasis added).

There is no basis for application of the Supremacy Clause or *Felder* to this case, because plaintiff has raised only state-law claims. Plaintiff notes the analogous association between the federal Civil Rights Act and Michigan's CRA. See *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). There is simply no basis, however, for the suggestion that MCL 600.6431 is preempted when plaintiff is not bringing a claim under federal law. As the *Felder* Court acknowledged, "[n]o one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts." *Felder*, 487 US at 138.[8] Accordingly, the Court of Claims correctly granted defendant summary disposition in Docket No. 339188.

Next, in Docket No. 338605, plaintiff argues that the Court of Claims erred in ruling that defendant was entitled to governmental immunity. We disagree.

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[7] 42 USC 1983 "provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes." *York v Detroit (After Remand)*, 438 Mich 744, 757-758; 475 NW2d 346 (1991).

[8] Plaintiff cites cases from other jurisdictions holding that various state notice-of-claim statutes are inapplicable in certain contexts. We have reviewed these cases and have concluded that they are inapposite. See, e.g., *Brennan v Norton*, 350 F 3d 399, 431-432 (CA 3, 2003) (determining, based on prior state decisions, that the 90-day notice requirement in New Jersey's Tort Claims Act (TCA), NJ Stat Ann 59:8-3, did not apply to claims brought against a public entity under a state whistleblower statute, because the statutes governed different subject matters); *Tannenbaum v City of New York*, 30 App Div 3d 357, 358; 819 NYS2d 4 (2006), abrogated in part on other grounds by *Kapon v Koch*, 23 NY3d 32; 11 NE3d 709 (2014) (holding that a state statute requiring notice in tort and negligence actions did not apply to *federal* civil rights claims).

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Under the government tort liability act (GTLA), MCL 691.1401 *et seq*., "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1).[9] "Governmental function" is defined, in relevant part, as "activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b). "[T]his definition is to be broadly applied and requires only that there be *some* constitutional, statutory or other legal basis for the activity in which the governmental agency was engaged." *Harris v Univ of Mich Bd of Regents*, 219 Mich App 679, 684; 558 NW2d 225 (1996) (quotation marks and citation omitted). "Conversely, governmental agencies are not entitled to immunity under the act for injuries arising out of ultra vires activity, defined as activity *not* expressly or impliedly mandated or authorized by law." *Richardson v Jackson Co*, 432 Mich 377, 381; 443 NW2d 105 (1989). "To determine whether a governmental agency is engaged in a governmental function, the focus must be on the general activity, not the specific conduct involved at the time of the tort." *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995). "The GTLA does not contain an 'intentional tort exception to governmental immunity' from tort liability." *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 328; 869 NW2d 635 (2015) (citation omitted).

Again, plaintiff's tort claims were based on the allegation that defendant provided false information to Freedman. The Court of Claims implicitly ruled that any information that defendant provided Freedman would have occurred through defendant's filings in the federal court proceedings.[10] Defendant undoubtedly has statutory authority to defend itself in litigation, see MCL 390.151, and was therefore engaged in the exercise of a governmental function when the allegedly tortious acts occurred. *Harris*, 219 Mich App at 684; MCL 691.1401(b). Further, "ultra vires activity is not activity that a governmental agency performs in an unauthorized manner. Instead, it is activity that the governmental agency lacks legal authority to perform in any manner." *Richardson*, 432 Mich at 387. Regardless if defendant submitted evidence or documents to the federal court in an unauthorized or improper manner, as plaintiff suggests, it had general authority to defend itself in the litigation. In sum, focusing on defendant's general activity of defending its lawsuit, *Pardon*, 213 Mich App at 649, it was engaged in a governmental function authorized by law when it provided information to the federal court.

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[9] "Governmental agency" is defined as "this state or a political subdivision." MCL 691.1401(a). "State includes a public university or college of this state, whether established as a constitutional corporation or otherwise." MCL 691.1401(g).

[10] To the extent that plaintiff may be understood to suggest that defendant contributed libelous information directly to Freedman and was not engaged in the exercise of a governmental function when it did so, she has abandoned any such claim by failing to provide "a meaningful argument in support of [her] position." *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). In any event, plaintiff has failed to identify an issue of fact with respect to this allegation. All of the information in the published statement at issue plainly traces back to the federal court's opinion. Because there is not a factual dispute as to whether Freedman contacted defendant in writing his article, summary disposition under MCR 2.116(C)(7) was appropriate. *RDM Holdings,* 281 Mich App at 687.

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Accordingly, defendant is entitled to governmental immunity for its conduct during the federal court proceedings. MCL 691.1407(1).

Finally, plaintiff argues that her compliance with MCL 600.6431(1) with respect to her tort claims effectively "waived" defendant's entitlement to governmental immunity. Plaintiff does not provide any authority supporting this position. See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Further, "[o]n appeal, in order for the appellant to receive relief, [she] has the burden to demonstrate that the lower court erred as governed by the relevant standard of review." *Menard, Inc v Escanaba*, 315 Mich App 512, 521 n 3; 891 NW2d 1 (2016). Nor does plaintiff address the basis of the Court of Claims' ruling on this issue. See *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997). Plaintiff has therefore abandoned this issue and is not entitled to appellate relief.

In any event, it is clear that the Legislature did not intend compliance with the Court of Claims Act to effectuate a waiver of governmental immunity. "[T]he GTLA's broad grant of immunity, MCL 691.1407(1), . . . grants immunity to governmental entities from 'tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function,' " with six exceptions as set forth elsewhere in the GTLA. *Hannay v Dep't of Transp*, 497 Mich 45, 60 n 34, 61; 860 NW2d 67 (2014). "[G]overnmental immunity is not an affirmative defense, but is instead a characteristic of government," and "[i]t is the responsibility of the party seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions [to governmental immunity]." *Fairley*, 497 Mich at 298 (quotation marks and citation omitted; third alteration in original).

"[B]ecause the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed." *McCahan*, 492 Mich at 736 (citation omitted). The GTLA expressly provides that "[c]laims against the state authorized under this act shall be brought in the manner provided in" the Court of Claims Act. MCL 691.1410(1). "In accordance with MCL 691.1410(1), a claim satisfying an exception to governmental immunity against a state agency must be 'brought in the manner provided in [the Revised Judicature Act],' including MCL 600.6431." *Fairley*, 497 Mich at 297 (alteration in original). "MCL 600.6431 sets forth several requirements that must be met in order to bring suit against a governmental entity in derogation of governmental immunity." *McCahan*, 492 Mich at 737. "[W]hile MCL 600.6431 does not 'confer governmental immunity,' it establishes conditions precedent for *avoiding the governmental immunity conferred by the GTLA*, which expressly incorporates MCL 600.6431," and a plaintiff therefore "must adhere to the *conditions precedent* in MCL 600.6431(1) to successfully expose [a governmental agency] to liability." *Fairley*, 497 Mich at 297-298 (citations omitted and emphasis added).

Critically, the GTLA provides that "[e]xcept as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed." MCL 691.1407(1). Further, the GLTA provides that "[c]laims against the state *authorized under this act* shall be brought in the manner provided in" the Court of Claims Act. MCL 691.1410(1) (emphasis added). Simply put, it is the GTLA that authorizes certain claims against the state, and there is no support for plaintiff's bald assertion that compliance with the Court of Claims notice provision somehow waives the "broad grant of immunity" from tort liability that the GTLA confers upon a governmental entity engaged in the

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exercise or discharge of a governmental function. *Hannay*, 497 Mich at 61; see also *Manion v State Highway Comm'r*, 303 Mich 1, 19; 5 NW2d 527 (1942) (explaining the "distinction between sovereign immunity from suit and sovereign immunity from liability"). Accordingly, the Court of Claims correctly ruled that compliance with MCL 600.6431 does not effectuate a waiver or displacement of governmental immunity.

Affirmed.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Peter D. O'Connell

APPELLANT'S MOAA APPENDIX
STECKLOFF v. WAYNE STATE UNIV.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMANTHA STECKLOFF,

Plaintiff,

v.

WAYNE STATE UNIVERSITY,

Defendant.
_____/

Case No. 18-13230

SENIOR U.S. DISTRICT JUDGE
ARTHUR J. TARNOW

U.S. MAGISTRATE JUDGE
R. STEVEN WHALEN

ORDER DENYING DEFENDANT'S MOTION FOR PARTIAL DISMISSAL [6]

Before the Court is Defendant Wayne State University's Motion for Partial Dismissal Pursuant to Fed. R. Civ. P. 12(c) [6] filed on November 13, 2018. The Motion is fully briefed. The Court held a hearing on the Motion on June 10, 2019.

For the reasons explained below, the Court **DENIES** Defendant's Motion for Partial Dismissal [6].

FACTUAL AND PROCEDURAL BACKGROUND

On August 1, 2011, Defendant Wayne State University ("WSU") hired Plaintiff Samantha Steckloff as a Student Service Center Specialist. In September 2013, WSU promoted Steckloff to Enrollment Management Coordinator.

On June 9, 2015, Steckloff was diagnosed with breast cancer for which she underwent a double mastectomy. WSU authorized Steckloff to take a period of leave in

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accordance with the Family and Medical Leave Act ("FMLA"). She returned to work on August 20, 2015.

On September 1, 2015, Steckloff asked her supervisor at the time, LaJoyce Brown, for approval to occasionally work from home while she received chemotherapy treatments. Brown denied her request.

In early February 2016, Steckloff had a second surgery which required her to take some time off. On February 22, 2016, she returned to work under the supervision of the Director of Undergraduate Admissions, Erica Jackson. She asked Jackson about the possibility of working from home when she felt sick from chemotherapy, but, like Brown, Jackson denied her request. Although she was denied approval to work from home, Steckloff continued to receive intermittent FMLA leave for the remainder of the calendar year.

Given the frequency of Steckloff's absences, WSU notified her that she would need to use her sick-bank hours, which were unpaid, before should could use her paid vacation hours. In effect, this would reduce Steckloff's salary by the number of sick bank hours she used to cover her absences. In February 2017, Steckloff started to feel the consequences of this policy when she began to receive a significant pay-cut.

In June 2017, Steckloff again asked Jackson if she could work from home when she felt ill. Both Jackson and an HR representative told Steckloff that she was ineligible. This prompted her to file a complaint with the Equal Employment Opportunity Commission ("EEOC") on June 29, 2017.

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In late August 2017, Steckloff was admitted to the hospital for two weeks. She returned to work on September 15, 2017. On October 4, 2017, she was fired for excessive absenteeism.

On October 2, 2018, Steckloff, through counsel, commenced this action in Wayne County Circuit Court. On October 18, 2018, WSU removed the action to this Court. She alleges a claim under § 504 of the Rehabilitation Act (Count I) and state law claims for disparate treatment, retaliation, and failure to accommodate under the Persons with Disabilities Civil Rights Act ("PWDCRA") (Counts II-IV).

On November 13, 2018, WSU filed this Motion for Partial Dismissal [6] pursuant to Fed. R. Civ. P. 12(c). Steckloff filed a Response [9] on December 4, 2018. WSU filed a Reply [10] on December 17, 2018. On June 10, 2018, the Court held a hearing on the Motion.

ANALYSIS

Defendant moves to dismiss Plaintiff's state law claims on the ground that she failed to comply with M.C.L. § 600.6431(1) which requires that a claimant file a notice of intent with the Court of Claims prior to filing suit against the State.

Section 600. 6431(1) provides:

> No claim may be maintained against the state unless the claimant, within 1 year after such 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 the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained . . . .

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It is undisputed Plaintiff filed neither a verified complaint nor a notice of intent to file a claim with the office of the clerk of the Court of Claims. It is also undisputed that WSU may be considered an arm of the state for purposes of this Section.

Defendant argues that Plaintiff's failure to comply with the notice provision set forth in § 600.6431(1) is fatal to her state law claims. Defendant relies on *Hawthorne-Burdine v. Oakland Univ.*, No. 338605, 2018 WL 1832336, at *1 (Mich. Ct. App. Apr. 17, 2018), *appeal denied,* 503 Mich. 888, 919 N.W.2d 74 (2018), in which the Court of Appeals affirmed the dismissal of a plaintiff's PWDCRA claims pursuant to § 600.6431(1).

In *Hawthorne-Burdine*, the plaintiff filed a complaint in the Oakland County Circuit Court alleging violations under the PWDCRA. *Id.* The complaint was transferred to the Court of Claims where Oakland University moved for dismissal based on plaintiff's failure to file a notice of intent. *Id.* The plaintiff conceded that she failed to comply with § 600.6431 but argued that the statute should not apply to civil rights violations under the PWDCRA. *Id.* at *3.

In an unpublished opinion, the Court of Appeals rejected the plaintiff's argument, noting that § 600.6431(1) does not "distinguish between claims that are subject to its notice requirements, [and] provides broadly that '[*n*]*o claim* may be maintained against the state unless' the claimant complies with the provision." *Id.* at *3.

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In Defendant's view, *Hawthorne-Burdine* stands for the proposition that a claimant may not sue an arm of the State in any court in Michigan, including federal district and state circuit courts, where she has failed to comply with § 600.6431(1).

Defendant's position overlooks the critical fact that *Hawthorne-Burdine* was litigated in the Court of Claims, where the Court of Claims Act, and § 600.6431(1) therein, are applicable. This case, on the other hand, which was originally filed in the Wayne County Circuit Court, does not involve the Court of Claims. Defendant even concedes that this action could not have been brought in the Court of Claims. As Plaintiff appropriately noted at the hearing, the instant case has never been, and never will be, litigated in the Court of Claims.

Plaintiff argues that *Doe v. Dep't of Transp.*, 324 Mich. App. 226, 238, 919 N.W.2d 670, 677, *appeal denied,* 503 Mich. 876, 917 N.W.2d 637 (2018) is more persuasive than *Hawthorne-Burdine*. In *Doe*, the plaintiff filed an Elliot-Larsen Civil Rights Act ("ELCRA") claim in the Ingham County Circuit Court. *Id.* at 228. Thereafter, the Department of Transportation ("DOT") filed a notice of transfer to the Court of Claims claiming the Court had exclusive jurisdiction. *Id.*

After transferring the case to the Court of Claims, the DOT moved for dismissal, in part, based on the plaintiff's failure to comply with § 600.6431(1). *Id.* The plaintiff moved for transfer back to the Circuit Court. *Id.* at 229. The Court of Claims granted the plaintiff's motion to transfer the case back to the Circuit Court. *Id.*

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On appeal, the DOT argued that the Court of Claims had exclusive jurisdiction over the action and therefore erred by transferring the case back to the Circuit Court. *Id.* The Court of Appeals, in a published opinion, rejected this argument finding that the Court of Claims had concurrent jurisdiction with the Circuit Court. *Id.* at 238. The Court declined to rule on the issue of whether the plaintiff was required to comply with the notice requirement in § 600.6431(1). *Id.* at 239 fn.4. ("Because the Court of Claims properly transferred the case back to the circuit court, defendant's argument that plaintiff did not follow the procedures necessary to proceed in the Court of Claims is moot and this Court need not address it.").

Because she did not file her complaint in the Court of Claims, but rather in a circuit court with concurrent jurisdiction, Plaintiff contends that she is not subject to the procedures set forth in § 600.6431(1).

Neither *Doe* nor *Hawthorne-Burdine* is directly on point. The issue of whether § 600.6431(1) applies to cases litigated outside of the Court of Claims appears to be a matter of first impression in this District.

The fact that nearly every case which cites to § 600.6431(1) has been litigated in the Court of Claims undercuts Defendant's argument for its broad-sweeping application. Defendant improperly construes § 600.6431(1) in a vacuum. Section 600.6431 is a specific provision within the Court of Claims Act set forth in Chapter 64 of the Revised Judicature Act of 1961. The Court need only its common sense to deduce that the *Court of Claims Act* sets forth the applicable procedures for cases litigated in

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the *Court of Claims*, not in every other court across the state of Michigan. *See Ranch Rheaume, LLC v. Dep't of Agric.*, No. 317631, 2015 WL 1227566, at *2 (Mich. Ct. App. Mar. 17, 2015) ("All suits brought before the Court of Claims are subject to the procedural rules specified in the broader Court of Claims Act[.]").

Plaintiff's failure to comply with § 600.6431(1) of the Michigan Court of Claims Act does not prohibit her from filing suit against an arm of the State in this Court.

Accordingly,

IT IS ORDERED that Defendant's Motion for Partial Dismissal [6] is **DENIED**.

SO ORDERED.

s/Arthur J. Tarnow
Arthur J. Tarnow
Senior United States District Judge

Dated: July 8, 2019

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

MOHAMED EL-SAYED,

Plaintiff,

Case No. 18-608-CD

Hon. Carol Kuhnke

v.

EASTERN MICHIGAN UNIVERSITY, DAVID WOIKE, an individual, MOHAMAD QATU, an individual

Defendant.

Nicholas Roumel (P37056)
Joseph X. Michaels (P79084)
Adam M. Taub (P78334)
NACHTLAW, P.C.
Attorney for Plaintiff
101 N. Main Street, Ste. 555
Ann Arbor, MI 48104
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ataub@nachtlaw.com

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Clerk/Register

There is no other pending or resolved civil action arising out of this transaction or occurrence alleged in the Complaint.

COMPLAINT AND JURY DEMAND

Plaintiff, Mohamed El-Sayed, alleges as follows:

INTRODUCTION

1. Plaintiff Mohammed El-Sayed is an accomplished and dedicated professor of engineering employed at Eastern Michigan University ("EMU") in Ypsilanti. In early 2018, while Plaintiff served as Director of the School of Engineering Technology, Plaintiff repeatedly and

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strenuously voiced his opposition to financial irregularities and discriminatory treatment by his supervisor, Defendant Mohamad Qatu.

2. When Plaintiff complained to Defendant Woike, one of the highest-ranking officers at EMU, Defendant Woike erroneously told Plaintiff that he had no right to report his concerns anywhere besides Defendant Woike's office. When Plaintiff persisted in his complaints by informing the U.S. Department of Labor and the EMU President about his concerns, Defendants Woike and Qatu immediately stripped Plaintiff of his Director title without explanation, causing Plaintiff significant damages. Defendant Woike then attempted to force Plaintiff to sign an illegal and invalid release that held Defendant Woike and the University harmless for their prior illegal actions. When Plaintiff opposed this additional illegal behavior, Defendant Woike again retaliated against Plaintiff by refusing to pay Plaintiff for the Summer 2018 term. The real reason for Defendants' actions was Plaintiff's exercise of his right to oppose unlawful discrimination and what he reasonably believed to be illegal financial practices.

3. Plaintiff brings this action pursuant to the Whistleblower's Protection Act ("WPA"), MCL § 15.362 *et seq.* and Michigan's Elliot-Larsen Civil Rights Act ("ELCRA"), MCL § 37.210 *et seq.*, to remedy unlawful retaliation perpetrated by Defendants.

PARTIES AND JURISDICTION

4. Plaintiff, Mohamed El-Sayed, is an individual residing in the City of Bloomfield Hills, Michigan in Oakland County.

5. Defendant Eastern Michigan University ("EMU") is a public university in Ypsilanti, Michigan, Washtenaw County, organized and operated under the laws of the State of Michigan.

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6. Defendant David Woike is an individual who, upon information and belief, resides and/or works in Washtenaw County.

7. Defendant Mohamad Qatu is an individual who, upon information and belief, resides and/or works in Washtenaw County.

8. Jurisdiction is proper pursuant to this Court's general jurisdiction contained in MCL § 600.605.

9. Venue is proper in this Court for Plaintiff's ELCRA claim under MCL § 37.2801 as this is the circuit court for the county in which the violation occurred.

10. Venue is proper in this Court for Plaintiff's WPA claim under MCL § 15.262 as this is the circuit court for the county in which the violation occurred.

11. This action against an instrumentality of the State is properly brought in this Court pursuant to MCL § 600.6421(1) as Plaintiff has a right to a trial by jury for all claims in this action and Plaintiff does not seek equitable relief.

12. In accordance with MCL § 6431(1), on June 1, 2018, Plaintiff filed a written Notice of Intent with the Michigan Court of Claims stating the time and place where Plaintiff's claims arose and setting forth the nature of the Plaintiffs claims and of the items of damage alleged.

13. Defendant EMU, its instrumentalities and agents, are not immune from liability in this action brought pursuant to the Whistleblower's Protection Act ("WPA"), MCL § 15.362 *et seq.* and the Elliot-Larsen Civil Rights Act ("ELCRA"), MCL § 37.210 *et seq.* as both statutes waive sovereign immunity.

FACTUAL ALLEGATIONS

A. EMU Appoints Plaintiff as Director of the School of Engineering Technology.

14. Plaintiff is an employee of Defendant Eastern Michigan University ("EMU").

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15. Prior to coming to EMU, Plaintiff served as a distinguished tenured professor at Kettering University in Flint, teaching mechanical engineering.

16. On March 31, 2017, EMU appointed Plaintiff Director of EMU's School of Engineering Technology. Plaintiff began working in this capacity on July 1, 2017.

17. As Director of the School of Engineering Technology, Plaintiff's job duties included, among other things, resolving classroom and workplace issues, scheduling of classes, curriculum design, managing his department's budget, and participation in decisions regarding hiring, promotions and tenure.

18. At all times during his employment as Director of the School of Engineering Technology, Plaintiff performed his job diligently and competently and was well-qualified for his position.

19. In February 2018, the faculty of the School of Engineering Technology unanimously supported Plaintiff in a vote of confidence.

20. While he served as Director of the School of Engineering Technology, Plaintiff reported to Defendant Mohammed Qatu, the Dean of the College of Technology.

B. Plaintiff Observes Potentially Discriminatory Practices and Financial Activity He Reasonably Believed to be Illegal and Reports to State and Federal Officials.

21. In the course of his duties, Plaintiff discovered a number of activities undertaken by Defendant Qatu and Interim Associate Dean Mary Brake that Plaintiff reasonably believed to be unlawful.

22. Plaintiff observed potential discrimination and harassment by Defendant Qatu with faculty members, including disparate treatment and favoritism.

23. Plaintiff reasonably believed that these actions constituted unlawful discrimination in violation of ELCRA.

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24. Plaintiff also observed that during a Mechanical Engineering Technology ("MET") faculty candidate search Defendant Qatu and Dean Brake were circumventing established faculty-search procedures designed to prevent discrimination in faculty hiring decisions.

25. Dean Brake who was not even on the faculty search committee—viewed a list of candidate names and decided that 13 or 14 of them should be excluded.

26. Plaintiff did not know why Dean Brake believed these individuals should be excluded and worried that it was the result of discrimination.

27. Dean Brake also discussed candidates with individuals who were not in the search committee, in violation of EMU policy.

28. Plaintiff reasonably believed that these activities constituted unlawful discrimination in violation of ELCRA.

29. When confronted with this information, Defendant Qatu stated: "I have delegated my authority to [Dr. Brake]" and "I can hire whoever I want."

30. Plaintiff also observed a number of concerning financial transactions made by Defendant Qatu. EMU funds were being paid without proper approval and without an indication of where the money was spent.

31. ***Among other things***, Plaintiff observed the following:

a. Dean Brake hired a close associate to create a marketing magazine at a cost of $20,000 during a time of budget cuts;

b. Defendant Qatu used EMU funds to renovate and furnish his office suite, and then immediately moved and renovated a second office; and

c. Dean Qatu used the school's Service, Supplies, and Materials (SS&M) account to pay the school secretary an honorarium of $700 with no explanation why she received this compensation.

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32. Even after his demotion, Plaintiff continued to receive financial reports indicating that Defendant Qatu and Dean Brake made multiple purchases on their secretary's EMU Purchasing Credit Card "P-Cards" without proper approval, including at Jimmy Johns, Grand Traverse Pie Company, Kroger, and Sam's Club.

33. Defendant Qatu and Dean Brake charged many of these items to the School of Engineering Technology, without Plaintiff's approval or consent as required under EMU policies.

34. Plaintiff reasonably believed that these actions could constitute a violation of state and federal laws and regulations, including ***but not limited to***, EMU's purchasing regulations, State of Michigan procurement and purchasing laws, and laws prohibiting embezzlement, corruption, public theft, and self-dealing such as MCL § 750.174, MCL § 15.321, *et seq.*, 18 U.S.C. § 201, 18 U.S.C. § 641, and 18 U.S.C. § 654.

C. Defendants Ignore Plaintiff's Complaints and Instruct Him Not to Report His Concerns to Anyone besides Defendant Woike.

35. When Plaintiff first raised his concerns regarding financial irregularity directly with Defendant Qatu, Defendant Qatu prevented Plaintiff from viewing his department's budget and suspended Plaintiff's EMU P-Card.

36. On February 1, 2018 Plaintiff met with Defendant David Woike, EMU's Assistant Vice President for Academic Affairs, to again raise his concerns regarding discriminatory treatment by Defendant Qatu and various budgetary irregularities as outlined above.

37. Defendant Woike took no action on any of Plaintiff's complaints.

38. On February 14, 2018, Plaintiff contacted Candice Hunter with EMU's Academic Human Resources about the unaddressed potential discrimination in the MET faculty search.

39. Ms. Hunter took no action to address Plaintiff's complaint.

40. The following day, February 15, 2018, Plaintiff emailed Ms. Hunter and stated:

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> . . . I did not hear from you about the MET search process violations that I reported to you. ***The more I read about the equal opportunity laws and the university guidelines, the more I feel uncomfortable. As the school director, I feel obligated to report the incident to the federal authorities.***
>
> (emphasis added).

41. Ms. Hunter forwarded Plaintiff's email to Defendant Woike, who responded to Plaintiff as follows:

> . . . My office manages the searches and any reporting of issues that might arise. ***You do not have the authority to report your concerns, except to my office.*** It is my responsibility to see that searches proceed appropriately, following both contractual and legal guidelines. . .
>
> (emphasis added).

42. Defendant Woike's statement is false. Under ELCRA, Plaintiff possesses the legal "authority" to report his concerns of discrimination to anyone—including state or federal authorities.

43. Four days later, on February 20, 2018, Defendants cut off the "banner access" of Plaintiff's administrative assistant, which prevented Plaintiff from performing necessary scheduling tasks.

44. On February 23, 2018, Defendant Qatu instructed staff to inform him when Plaintiff was not in the office.

45. On March 9, 2018, after receiving no response to any of his complaints, Plaintiff emailed Defendant Qatu, Defendant Woike, EMU Provost Rhonda Longworth, and EMU president James Smith.

46. In that email, Plaintiff again demanded that the potentially discriminatory practices be stopped and stated his intention to file an equal employment complaint regarding the MET search process. Plaintiff stated:

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> . . . Since I am hiring authority, being the School Director, ***it is my duty to protect EMU and report any violation including federal EEOC violations such as this***. . .
>
> (emphasis added).

47. Plaintiff also opposed Defendant Qatu's discriminatory treatment of faculty members, stating:

> . . . The second issue . . . is [Defendant Qatu's] continuous unfair treatment, targeting, discrimination, and violation of the faculty, staff, [and] director's rights. . .

48. Plaintiff also demanded an investigation into financial improprieties, stating:

> . . . The third issue, that must be investigated, is ***[Defendant Qatu's] office's dealings with the college finance and allocations and the movement of funds between accounts, some of which are restricted funds, which are addition [sic] violations***. I have examples. In addition, I have seen many favors given to those who are considered loyal to [Defendant Qatu] and in [Defendant Qatu's] close circle, not based on professional merit. ***I have repeatedly asked for more fair, equitable, and transparent financial dealings***. Yet your office has deprived me as director from looking into my school budget summary for many months, always blaming EMU system. . .
>
> (emphasis added).

49. EMU—including its representatives such as Defendant Woike, Defendant Qatu, Provost Longworth, and President Smith—is a "public body" of the State of Michigan as defined in the WPA. MCL § 15.362.

50. Defendant Qatu responded to Plaintiff's email and demanded Plaintiff meet with him regarding "your challenges performing your duties . . ."

51. On March 13, 2018, Plaintiff informed Defendant Qatu that he had filed a complaint with the U.S. Department of Labor, which he had submitted the previous day.

52. The U.S. Department of Labor is a federal "law enforcement agency" and thus a public body as defined in the WPA. MCL § 15.362.

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53. Defendant Woike responded to Plaintiff on March 13, 2018 and acknowledged that Plaintiff had raised concerns, including "discriminatory treatment on the part of [Defendant Qatu's] office," issues with the MET faculty search, and issues with the school's budget.

54. Defendant Woike told Plaintiff that "no action could be taken" on his complaints of discrimination at that time.

55. Defendant Woike also refused to act on Plaintiff's financial concerns. Defendant Woike stated:

> . . . [I]t is important for you to understand the role of the Dean's office in managing college and school budgets. The dean is ultimately responsible for monitoring expenditures, including P-card purchases, and verifying that all budget actions throughout the college and its subsidiary units adhere to all university policies, practices, and best procedures. . .

56. In that same email, Defendant Woike demanded that Plaintiff meet with him at 9 a.m. the following day to "discuss [Plaintiff's] status with the department."

D. EMU Demotes Plaintiff Because of his Complaints of Discrimination and Financial Impropriety.

57. On March 14, 2018, Plaintiff met with Defendant Woike, who presented Plaintiff with a letter signed by Defendant Qatu stating: "[t]he University is exercising its right to at-will your employment [sic] as director of the School of Engineering Technology, ***effective immediately***." (emphasis added).

58. Plaintiff ceased to perform any of the functions of Director as of March 14, 2018.

59. As a result of this demotion, Plaintiff returned to faculty as a tenured professor and will suffer a significant decrease in compensation for the remainder of his career.

60. Defendants never provided Plaintiff with a reason of any kind as to why they removed his Director title.

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61. Defendants' real motivation for demoting Plaintiff was retaliation for Plaintiff's complaints of discrimination and Plaintiff's reports of financial impropriety.

E. Defendant Woike Illegally Attempts to Force Plaintiff to Sign an Invalid Settlement Agreement and Retaliates Against Plaintiff When He Refuses to Do So

62. After March 14, 2018, Defendants placed Plaintiff on paid administrative leave.

63. On April 30, 2018, Defendant Woike emailed Plaintiff to discuss his "return to faculty in the School of Engineering Technology."

64. Plaintiff responded and arranged for a meeting on May 2, 2018.

65. During the meeting Defendant Woike presented Plaintiff with a document outlining the terms of Plaintiff's return to faculty, indicating that he would return to faculty "effective 01 May 2018" and would receive a salary during Summer 2018.

66. The document provided "with the execution of this agreement, you agree to release and hold the University and its employees harmless from any and all claims, damages, or liabilities of any kind associated with your return to faculty."

67. Defendant Woike attempted to require Plaintiff to sign and return the document by 2 p.m. the following day.

68. As Plaintiff is over 40 years of age, he is entitled to the protections of the Older Worker's Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626.

69. Accordingly, the release Defendant Woike ordered Plaintiff to sign violated federal law, and was invalid for potential claims under Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. ("ADEA") as it did not, *inter alia*, advise Plaintiff "in writing to consult with an attorney prior to executing the agreement," provide Plaintiff "a period of at least 21 days within which to consider the agreement," or provide Plaintiff "a period of at least 7 days following the

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execution of such agreement in which he could individual may revoke the agreement" 29 U.S.C. §§ 626(E), (F)(i), (G).

70. On May 3, 2018, Plaintiff, through counsel, contacted EMU's General Counsel and informed EMU that Defendant Woike's proposed agreement violated federal law.

71. EMU including its representatives such as its General Counsel is a "public body" of the State of Michigan as defined in the WPA. MCL § 15.362.

72. Following Plaintiff's complaint to EMU's General Counsel, Defendant Woike retaliated against Plaintiff by refusing to pay Plaintiff for the Summer 2018 term.

73. Defendant Woike stated: "[a]s a result of your return-to-faculty effective date of 01 May 2018, you will receive no pay during the summer . . ."

74. Defendant Woike's real motivation for refusing to pay Plaintiff was retaliation for Plaintiff's complaints of discrimination, Plaintiff's reports of financial impropriety, and Plaintiff's report of Defendant Woike's violation of the OWBPA to EMU's General Counsel.

CAUSES OF ACTION

COUNT I
WHISTLEBLOWER'S PROTECTION ACT
MCL § 15.362
(Against All Defendants)

75. At all relevant times, Defendant EMU was Plaintiff's employer covered by and within the meaning of the Whistleblower Protection Act, MCL 15.361(b).

76. At all relevant times, Defendants Qatu and Woike acted as agents of Defendant EMU, and were thus employers under MCL 15.261(b).

77. Plaintiff reasonably suspected Defendants of engaging in violations of the laws or regulations of the State of Michigan, a political subdivision thereof, or the United States.

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78. Plaintiff reported these suspected violations of laws to a public body as defined by MCL 15.631(d), including the U.S. Department of Labor, a federal law enforcement agency, and the President, General Counsel, Provost, and Assistant Vice President of Eastern Michigan University, a public body of the State of Michigan.

79. As a result of Plaintiff's protected conduct, Defendants unlawfully retaliated against Plaintiff in the terms and conditions of his employment by removing his Director title, decreasing his compensation, and refusing to pay Plaintiff for the Summer 2018 term.

80. Plaintiff's protected activity was a motivating factor in Defendants' actions.

81. As a direct and Proximate result of Defendants' wrongful acts, Plaintiff has sustained injuries and damages including but not limited to, loss of earnings and earning capacity; loss of career opportunities; loss of fringe and retirement benefits; mental anguish; physical and emotional distress; humiliation and embarrassment; loss of professional reputation.

COUNT II
ELLIOTT-LARSEN CIVIL RIGHTS ACT RETALIATION
MCL 37.2202(1)(a)
(Against All Defendants)

82. At all relevant times, Defendant EMU was Plaintiff's employer covered by and within the meaning of the Elliott-Larsen Civil Rights Act. MCL 37.2201(a).

83. At all relevant times, Defendants Qatu and Woike acted as agents of Defendant EMU, and were thus employers under MCL37.2201(a).

84. Plaintiff engaged in protected activity by, among other things, repeatedly complaining about and opposing discrimination by Dean Qatu and the MET search committee, filing a complaint opposing discrimination with the U.S. Department of Labor, and contacting EMU officials including President Smith to oppose discrimination.

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85. As a result of Plaintiff's protected conduct, Defendants unlawfully retaliated against Plaintiff in the terms and conditions of his employment by removing his Director title, decreasing his compensation, and refusing to pay Plaintiff for the Summer 2018 term.

86. Plaintiff's protected activity was a significant factor in Defendants' actions.

87. As a direct and proximate result of Defendants' wrongful acts, Plaintiff has sustained injuries and damages including but not limited to, loss of earnings and earning capacity; loss of career opportunities; loss of fringe and retirement benefits; mental anguish; physical and emotional distress; humiliation and embarrassment; loss of professional reputation.

RELIEF REQUESTED

WHEREFORE, Plaintiff Mohamad El-Sayed requests the following relief from this Court against Defendants Eastern Michigan University, David Woike, and, Mohamad Qatu:

A) A monetary judgment against Defendants in an amount that exceeds Twenty-Five Thousand ($25,000) Dollars, including compensatory damages for all lost wages and benefits, past and future, to which he is entitled, emotional distress damages, exemplary and punitive damages; and;

B) A judgment for costs and attorney fees in favor of the Plaintiff.

Respectfully Submitted,
NACHTLAW, P.C.

Joseph X. Michaels (P79084)
Attorney for Plaintiff
101 N. Main Street, Suite 555
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Dated: June 4, 2018

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

MOHAMED EL-SAYED,

Plaintiff,

Case No. 18-608-CD

Hon. **Carol Kuhnke**

v.

EASTERN MICHIGAN UNIVERSITY,

Defendant.

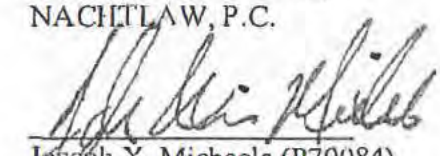
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DEMAND FOR TRIAL BY JURY

NOW COMES Plaintiff, Mohamed El-Sayed, by and through his attorneys, NachtLaw, P.C. and hereby demands for a jury trial in the above-captioned matter.

Respectfully Submitted,
NACHTLAW, P.C.



Joseph X. Michaels (P79084)
Attorney for Plaintiff
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Dated: June 4, 2018