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STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN CHRISTIE,

Plaintiff-Appellee

v.

Supreme Court No. 162706
COA Case No. 350321
Lower Court Case No. 19-004888-CD

WAYNE STATE UNIVERSITY,

Defendant-Appellant

_____/

PLAINTIFF-APPELLEE, SUSAN CHRISTIE'S CORRECTED SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT WAYNE STATE UNIVERSITY'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

RECEIVED by MSC 3/21/2022 6:24:14 PM

TABLE OF CONTENTS

Contents

TABLE OF CONTENTS i

INDEX OF AUTHORITIES ii

BASIS FOR SUPPLEMENTAL BRIEF iii

QUESTIONS PRESENTED v

SUPPLEMENTAL STATEMENT OF THE CASE 1

SUPPLEMENTAL ARGUMENT 1

1. Plaintiff's claims against Defendant, which were filed in the circuit court, are not subject to MCL 600.6431's notice requirements. 1
2. The order denying Defendant's motion for summary disposition, which asserted governmental immunity, was a final order that is appealable as of right. 7

CONCLUSION 8

RECEIVED by MSC 3/21/2022 6:24:14 PM

INDEX OF AUTHORITIES

Cases

Anzaldua v Band,
457 Mich 530, 548 6
Dietert v Board of Regents, University of Michigan,
2021 WL 3817688 4
Doe v Dept of Transportation,
324 Mich App 226 (2018) 5
Elia Cos, LLC v Univ of Michigan Regents
(Docket No. 162830) ..... iii, 5
El-Sayed v Eastern Michigan University,
Case No. 18-608-CD 5
Fairley v Department of Corrections,
497 Mich 290 (2015) 6
Hawthorne-Burdine v Oakland University,
2019 WL 2929185 5
McCahan v Brennen,
492 Mich 730 (2012) 1
Miller v Allstate Ins. Co.,
481 Mich 601 (2008) 1, 2
Pike v. Northern Michigan University,
327 Mich App 683 (2019) 2
Sandford v Mich,
506 Mich 10, 15 (2020). 4
Steckloff v Wayne State University,
2019 WL 2929185 5
Tyrrell v University of Michigan,
335 Mich App 254 (2020) 3, 5, 6, 7
Zarza v Board of Regents, University of Michigan,
2019 WL 3556705 4

Statutes

Governmental Liability for Negligence Act (MCL 691.1406) 2
MCL 2.116(C)(7) iii
MCL 37.1101 et seq. iii
MCL 37.2101 *et seq* ..... iii, 6
WICA, 2016 PA 343, MCL 691.1751 ..... 3, 4

Rules

MCR 7.202(6)(a)(v) iii
MCR 7.203 (B)(1) 7

RECEIVED by MSC 3/21/2022 6:24:14 PM

BASIS FOR SUPPLEMENTAL BRIEF

Defendant-Appellant filed an application for leave to appeal in this Court on March 11, 2021. The subject of the application is the Michigan Court of Appeals decision holding that the Plaintiff-Appellee was not required to comply with MCL 600.6431, a provision of the Court of Claims, to proceed with a claim alleging a violation of the Elliott Larsen Civil Rights Act, MCL 37.2101 et seq.. ("ELCRA") and the Persons with Disabilities Civil Rights Act, MCL 37.1101 et seq., ("PWDCRA") in circuit court. The court also found that a plaintiff's non-compliance with MCL 600.6431 when proceeding against a state defendant in the circuit court does not implicate immunity such that a trial court's denial of a state defendant's summary disposition motion brought under MCL 2.116(C)(7) is not appealable as of right (Court of Appeals Opinion, Defendant's Appendix 1a-6a).

On December 22, 2011, this Court issued an order directing the parties to file supplemental briefs addressing (1) whether the appellees claims against the appellant, which were filed in the circuit court, are subject to MCL 600.6431(1)'s notice requirements and (2) whether the order denying the appellant's motion for summary disposition, which asserted governmental immunity, is a final order that is appealable by right, see MCR 7.202(6)(a)(v). The Court ordered the parties not to submit mere restatements of their application papers and directed the Clerk to schedule oral argument for the same session of the Court when it will hear oral argument in *Elia Cos, LLC v Univ of Michigan Regents* (Docket No. 162830). This supplemental brief only presents arguments not made or fully developed in the response to Defendant's application and plaintiff incorporates her brief in response to the application.

The Court should deny Defendant-Appellant's application for leave to appeal and affirm the Court of Appeals January 28, 2021, opinion and order adopting the analysis from *Tyrrell Univ of Michigan,* 335 Mich App 254 (2021) on the issues at stake in this appeal.

RECEIVED by MSC 3/21/2022 6:24:14 PM

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QUESTIONS PRESENTED

1. Whether the appellee's claims against the appellant, filed in the circuit court, are subject to MCL 600.6431(1)'s notice requirements.

   Appellant: Yes

   Appellee: No

   Circuit Court: No

   Court of Appeals No

2. Whether the order denying the appellant's motion for summary disposition, which purportedly asserted governmental immunity, is a final order that is appealable as of right?

   Appellant: Yes

   Appellee: No

   Court of Appeals: No

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SUPPLEMENTAL STATEMENT OF THE CASE

Plaintiff-Appellee has no supplemental statement of facts.

SUPPLEMENTAL ARGUMENT

1. Plaintiff's claims against Defendant, which were filed in the circuit court, are not subject to MCL 600.6431's notice requirements.

As a preliminary matter, the Defendant begins its supplemental brief by outlining several points on which it purports the parties agree:

"They agree that the Legislature has waived immunity from liability for claims arising under the Elliot-Larsen Civil Rights Act ("ELCRA") and the Persons with Disabilities Civil Rights Act ("PWDCRA"). They also agree that the Legislature has waived immunity from suit by submitting the state to the jurisdiction of various trial courts through the Court of Claims Act ("COCA"). The parties further seem to agree that the Legislature has conditioned its waiver of immunity from suit by imposing conditions precedent to filing a claim against the state under §6431. (Defendant's brief at p. 1).

Defendant's list of purported "agreements" is misleading. Plaintiff concurs with Defendant's recognition that the Legislature has waived immunity from claims arising under the ELCRA and the PWDCRA. Defendant's second point of "agreement" is incomplete. Yes, the Legislature waived immunity by submitting the state to the jurisdiction of various trial courts though Court of Claims Act. But, as recognized by the first concession, the COCA is not the legislature's only vehicle to waive immunity as demonstrated by the waivers contained in the ELCRA and PWDCRA. Defendant's third point is also incomplete. The Legislature conditioned its waiver of immunity from suit *in the court of claims* by imposing conditions precedent to filing a claim against the state under §6431. Claims filed in the Court of Claims

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must follow the Court of Claims notice provisions. Claims for damages filed in the Circuit Court do not need to follow the Court of Claims notice provision.[1]

The Court of Claims Act does not graft procedural notice provisions onto the Elliot Larsen Civil Rights Act or the Persons with Disabilities Civil Rights Act.

This case does not turn on whether the State is immune from liability and if so, what type of immunity applies. Appellee acknowledges that "the government may voluntarily subject itself to liability, [and] it may also place conditions or limitations on the liability imposed. *McCahan v Brennen*, 492 Mich 730, 736 (2012). Appellant recognizes that "the Legislature has waived immunity from liability for claims arising under the Elliot-Larsen Civil Rights Act and the Persons with Disabilities Civil Rights Act" (Appellant's brief at p. 1).[2] The central issue is whether the State subjected itself to liability under the ELCRA and PWDCRA *with or without the condition* that Plaintiffs file a notice of intent to sue with the Court of Claims as a prerequisite to suit in the Circuit Court. The Legislature's full-throated abrogation of immunity under the ELCRA and the PWDCRA compels the conclusion that Defendant is an employer, just like any other employer under the Acts and plaintiffs suing governmental agencies for damages need not do anything different because they bring suit against a governmental entity in circuit court.

Basic statutory construction compels the conclusion that the notice provision of the Court of Claims Act does not apply to ELCRA and PWDCRA

The statute that is "more specific to the subject matter" is the one to follow when there is a conflict in the provisions. *Miller v Allstate*, 481 Mich 601, 613 (2008). It is a "well

[1] Because the COC has concurrent jurisdiction over ELCRA and PWDCRA, a claim for equitable relief would be properly filed in the COC.
[2] Plaintiff briefed this issue at length in her response to Defendant's application for leave to appeal and will not repeat it here.

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established-rule of statutory construction that when two applicable statutory provisions conflict, the one that is more specific to the subject matter prevails over the provision that is only generally applicable." *Pike v. Northern Michigan University*, 327 Mich App 683, 693 (2019) (citing *Miller v Allstate Ins. Co*., 481 Mich 601, 613 (2008)). In *Pike,* the Court considered the ramifications of differing notice requirements in the Governmental Liability for Negligence Act (MCL 691.1406) and the Court of Claims Act, MCL 600. 6431. Pike sued Northern Michigan University and Peter Bosma, an instructor employed by NMU, in the Court of Claims after she suffered an injury on a rock-climbing wall in a building owned by NMU. Plaintiff alleged negligence against NMU under the public-building exception to governmental immunity, MCL 691.1406, and gross negligence against Bosma. The Defendants argued, in part, that 1) the claim under the public building exception to governmental immunity, MCL 691.1404, was filed three days after the 120-day notice requirement of the public building exception, thus the claim was time barred and 2) the Court of Claims lacked jurisdiction over Bosma because he was an instructor not a "state officer" The Court of Claims granted Defendants' motion for summary disposition.

On appeal, plaintiff argued that her claim against NMU was timely because she complied with the Court of Claims notice requirement by filing her claim within 6 months of the event giving rise to the cause of action. The Court held that 120-day notice deadline contained in MCL 691.1404, the public building exception, not the 6-month notice deadline applied to her claim and her filing was untimely. "Because plaintiff's claim arises under the public-building exception to governmental immunity, the notice provisions in MCL 691.1404 and MCL 691.1406 are more specific to the subject matter and prevail over the notice provision in MCL 600.6431 that is only generally applicable to claims against the state." *Pike*

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at 693. Here, ELCRA and the PWDCRA are more specific to the subject matter of plaintiff's claim, her wrongful termination in violation of ELCRA and PWDCRA. This means that the provisions (or lack of) in the ELCRA and PDCRA prevail over the provisions of the more general statute, MCL 600.6431. The state has not attached conditions to its waiver of immunity under ELCRA and PWDCRA and Plaintiff was not required to file a notice with the Court of Claims before proceeding in Circuit Court.

The *Tyrrell* Court directly addressed the question of what conditions apply: "Then what does compliance with MCL 600.6431 implicate? Absent the Legislature conditioning its consent to be sued on compliance with the COCA, including MCL 600.6431, is a question of compliance with the rules of the forum, meaning that MCL 600.6431 requires compliance only for those claims brought against state defendants in the Court of Claims." *Tyrrell* at 271. This Court should hold that the Legislature has not conditioned its consent to be sued for violations of the ELCRA and PWDCRA in circuit court on compliance with the COCA therefore no compliance is required. *Tyrrell* was properly decided.

When venue is conferred in the Court of Claims exclusively, the Legislature knows how to carve out compliance with the notice provision and when venue is not conferred in the Court of Claims, there is no need to provide an exception

The Amicus Curiae brief argues that the 2020 amendment of the Court of Claims notice provision demonstrates that MCL 600.6431 itself must explicitly define which statutes are exempted from compliance. A closer look shows just the opposite. On March 29, 2017, the Legislature enacted the Wrongful Imprisonment Compensation Act ("WICA") Before the WICA became effective, "people who were wrongfully imprisoned by the state of Michigan had no recourse because the state was protected by sovereign immunity. WICA is an express waiver of the state's sovereign immunity" *Sandford v Mich*, 506 Mich 10, 15 (2020). MCL

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691.1753 provides as follows: "An individual convicted under the law of this state and subsequently imprisoned in a state correctional facility for 1 or more crimes that he or she did not commit may bring an action for compensation against this state *in the court of claims* as allowed by this act" (emphasis added).

The legislature explicitly waived the state's sovereign immunity under WICA, the PWDCRA, and ELCRA. But WICA explicitly placed venue in the court of claims unlike ELCRA and PWDCRA, which explicitly place venue in circuit court.

Perhaps realizing that it would be unfair to require an unjustly accused individual to take the additional step of filing a notice with the Court of Claims, the legislature exempted claims for compensation under WICA from the notice provision. "This section does not apply to a claim for compensation under the WICA, 2016 PA 343, MCL 691.1751 to 691.1757." MCL 600.6431 (5). This exemption is not indicative of the legislature's acknowledgement that the Court of Claims Act applies to all claims against the state. It's a recognition that WICA claimants, proceeding in the Court of Claims, are exempted from the notice requirement. Because the ELCRA and PWDCRA specify venue in circuit court, it would be unnecessary for the Legislature to require an exception in the Court of Claims Act.

The fact that some plaintiffs file a notice of intent is immaterial

After Defendant filed its motion to dismiss in Wayne County Circuit Court claiming that the Court of Claims procedural rules apply to anti-discrimination laws in circuit Court, plaintiff began to research whether other defendants were making similar arguments. Plaintiff learned that state defendants were testing variations of this defense across the state including but not limited to: *Dietert v Board of Regents, University of Michigan*, 2021 WL 3817688, *Zarza v Board of Regents, University of Michigan*, 2019 WL 3556705, *Doe v Dept of*

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Transportation, 324 Mich App 226 (2018), *Hawthorne-Burdine v Oakland University*, 2019 WL 2929185, *Steckloff v Wayne State University,* 2019 WL 2929185. Given this rash of challenges to Plaintiffs seeking relief for violations of the ELCRA and other anti-discrimination suits in circuit and federal court, some plaintiffs' attorneys, like the one cited by Defendant in *El-Sayed v Eastern Michigan University*, Case No. 18-608-CD understandably believed it was easier to file a notice of intent to sue than to litigate the notice issue, like plaintiff here who has been forced to do for going on three years (Defendant's MOAA Appendix at 81a-94a). This defensive step should not be viewed as a concession that notice to the COC is required but rather a measure taken to avoid years of wasteful litigation.

Defendant's argument that *Tyrrell* will lead to gamesmanship misapprehends the Court of Appeals decision in *Elia Cos, LLC*

Defendant also argues that *Tyrrell's* analysis of the question presented here will lead to gamesmanship, citing to *Elia Cos, LLC v Univ of Mich Regents*, 335 Mich App 439 (2021). There may well have been gamesmanship in *Elia*, but not a manner that was authorized by the reasoning in *Tyrrell.* Defendant's description of the finding in *Elia* is misleading and incomplete. Defendant claims that *Elia* stands for the proposition that "the notice requirement still applies when a plaintiff first files her claim in circuit court but the case is later transferred to the Court of Claims" (Defendant's brief at 5). This is a dangerous oversimplification of the court's analysis on this issue.

In *Elia,* the plaintiff filed tort and breach of contract claims against the University of Michigan in circuit court.[3] Unlike this case, there were no statutory claims involved that made venue in circuit court appropriate. Defendant properly removed those claims from

[3] This Court has directed that *Elia* be heard in the same term as *Christie* (Ex 1, *Elia* Sup Ct Order).

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circuit court to the COC. Perhaps seeking a jury trial (which is unavailable in the Court of Claims), the plaintiff filed claims against the state in circuit court that should have been filed in the COC. The relevant reasoning is as follows: "However the question is not whether there would ordinarily be a right to a jury trial as between private parties but whether there is a specific right to a jury trial *against the state*… [a] right to a jury trial against the state exists under certain statutes, such as the Whistleblowers' Protection Act, MCL 15.361 *et seq* and the Civil Rights Act, MCL 37.2101 *et seq*. But those statutes make clear that the Legislature intended for the circuit court to have jurisdiction over those claims. See *Anzaldua v Band*, 457 Mich 530, 548. Otherwise, the Court of Claims has exclusive jurisdiction over claims against the state for money damages" (emphasis in original). In *Tyrrell and Christie*, the plaintiffs did not improperly file their claims in circuit court, they were authorized by statute to do so. There will be more gamesmanship if the Court rejects the *Tyrrell/Christie* analysis.

2. The order denying Defendant's motion for summary disposition, which asserted governmental immunity, was a final order that is appealable as of right.

Plaintiff's response to Defendant's application for leave to appeal fully addresses this issue and Plaintiff incorporates that response in this supplemental brief. In sum, the Michigan Supreme Court has held that MCL 600.6431 does not confer governmental immunity, it established conditions precedent for avoiding the governmental immunity conferred by the GTLA, which expressly incorporates MCL 600.6431. *Fairley v Department of Corrections*, 497 Mich 290 (2015). In contrast to the GTLA, the PWDCRA and the ELCRA do not incorporate MCL 600.6431 and as described above, the Legislature waived immunity in the PWDCRA and the ELCRA without condition. "If as in Fairley, the Legislature conditions the state's waiver of immunity of a plaintiff's complying with MCL 600.6431, then

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governmental immunity is implicated. If however the legislature does not condition waiver of immunity on a plaintiff's complying with MCL 600.6431, then governmental immunity is not involved." *Tyrrell v University of Michigan*, 335 Mich App 254 (2020). Because the trial court's order denying summary was not an order denying governmental immunity, defendants should have appealed by leave granted. MCR 7.203 (B)(1). Realizing the importance of the underlying issue, the Courts of Appeal in Tyrrell and Christie appropriately considered the appeal as if on leave in resolving the substantive issue.

CONCLUSION

For the reasons outlined in Plaintiff's response to Defendant's application for leave to appeal and this Supplemental brief, Plaintiff respectfully requests that this Court deny Defendant's application and affirm the decision of the Court of Appeals finding that a plaintiff bringing a statutory civil rights act claim in circuit court is not required to comply with MCL 600.6431 and that the circuit court's denial of defendant's motion for summary disposition was not an order denying governmental immunity to a governmental party and thus was not a final judgment appealable as of right pursuant to MCR 7.203 (B)(1). Plaintiff submits that the Court of Appeals properly resolved the substantive issue when it treated defendant's appeal as though it had granted leave.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was filed with the Michigan Supreme Court through the MIFile filing system and that all parties listed on the pleadings were served via the e-filing system on March 21, 2022.

Signed: */s/ Andrea White*
Andrea White, Legal Assistant