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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

_____/

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PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT'S

APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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JURISDICTION

Plaintiff/Appellee does not contest Defendant/Appellant's statement of this Court's jurisdiction.

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QUESTIONS PRESENTED

1) When the order denying Defendant/Appellee's motion for summary disposition was not a final order under MCR 7.202(6)(a)(v) and MCR 7.203(A)(1) did the Court of Appeals have jurisdiction as of right?
2) Does the Court of Claims notice requirement in MCL 600.6431(1) apply to actions that was not filed and pending in the Court of Claims?

STATUTORY PROVISION INVOLVED

MCL 600.6431(1) provides:

No claim may be maintained against the state unless the claimant, within one 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.

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STANDARD OF REVIEW

Plaintiff/Appellee does not contest the standard of review articulated by Defendant/Appellant.

STATEMENT OF THE CASE[1]

This case arises out of the employment and subsequent termination of the Plaintiff-Appellee, Susan Christie, by the Defendant Wayne State University. Christie had been employed by Defendant for 43 years until her termination on November 27, 2017. In her complaint filed on March 4, 2019, Plaintiff alleged that Defendant terminated her employment in violation of the Elliott Larsen Civil Rights Act, MCL 37.2101 et seq (ELCRA) and the Michigan Persons with Disabilities Civil Rights Act, MCL 37.1101 et seq (PWDCRA).

Christie commenced employment with the Defendant on March 11, 1974 as an office assistant. Christie was last employed as an Office Services Supervisor in the Dean's office of the Eugene Applebaum College of Pharmacy and Health Services. 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. Then in

[1] This statement is drawn directly from Plaintiff's complaint as discovery has not yet taken place (Exhibit A, Complaint).

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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 then fired Christie on November 27, 2017, falsely claiming that her services were no longer required. Christie was 63 years old at the time of her termination.

A. Procedural History

The Plaintiff filed her complaint on April 4, 2019 in Wayne County Circuit Court alleging that Defendant terminated her employment because of her age and disability in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq (ELCRA) and the Michigan Persons with Disabilities Civil Rights Act, MCL 37.1101 et seq. (PWDCRA). Prior to filing an answer, the Defendant filed a motion for summary disposition pursuant to MCR 2.116 (C)(7) asserting that Plaintiff's failure to comply with the notice filing requirement in the Court of Claims Act barred her action in Circuit Court. The Plaintiff responded to that motion, presenting cogent arguments why the procedural rules, including the notice requirement contained in the Court of Claims Act, should not be imposed on statutory claims in which the State of Michigan has waived immunity and without limitations and conditions that are properly filed and venued in Circuit Court.

The trial court heard oral argument on the motion on August 7, 2019. Following argument, the Court denied the Defendant's motion, finding that the statutory notice requirements of the Court of Claims Act do not apply to claims against the state filed in Circuit Court and thus the Plaintiff's failure to comply with those requirements did not preclude her from pursing her statutory discrimination claims in Circuit Court. An order to that effect was entered on August 9, 2019.

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Defendant filed a claim of appeal as of right on August 22, 2019 in the Michigan Court of Appeals. Plaintiff challenged the Court of Appeals jurisdiction in a Motion to Dismiss on October 23, 2019. The basis for the challenge to the jurisdiction of the Court of Appeals was that the trial Court's order denying Defendant's motion to dismiss was not a final order as defined by MCR 7.202 (6)(v). The trial court did not consider or rule on whether governmental immunity applied to bar Plaintiff's statutory civil rights claims. The Court of Appeals denied Plaintiff's motion to dismiss. The Court heard oral argument on November 5, 2020.

On January 28, 2021, the Court of Appeals issued its opinion affirming the trial court's denial of Defendant's motion to dismiss. Relying on the recently issued *Tyrrell v Univ of Michigan*, Docket No. 349020 (2020), the Court concluded that a plaintiff's failure to comply with MCL 600.6431 when proceeding against a state defendant in circuit court does not implicate governmental immunity such that a denial of a summary disposition motion is not appealable as of right. The Court of Appeals then exercised its discretion to treat the appeal as if it had granted leave. The Court, relying on *Tyrrell*, found that "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" and that "defendant here was not entitled to governmental immunity from suit based on the claim that plaintiff failed to comply with MCL 600.6431.

The Court of Appeals correctly decided that the trial court's denial of Defendant/Appellant's motion for summary disposition was not a final order such that Defendant had a viable appeal as of right. The Court of Appeals also properly exercised its discretion to treat Defendant's appeal as if it were on leave granted. Finally, the Court of

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Appeals correctly concluded that the trial court properly denied defendant's motion for summary disposition because a plaintiff bringing a statutory civil rights claim need not comply with the notice provision of MCL 600.6431.

ARGUMENT

I. The trial court's order denying Defendant/Appellant's motion for summary disposition was not a final order permitting an appeal as of right to the Court of Appeals, but the Court properly exercised its discretion to decide as if on leave granted finding that defendant was not entitled to governmental immunity from suit based on the argument that plaintiff failed to comply with MCL 600.6431

Defendant is right. Orders denying governmental immunity are final orders. MCR 7.202(6)(a)(v). But Circuit Court Judge Allen did not deny Defendant's motion for summary disposition on the basis of governmental immunity, therefore that order was not a final order appealable as of right (Ex B, order, Ex C, transcript). The trial court's order stated that "[f]or the reasons stated on the record on August 1, 2019 it is hereby ordered that Defendant's Motion for Summary Disposition pursuant to MCR 2.116 (C)(7) is denied" (Ex B).

The Court's ruling from the bench, incorporated by reference in the order was as follows:

> What the rules are on [sic] 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 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

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> 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 more fully set forth in the Plaintiff's briefing the Court respectfully denies the motion.
>
> (Exhibit C, transcript and D, Tarnow opinion in Steckloff).

This ruling makes sense because Defendant did not *claim* immunity in its motion for summary disposition.

Governmental immunity does not apply to ELCRA or MPWDCRA claims therefore an order denying a motion for summary disposition is not a final order

"[T]he law is clear that governmental immunity does not apply to ELCRA claims."[2] *Does 11-18 vs Department of Corrections*, 323 Mich App 479, 490 (2018). The question here is whether MCL 600.6431 establishes conditions precedent for avoiding governmental immunity in statutory civil rights claims, despite the legislature's clear direction that immunity does not apply. The Michigan Supreme Court has not yet addressed the question of "whether a plaintiff's failure to comply with MCL 600.6431 of the COCA is properly considered a question of immunity or a question of compliance with the rules of the forum." *Tyrrell v University of Michigan*, (Docket No. 349020). The answer to that question depends on whether the statute that creates the right to sue requires compliance with the Court of Claims procedural rules.

The legislature has decided that claims against a state agency brought under the government tort liability act (GTLA) "must be brought in the manner provided in [the Revised Judicature Act], including MCL 600.6431. That is, while MCL 600.6431 does not

[2] Similarly, the Legislature abrogated the state's sovereign immunity for claims brought under the PWDCRA. *Tyrrell.*

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confer governmental immunity, it establishes conditions precedent for avoiding the governmental immunity conferred by the GTLA, **which expressly incorporates MCL 600.6431**." *Fairly v Dep't of Corrections*, 497 Mich 290, 297 (2015) (emphasis added). In *Fairly*, two drivers injured by vehicles owned by state agencies sued the agencies in the Court of Claims to recover damages for their injuries. The actions fell within the motor vehicle exception to governmental immunity. MCL 691.1405. Neither plaintiff verified the Notice of Intent as required by MCL 600.6431. The plaintiffs' claims were properly dismissed because they did not comply with the condition precedent mandated by the GTLA, namely the requirement that they verify their Notices of Intent.

Plaintiffs Christie and Tyrell brought statutory civil rights claims under the ELCRA and the PWDCRA. Those statutes do not contain conditions precedent similar to MCL 691.1410 of the GTLA. And both statutes define an employer to include a state agency and proscribe venue in Circuit Court without pre-condition. Neither the ELCRA or the PWDCRA expressly or implicitly incorporate MCL 600.6431. Thus, the trial courts in both cases properly denied summary disposition because governmental immunity is not at issue. "If, as in *Fairley*, the Legislature conditions the state's waiver of immunity on a plaintiff's compliance complying with MCL 600.6431, the governmental immunity is implicated. If, however, the Legislature does not condition the state's waiver of immunity on a plaintiff's complying with MCL 600.6431, then governmental immunity is not implicated." *Tyrrell v University of Michigan*, ___ N.W.2d ___ *4 (2020). The state *could* have proscribed limitations or conditions to its abrogation of governmental immunity in the ELCRA and the PWDCRA, but it did not. The Court of Appeals in *Tyrrell* was correct in its finding that that a trial court's denial of a defendants' motion for summary disposition was not "an order denying

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governmental immunity to a governmental party, MCR 7.202(6)(a)(v), and was therefore not a final judgment appealable as of right, MCR 7.203(A)(1)." *Tyrrell* at *4.

Contrary to Appellant's claims, *Watts* and *Walsh* do not apply to the facts and law in *Christie* and *Tyrrell*

Defendant/Appellant argues that the Court of Appeals decisions in *Tyrrell* and *Christie* conflict with *Watts v Nevils*, 477 Mich 856 (2006)[3] and *Walsh v Taylor*, 263 Mich App 618 (2004). The *Watts* and *Walsh* cases do not apply here because those cases involved governmental immunity and as discussed above, *Christie* and *Tyrrell* do not. The question before this Court is whether a *procedural rule* applies in a case brought in Circuit Court, not whether immunity applies. In *Walsh*, the plaintiff brought a §1983 claim against law enforcement officers arising from his arrest and detention. The plaintiff's allegations involved the conduct of police officers acting under color of law. Defendant Taylor asserted that the case was barred because of qualified immunity. Defendant sought summary disposition based on MCR 2.116 (C)(7) and (C)(10). The trial court denied the motion. The parties did not dispute jurisdiction of the Court of Appeals, but the Court addressed it in light of *Newton v State Police,* 263 Mich App 251 (2004), which held that a party cannot claim an appeal as of right where, although a party asserts governmental immunity, the trail court grants summary disposition under MCR 2.116 (C)(10).[4] The Court held that were it not for *Newton*, it would have considered the appeal as one of right.

[3] In *Watts*, the Michigan Supreme Court issued a preemptory reversal and adopted the holding in *Walsh* in a memorandum opinion.

[4] The *Walsh* Court disagreed with the *Newton* holding and identified a conflict on the question of jurisdiction. Two years later, In *Watts v Nevils*, 477 Mich 856 (2006), the Michigan Supreme Court overruled *Newton* and adopted the *Walsh* analysis.

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The court reasoned in the context of an action under §1983, "whenever a plaintiff alleges facts in avoidance of immunity or when defendant claims immunity applies, the trial court should be obligated to evaluate the specific conduct to determine whether a valid exception exists"…. "[W]e would find that a defendant who claims immunity may challenge, as of right, a plaintiff's alleged exception to governmental immunity when those allegations result in an order denying governmental immunity." *Walsh* at 625. Put another way, when there is a factual inquiry into immunity and that claim is denied in a motion under MCR 2.116(C)(10), the underlying issue remains as to whether immunity applies such that an appeal of right is appropriate.

In the context of a §1983 claim, *Walsh* makes sense. Qualified immunity is a defense to a §1983 claim. *Morden v Grand Traverse County*, 275 Mich App 325, 340 (2007). *Walsh* does not make sense as applied to ELCRA or PWDCRA claims because immunity is not a defense to a claim under those statutes. Because it is clear that immunity has been abrogated under ELCRA and PWDCRA, the Court of Appeals properly treated the appeal as if on leave granted instead of an appeal as of right.

This Court should clarify that a denial of summary disposition of ELCRA and PWDCRA claims as they relate to the Court of Claims Notice of Intent issue do not provide for an appeal of right to the Court of Appeals

The Court of Appeals in *Tyrrell* and *Christie* properly found that a plaintiff's non-compliance 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. In both cases, the Courts elected to treat the appeals as though leave was granted. This was an appropriate and efficient way to decide an issue that has been raised by defense

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counsel with increasing frequency.[5] The impact of this argument has led to significant and time-consuming delays in the litigation of important civil rights claims. Clarification from this Court that appeals related to this issue should be made by application for leave to appeal and not as of right will streamline these unfortunate delays. The Court of Appeals has the authority to treat an improper claim of appeal as an application in order to reach the legal questions presented in the name of judicial efficiency and properly exercised that authority here.[6]

II. The Court of Appeals correctly held that the statutory notice requirement contained in the Court of Claims Act was not applicable to Plaintiff's claim which was filed in and pending in Circuit Court

In seeking reversal of the Court of Appeals decision, the Defendant contends that Section 6431 of the Court of Claims Act should be applied to claims brought in Circuit Court. Section 6431 provides that no claims against the state may be maintained in the Court of Claims unless the claimant files a written claim or notice of intent with the clerk of court of claims within one year. MCL 600.6431(1).[7] That provision, however, has no application beyond the Court of Claims as it is simply a procedural rule of the forum with no relevance to cases properly filed and pending in Circuit Court.

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[5] Butzel Long, attorneys for Defendant have also advanced the novel argument that the Court of Claims notice of intent rule applies to statutory civil rights cases in *Drouin v Oakland University Board of Trustees*, COA No. 350947; *Deitert v University of Michigan*, COA No. 349059; Zarza v University of Michigan, COA No. 352926; *Steckloff vs Wayne State University*, USED No. 18-13230; and *Hawthorne-Burdine v Oakland University*, COA No. 338605;

[6] *In re Ballard*, 323 Mich App 233, 235 n.1 (2018); *Stumbo v Roe*, 2020 WL 3039042 (2020); *Rains v Rains*, 301 Mich App 313, 320 n. 2 (2013); *SNB Bank & Trust v Kensey*, 145 Mich App 765,770 (1985).

[7] Pursuant to MCL 600.6431 (1) a plaintiff can either file the actual claim or notice of intent to file the claim at a later time.

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Affirming the decision of the trial court, the Court of Appeals rejected Defendant's position holding that that the procedural rules of Section 6431 of the Court of Claims Act are not applicable to cases properly filed and pending in Circuit Court. Neither the court rules governing litigation in circuit court nor the statutory jurisdictional requirements for ELCRA or PWDCRA claims have a pre-suit notice requirement. Nor have the circuit courts imported the notice provision from the court of claims rules. As a result, the Court of Appeals affirmed the trial court's refusal to apply Section 6431 of the Court of Claims Act to this case which Defendant does not dispute was properly filed in Circuit Court.

In affirming the trial court, the Court of Appeals adopted the rationale and holding of its recent decision in *Tyrrell v University of Michigan* NW2d , 2020 WL 7635268 (2020), a published decision of the Court of Appeals which addressed the identical issue raised in this case. The court held:

> 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." *Tyrrell, supra* at * 7.

The Court of Appeals, therefore, concluded that the trial court was bound only by rules and procedures that the Legislature determined were applicable in the Circuit Court, which did not include the notice requirement from the Court of Claims Act.

The Defendant, however, contends that the *Tyrrell* was wrongly decided and thereby improperly relied upon by the *Christie* panel. Defendant continues to argue that a provision included in the Court of Claims Act should be applied to claims litigated in Circuit Court. In asserting this argument, Defendant has not cited a single case in which Court of Claims

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procedures were imported from the Court of Claims and imposed on Circuit Court procedures and claims. The Legislature waived the state's immunity for liability for discrimination and further provided that actions commenced against the state pursuant to ELCRA and PWDCRA can be brought in Circuit Court. MCL 37.2801; MCL 37.1606. No notice requirement or other procedural prerequisites were set by the Legislature with regard to these claims. Since the state waived immunity for these claims without conditions including the COC notice requirement, the refusal to impose the COCA notice requirements on Circuit Court actions does not deprive the state of immunity as the Defendant mistakenly claims. The Court of Appeals ruling therefore was proper and consistent with case law and statutory construction of the Court of Claims Act. Thus, leave should be denied.

A. Jurisdiction in Circuit Court is proper and the procedural rules applicable to that forum, not the procedural requirements of the Court of Claims, should be applied to this case

The Michigan legislature expressly included state agencies as employers subject to suit in both the ELCRA and the PWDCRA. ELCRA includes in its definition of 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 an 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). Additionally, jurisdiction 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 complaint is filed, resides or has his

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principal place of business. MCL 37.2801 (2). The PWDCRA contains identical language at MCLA 37.1606 (2). Thus, the Legislature has completely waived immunity for both ELCRA and PWDCRA claims and established jurisdiction in the circuit court without setting any additional terms or conditions such as a notice requirement as a prerequisite for that jurisdiction.[8] *Anzaldua v Band,* 457 Mich 530, 546-7 (1998); *Doe v Dept of Transportation,* 324 Mich App 226 (2018) app den 503 Mich 876 (2018); *Mays v Governor,* No 338609, 2018 WL 2122098 (Mich Ct App May 8, 2018) app den 503 Mich 875 (2018).

Thus, it is clear that the Legislature intended for the state and its political subdivisions to be regulated by and subject to ELCRA and the PWDCRA. *Mays*, supra at *6. And further the Legislature intended to submit the state to the jurisdiction of the circuit court and the rules governing the Circuit Court. *Id.* Nothing in the ELCRA or the PWDCRA or court rules governing circuit court practice or procedure indicate that the state should be treated differently than any other employer. And nothing in either Act indicates that a plaintiff must jump through extra hoops to assert their rights under these statutes.

B. There is no case law applying Court of Claims procedures in the Circuit Court; to the contrary, attempts to apply those rules have been rejected by Michigan appellate courts

Although this Court has not directly addressed the precise issue raised by Defendant, recent decisions support the Court of Appeals' conclusion that procedural rules governing claims pending in the Court of Claims should not grafted on circuit court rules and applied to ELCRA and PWDCRA cases against the state and its instrumentalities pending in Circuit

[8] Plaintiff does not dispute Defendant's premise that the Legislature can determine both if and on what terms the State can be sued. However, it is clear that in waiving its immunity from suit and liability under both ELCRA and the PWDCRA, jurisdiction was set in the Circuit Court without any preconditions or other limiting terms.

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Court. 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 ELCRA.

After the Court of Appeals affirmed the Court of Claims' decision to transfer the case back to Circuit Court after the Defendant had improperly removed the case to the Court of Claims, the court also addressed defendant's additional argument that because the plaintiff did not comply with the notice requirements contained in the Court of Claims Act, the case should be dismissed. The Court of Appeals 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, n4. The Michigan Supreme Court denied leave to appeal. *Doe vs Department of Transportation*, 503 Mich 876 (2018). While the procedural posture of the case was different, if a plaintiff was truly required to file notice with the Court of Claims to pursue a discrimination claim in circuit court, the Court of Appeals would not have found the issue moot and would have ruled differently or this Court would have granted leave. Judge Swartzle similarly noted in his concurrence in *Pike* that the notice of intent requirement provides that only "claims against the state and its subdivisions in the *court of claims* were subject to the notice requirement." *Pike*, supra at 700-1. The Court of Appeals also recently decided *Tyrrell*, which considered and resolved the precise issue raised in this appeal. The Christie panel adopted the rationale and holding of that published decision. [9]

[9] In addition to *Doe, supra*, the Court of Appeals addressed the same issue in *Carter v Michigan State Police* 2019 WL 846106 (Mich Ct App Feb 21, 2019). In *Carter*, the Court of Appeals found that the notice provision in the Court of Claims Act did not apply once a case was transferred back to Circuit Court stating "Indeed, defendants fail to provide any legal analysis or reasoning with respect to the question of MCL 600.6431(1)'s continuing relevance or

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Defendant's attempt to import requirements from the Court of Claims, a court of limited jurisdiction, into circuit court litigation was not intended by the Legislature, has never been adopted by any court, defies rules of statutory construction and is wholly inconsistent with the Legislature's complete abrogation of immunity in the ELCRA and the PWDCRA. Simply put, the *Court of Claims Act* applies only to cases in the *Court of Claims*. Thus, there is no basis to grant the Defendant's application to review the court of Appeals decision.

C. The notice requirements of the Court of Claims Act have no applicability to claims properly filed in Circuit Court

The Michigan Legislature created a Court of Claims as a substitute "for the 'board of State Auditor' and the 'State administrative board' for the purpose of hearing and determining 'all claims and demands, liquidated and unliquidated, ex contractu and ex delicto against the State'." *Manion v. State Highway Comm'r*, 303 Mich. 1, 20 (1942). Thus, the jurisdiction granted to the Court of Claims is "narrow and limited, substituting, merely, a 'court' of claims for the superseded claims jurisdiction of the earlier boards." *Littsey v. Board of Governors of Wayne State University*, 108 Mich. App. 406, 412 (1981).

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application in light of the procedural posture of the case." *Id* at *3. Although not dispositive, the same issue was raised in a federal court case. In *Steckloff v Wayne State University* 2019 WL 2929185 (ED Mich July 8, 2019) the defendant argued that the Court of Claims notice provision applied to PWDCRA claims which were originally filed in circuit court but had been removed to federal district court. The *Steckloff* 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"

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In addition to establishing the Court of Claims, the Court of Claims Act also identifies the jurisdiction of the Court of Claims and the procedural rules governing those claims. However, not all claims against the State or its instrumentalities are subject to jurisdiction of the Court of Claims. Specifically, relevant here, the Legislature waived sovereign immunity and provided that the "state and its political subdivisions" were persons, subject to suit and liability for violations of Elliott-Larsen. *Mays*, supra. Further ELCRA and the PWDCRA both provide that actions can be brought in Circuit Court. MCL 37.2801; MCL 37.2601. The Legislature did not distinguish between the state and private entities in these Acts. Thus, nothing in the ELCRA or PWDCRA indicates that the state is to be treated differently from any other person." *Mays*, citing *Anzaldua* 457 Mich 530, 553 (1998)(which found that Legislature intended the state and businesses were to be treated the same under the Whistleblowers Protection Act and thereby subject to jury trial in circuit court rather than jurisdiction in the Court of Claims).

An analysis of the Court of Claims Act itself provides further evidence that any notice requirement contained in the Court of Claims Act has no applicability to this case or any claims against the state brought pursuant to the ELCRA and the PWDCRA. It is clear from the structure and history of the Act that the notice provision contained in Section 6431 applies only to claims pending in the Court of Claims, which is aptly named the Court of Claims Act. While Plaintiff does not dispute that the notice requirement of Section 6431 is a condition precedent to filing suit against the state in the Court of Claims, that requirement is limited to cases brought in the Court of Claims.

The Court of Claims Act 1) created the court of claims and only the court of claims; 2) established the scope of its exclusive and concurrent jurisdiction; 3) established procedural

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rules and operational court rules governing litigation of cases pending in the court of claims only and 4) established the notice requirement. All these provisions from the title of the Act to the last section dealing with actions involving negligent operation of motor vehicles brought in the court of claims (MCL 600.6475) deal with only actions before the Court of Claims.[10]

The notice provision itself is situated in the middle of the Court of Claims Act and makes no reference to any other court of limited or general jurisdiction. The provisions immediately before and after the notice provision concern procedures and practices applicable only to the Court of Claims. Section 6422 provides that the "practice and procedure in the court of claims shall be in accordance with the statutes and court rules prescribing the practice in the circuit courts…" Subsequent sections set rules for the taking of depositions and deal with the Court of Claims' power to subpoena witness and require production of evidence. MCL 600.6425; MCL 600.6428. Then the sections immediately following the notice provision concern the form of pleadings and requirements for service MCL 600. 6434. It is unreasonable to believe that the Legislature intended to place a single provision within the broader Court of Claims Act that applied beyond the parameters of the Court of Claims when all the other provisions in the Act apply only to the Court of Claims.[11]

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[10] The Defendant's argument is based on an erroneous premise, i.e. that the COCA governs all claims asserted against the State. (Def App, p 21). The Act sets forth the limited jurisdiction of the Court of Claims, including identifying those circumstances in which it has concurrent jurisdiction with circuit court and those in which it has no jurisdiction. The COCA also sets forth the practice and procedure applicable only to the Court of Claims. Nowhere in the text of the COCA does it indicate that the Act governs or applies to all claims against the State. In fact, the COCA explicitly excludes many claims from the reach of the Court of Claims and the rules applicable to those claims as set forth in the COCA. MCL 600.6419; MCL 600.6421.

[11] Although Defendant faults *Tyrrell* for only examining three sections of the COCA, the Court of Appeals actually examined the whole statute and then referenced the placement of the

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The Defendant acknowledges the importance of examining the notice provision in the context of the entire act. *Sun Valley Foods v Ward,* 460 Mich 230, 237 (1999). However, the Defendant's contention that the Legislature intended and this Court should interpret section 6431 as a notice requirement applicable to any and all actions against the state filed in any state court despite the fact that the preceding and succeeding sections of the Court of Claims Act apply only to actions before the Court of Claims defies logic as well as the very rule of statutory interpretation.

Statutory construction requires the court to "examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme." *Ally Fin. Inc. v. State Treasurer*, 502 Mich. 484, 493, 918 N.W.2d 662 (2018). The court should "consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Id.* Proper statutory interpretation requires: (1) reading the statute as a whole, (2) reading its words and phrases in the context of the entire legislative scheme, (3) while considering both the plain meaning of the critical words and phrases along with their placement and purpose within the statutory scheme, and (4) interpreting the statutory provisions in harmony with the entire statutory scheme. *Bush v. Shabahang*, 484 Mich. 156, 167, 772 N.W.2d 272 (2009).

An examination of this provision in the context of the entire Act makes clear that the notice provision is intended to apply only to actions in the Court of Claims. It is placed in the

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notice provision in the statutory scheme. Because the notice provision was sandwiched in the middle of the Act and specifically between two procedural provisions, Tyrrell concluded that the Legislature's intent was that the notice provision was simply a procedural rule applicable only to the Court of Claims forum. *Tyrrell*, supra at *6. As set forth above, a review of all sections of the COCA demonstrates that *Tyrrell's* conclusion is proper. Additionally, while complaining that *Tyrrell* only looked at three provisions, Defendant here only cites 1 section of the COCA in its analysis of the statute.

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middle of an Act which contains provisions concerning the procedures applicable only to the Court of Claims. Further supporting this conclusion is that the section 6431 provides that the notice is to be filed with the clerk of the **court of claims**. MCL 600.6431.[12] It is inconceivable and wholly illogical that the Legislature intended that before a claim could be filed in circuit court, the plaintiff would be required to file a notice of intent in the court of claims. As its plain language, the "claim against the state" referenced in the notice section is the claim to be filed in the Court of Claims. If there is no claim to be filed in the Court of Claims, no notice to that body is required. Thus, applying these rules, it is clear that the Legislature's intent is that the notice requirement contained in the Court of Claims Act applies only to claims against the state brought in the Court of Claims and not to the Plaintiff's ELCRA and PWDCRA claims pending in Circuit Court.

D. Section 6431 is not a condition precedent to suing the state in all cases

The Defendant also argues that Section 6431, the statutory notice requirement contained in the Court of Claims Act, is a condition precedent to suing the State of Michigan in any and all cases and in any and all jurisdictions. Admittedly, the Legislature has the sole authority to determine whether and under what conditions the state is subject to suit. In fact, as Defendant itself acknowledges, the government can voluntarily subject itself to suit under any conditions that it desires to apply. *McCahan v Brennan,* 492 Mich 730, 736 (2012). Applicable here is the fact that Legislature voluntarily subjected the state to suit for age and

[12] Additionally, Defendant contends that the purpose of the provision supports its argument. Courts have found that notice provision allows the state to investigate and reduce the uncertainty of future claims. (Def App, p 20). However, the notice provisions permits the filing of the actual claim so clearly the purported purpose is not served by requiring a plaintiff to file a complaint in circuit court and redundantly file that same complaint with the Court of Claims clerk.

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disability discrimination by virtue of identifying itself as a potential defendant under both the ELCRA and the PWDCRA. In these statutes, the Legislature waived its sovereign immunity completely unlike statutes in which the state imposed limitations or conditions on its immunity such as the GTLA, in which the Legislature explicitly incorporated the notice requirement set forth in Section 6431 of the Court of Claims Act. See *Fairley,* supra at 297-8. Unlike the GTLA, the Legislature provided that the circuit court had jurisdiction over ELCRA and PWDCRA claims without the imposition of any statutory notice requirements or any other condition precedent to suit.[13] Thus the Legislature did not impose the statutory notice requirement on the claims brought by the Plaintiff in this case.

Defendant has not cited any case supporting its position that the notice requirement should be applied to cases against the State filed in Circuit court. No published case[14] has

[13] If the Legislature intended that the notice provision contained in a wholly separate statute was applicable to the ELCRA and the PWDCRA claims brought in circuit court, it clearly could have incorporated the notice provision by reference in those statutes when they were enacted decades after the Court of Claims Act. However, the Legislature chose not to place any limitations on Plaintiffs asserting their rights under the ELCRA or the PWDCRA. By contrast, other statutes such as the GTLA specifically incorporated MCL 600.6431 in the section regarding notice of an injury on a highway. MCL 691.1404. Moreover, even when the Court of Claims Act was amended in 2013, no attempt was made to impose the notice requirement on ELCRA and PWDCRA claims which despite the expanded jurisdiction of the Court of Claims, were still to be heard in circuit court. MCL 600.6421.

[14] In the court below, Defendant cited the unpublished decision in *Hawthorne-Burdine v Oakland Univ*, 2018 WL 1832336 (Mich Ct App April 17, 2018) app den 503 Mich 888 (2018) which does not support Defendant's argument either. In that case, the plaintiff brought claims under the ELCRA and the PWDCRA in circuit court which were subsequently transferred to the Court of Claims by the defendant. The defendant then moved for summary disposition based on the plaintiff's failure to comply with the notice requirements of section 6431. The court of claims granted that motion. Plaintiff, acting pro se, appealed that decision arguing that the notice requirement should not apply to civil rights claims. In considering the appeal from the Court of Claims' decision, this court held that "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.)

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been identified by Defendant which has held that a plaintiff suing the state in circuit court must first file a notice of intent in Court of Claims. Instead, Defendant has relied entirely on cases filed and litigated in the Court of Claims. In *McCahan*, the plaintiff brought a personal injury claim arising from an automobile accident. The question before the Court of Claims was whether the defendant had to show actual prejudice or if substantial compliance with the notice provision was sufficient. Similarly in *Fairley v Michigan Department of Corrections,* 497 Mich 290 (2015), the Supreme Court considered whether a case filed in the Court of Claims could be maintained when the plaintiff failed to file a verified notice with the clerk of the Court of Claims. Both *Progress Michigan v Atty Gen,* 324 Mich App 659 (2018) rev and remanded, 506 Mich. 74 (2020) and *Rusha v Dept of Corrections,* 307 Mich App 300 (2014) considered whether plaintiffs had complied with the notice requirements of section 6431 in cases brought in the Court of Claims. In each of these cases, the statutory notice requirement of section 6431 was relevant and applicable because the plaintiffs brought their claims in the Court of Claims and therefore were subject to the requirements that the Legislature established for jurisdiction before that court. In none of the cases on which Defendant relies in support of its application was there a challenge to the applicability to the notice requirement in forums other than the Court of Claims or to whether notice was required. Each case dealt with the sufficiency of the notice which in each instance the parties agreed that notice to the clerk of the court of claims was required.

Hawthorne-Burdine, supra at *3 In basing its holding on the claims subject to the jurisdiction of the Court of Claims, this Court found only that the notice requirement applied to all claims litigated in the Court of Claims. The *Hawthorne-Burdine* court did not consider or decide that the notice requirement was applicable to all courts or all claims against the state. It considered and concluded only that claims which were pending in the Court of Claims were subject to the notice requirement contained in the Court of Claims Act.

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E. Despite Defendant's attacks, *Tyrrell* was properly decided

The essence of Defendant's application is an attack on the Court of Appeals decision in *Tyrrell*, supra on which the Christie court relied in denying Defendant's appeal because of "its clear and direct application to the matter" before it. Christie, slip op at *4. The Court of Appeals rationale and holding in *Tyrrell,* however, is sound and consistent with the statutory language of the COCA and decisions of this Court. Thus, review by this Court is unnecessary and the Defendant's application should be denied.

To correctly determine the appropriate application of the COCA's notice provision, the *Tyrrell* court first analyzed the language used in the entire COCA to understand the Legislature's intent. The analysis of all the statutory language and construction of the entire COCA is the process required by this Court. See *Michigan Properties LLC v Meridian Twp,* 491 Mich 518, 528 (2012) and *Sun Valley Foods v Ward*, 460 Mich 230, 237 (1999). Although *Tyrrell* found the notice provision to be "unclear", a review of the entire COCA provided clarity and confirmed that the notice provision applied only to claims brought in the Court of Claims. While Defendant appears to object to *Tyrrell's* review of the entire statute to determine the intent of the notice provision, that review is the precise statutory analysis required by this Court.

Additional principles of statutory construction support the finding that the notice provision in the Court of Claims applies only to cases in that forum and not all claims against the State. It is a well-established rule of statutory construction that when two applicable statutory provisions appear to conflict, the one that is more specific to the subject matter prevails over the provision that is only generally applicable. *Miller v Allstate Ins Co,* 481 Mich

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601, 613 (2008); *Pike v Northern Michigan University,* 327 Mich App 683, 693 (2019). Thus the Pike court found that because the plaintiff's claim arose under the public building exception to governmental immunity, the notice provisions in the government tort liability act were more specific to the subject matter and prevailed over the general notice requirement contained in the Court of Claims Act. *Id.*

Here, Plaintiff's claim arises under the ELCRA and the PWDCRA and statutory requirements for jurisdiction would be those contained in these more specific statutes rather than the Court of Claims Act, a more general statute which ultimately has no applicability here. Since ELCRA and the PWDCRA impose no limitations or notice requirements on filing discrimination claims against the state and treats the state as any other entity covered by the statute, the trial court correctly found that Plaintiff was not required to file a notice of intent with the Court of Claims before filing her case in Circuit court.

Next Defendant attacks *Tyrrell* for "dodging" the statement in *McCahan* that the legislature can specify "on what terms" that the State can be sued by citing and relying on *Fairley*. Defendant further asserts that *Tyrrell* "implicitly" held that § 6431 applies only when incorporated by reference into a statute. However, that was neither the explicit or implicit holding of *Tyrrell*. To the contrary, the Court of Appeals held that "the sovereign can place conditions on the suits it permits to be brought against itself" *Tyrrell*, supra at *7 citing *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 212 (2007). Applying that principle, *Tyrrell* found that the Legislature expressly consented to suit in the PWDCRA but "did not condition that consent on compliance with MCL 600.6431." *Id. Tyrrell* contrasted that legislative action with the GTLA which explicitly incorporated Section 6431 in the Act and thereby set conditions under which it would permit suits against the State. Thus, *Tyrrell*

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concluded that MCL 600.6431 was not a condition precedent to suits brought pursuant to the PWDCRA and ELCRA in circuit court.[15]

Defendant next faults *Tyrrell* for not addressing the amendments to the COCA which Defendant believes has some relevance to its application because the notice provision was not changed when the Court of Claims Act was amended, (Def App, p 18). However, the Legislature likely found no amendment necessary because the amendment merely reflected that ELCRA and the PWDCRA claims against the state had always been heard in circuit court with jury demands. The amendment simply reinforced and preserved that long-standing practice. And since no court had held that a plaintiff was required to file a notice of intent with the clerk of the court of claims before filing a complaint with jury demand in circuit court since the enactment of the Court of Claims in 1939, there was no reason for the Legislature to amend the notice provision of the Court of Claims.

The Defendant contends that *Tyrrell* improperly creates a "judicial exception" to the notice requirement for cases in which the plaintiff has requested a jury trial. Defendant presupposes a judicial exception was created by *Tyrrell* when in actuality no exception was created or applied. Rather *Tyrrell* found that no notice requirement existed for ELCRA and PWDCRA claims filed in circuit court because the Legislature exercised its authority to determine under what conditions it could be sued and established the "exception" by providing for suits against it in circuit court without requiring any notice or other condition precedent to suit. And that circuit court jurisdiction continued even after the amendment to the COCA expanding the jurisdiction of the Court of Claims. Thus, the Legislature not the

[15] The notice provision contained in the COCA would only apply to ELCRA and PWDCRA claims if those claims were litigated in the Court of Claims since the notice requirement is a procedural rule of the forum. *Progress Michigan v Atty Gen*, 506 Mich 74, 89 (2020).

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judiciary determined that there was no notice requirement for ELCRA and PWDCRA claims brought by plaintiffs in circuit court.

Finally, the Defendant claims that *Tyrrell* misread *Doe*, *supra* because the defendant in *Doe* did not argue that the notice requirement applied to claims against the state which were pursued in circuit court. Defendant, however, offered no citation for that assertion which is inconsistent with the note in the *Doe* opinion which states that the defendant did indeed argue this position which was rejected as moot by the Court. *Doe*, supra at 239, n 4. In any event, *Tyrrell* did not basis its holding on Doe but simply cited to the case as additional support for its decision.

Ultimately, Defendant has not identified any error in the Court of Appeals' reasoning or any other explanation for its argument that the Court of Claims' procedures should be superimposed and/or applied to claims against the State which are properly filed in Circuit Court.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals correctly recognized that the notice of intent requirement contained in section 6431 of the Court of Claims Act does not apply to claims against the state properly brought in circuit court. The structure and language of the Court of Claims Act, of which the notice requirement is a single section placed in the middle of the Act between other procedural rules governing discovery, pleadings and trial in the Court of Claims supports this conclusion. In addition, while the State can place conditions or limitations on its waiver of liability such as a notice requirement, in the ELCRA and the PWDCRA the state has waived its sovereign immunity entirely without limitations or conditions. Thus the notice requirement contained in the Court of Claims Act has no applicability here.

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Defendant did not point to a single case decided since the notice requirement was enacted in 1939 in which the Court of Claims' notice requirement was imposed on a claim filed in circuit court. All cases cited by Defendant in which claims were dismissed for failure to satisfy the Court of Claims notice requirement were cases filed in or transferred to the Court of Claims. In fact, when the Court of Claims transferred a case to Circuit Court, it has held the notice requirement to be an irrelevant and moot issue. Thus the Court of Appeals committed no error which would justify review by the court.

Therefore, Plaintiff requests that the Court deny the application for leave to appeal and affirm the decision of the Court of Appeals so that the Plaintiff can conduct discovery and obtain a hearing on the merits by a jury without further delay.

PITT, McGEHEE, PALMER,
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Dated: April 8, 2021

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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 April 8, 2021.

Signature: /s/ Kathy Prochaska

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