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STATE OF MICHIGAN

IN THE SUPREME COURT

KAREN CARTER,

Plaintiff-Appellee

Supreme Court No. 165425
Court of Appeals No. 360772
Lower Court No. 21-228-NO

v

DTN MANAGEMENT COMPANY,

Defendant-Appellant
_____/

DEFENDANT-APPELLANT DTN MANAGEMENT'S SUPPLEMENTAL BRIEF ON APPEAL

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Introduction

This supplemental brief is filed pursuant to this Court order entered February 1, 2024.

This Court in *McDougall v Schanz,* 461 Mich 15, 30-31; 597 NW2d 148 (1999), concluded that a statute or rule is substantive when it has as its basis something other than court administration. *Gladych v New Family Homes, Inc*, 468 Mich 594, 599-600; 664 NW2d 705 (2003), correctly concluded that statutes of limitation are substantive because they have as their basis underlying policy considerations other than judicial dispatch of litigation or court administration.

Prior to *Gladych,* this Court had repeatedly illustrated the important public policies served by statutes of limitation. Additionally, prior to *Gladych,* courts from other jurisdictions, and the U.S. Supreme Court, had concluded that statutes of limitation are substantive. *Gladych* upholds the plain statutory language and furthers citizens' legitimate expectations regarding their rights and duties. Overruling *Gladych* and holding that statutes of limitation are procedural and can simply be modified by an administrative order of this Court, would eviscerate citizens' ability to rely on the plain language of the statutory text in determining their substantive rights and duties.

I. A RULE IS SUBSTANTIVE WHERE IT INVOLVES UNDERLYING POLICY CONSIDERATIONS AND HAS AS ITS BASIS SOMETHING OTHER THAN COURT ADMINISTRATION.

This Court in *McDougall* concluded that a rule or statute is procedural if "'no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified.'" 461 Mich at 30 (quoting *Kirby v Larson,* 400 Mich 585, 598; 256 NW2d 400 (1977) (opinion of J. Williams). If a rule or a statute has "as its basis something other than court administration" the rule or statute is substantive. *McDougall,* 461 Mich at 31. The Court noted that this distinction between substantive law and procedural law was advocated by "recognized scholars contemporaneously with the development and passage of our 1963 Constitution" and was

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one "that . . . the drafters contemplated." *Id* at 30 (citing Joiner & Miller, *Rules of Practice and Procedure*: *A study of judicial rule making,* 55 Mich L R 623, 635, 650-651 (1957)). In discussing the substantive versus procedural distinction in the rule of evidence context, the authors in Honigman and Hawkins, Michigan Court Rules Annotated (2 ed), p 403), note that where rules of evidence are "'inextricably involved with legal rights and duties . . . [t]hey are substantive declarations of policy, although they may be drafted in terms of the admission or exclusion of evidence.'" See, *McDougall,* 461 Mich at 30 n 15 (quoting Honigman and Hawkins, *supra.*).

Prior to *McDougall,* this Court implicitly recognized the public policy test for determining whether a rule is procedural or substantive in *Shannon v Ottawa Circuit Judge,* 245 Mich 220; 222 NW 168 (1928). In that case, this Court invalidated a court rule that fixed the compensation of attorneys without providing for a hearing on the subject. In invalidating the rule this Court stated: "The rule before us goes much beyond prescribing a method of procedure or practice, and attempts to define the public policy of the State as effective in that county, and to fix the substantive rights of parties and their attorneys in that county different from such rights in other counties in the State." *Shannon,* 245 Mich at 222.

Other jurisdictions have also recognized and cited approvingly the policy-based substantive/procedural test adopted by this Court in *McDougall.* In *People v McKenna,* 585 P 2d 275, 277; 196 Colo 367 (Colo 1978), the Supreme Court of Colorado stated:

> One basic and widely-recognized test for distinguishing procedural from substantive matters has been stated as follows:
>
> "if the purpose of [a rule's] . . . promulgation is to permit a court to function and function efficiently, the rule-making power is inherent unless its impact is such as to conflict with other validly enacted legislative or constitutional policy involving matters other than the orderly dispatch of business."

Quoting *Joiner & Miller, supra,* at 629-630).

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In *Nolan v Sea Airmotive*, 627 P 2d 1035, 1042-1044 (Alaska 1981), the Alaska Supreme Court applied a policy driven approach to the substantive/procedural distinction after recognizing that the traditional distinction between substantive and procedural law was often inadequate. The Court noted that "'substantive law creates, defines and *regulates* rights, while procedural law prescribes the method of enforcing the rights.'" *Nolan*, 627 P 2d at 1042 (quoting *Ware v City of Anchorage*, 439 P 2d 793, 794 (Alaska 1968)) [Emphasis added]. The Court further stated that "while this distinction claims venerable origins, it has been recognized that the definition falls far short of drawing an unequivocal line." *Id* at 1042. In further defining and clarifying this distinction, the Court noted that statutes or rules that are more closely related to matters of public policy are "properly within the sphere of elected representatives." *Id* at 1042-1043. The Court in *Nolan* further recognized that "setting appropriate statutes of limitation is indeed a function within the legislative purview, as such statutes represent judgments on questions of public policy appropriate to the legislative sphere." *Id* at 1045.

After reviewing the widely recognized authorities which have attempted to address and clarify the procedural versus substantive distinction, this Court in *McDougall* acknowledged the inherent flaws in the traditional definition and attempted to adopt a bright line rule reflecting the fact that matters of public policy are best left to the legislature and therefore statutes or rules that embody public policy concerns are substantive in nature whereas rules or statutes that are concerned primarily with court administration are procedural.

This distinction has been routinely followed by this Court since *McDougall*. *See People v Watkins*, 491 Mich 450, 474; 818 NW2d 296 (2012) ("But statutory rules of evidence that reflect policy considerations 'over and beyond matters involving the orderly dispatch of judicial business' are substantive."); *People v Jones*, 497 Mich 155, 165; 860 NW2d 112 (2014) ("And because

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'[d]etermining what charges a jury may consider does not concern merely the 'judicial dispatch' of litigation,' MCL 768.32(1) thus concerns a matter of substantive law . . ..'" (quoting *People v Cornell,* 466 Mich 335, 353; 646 NW2d 127 (2001) quoting *McDougall,* 461 Mich at 30)); *Muci v State Farm Mut Auto Ins Co,* 478 Mich 178, 191; 732 NW2d 88 (2007) (statutory provision regarding medical examinations in the no-fault act was substantive, as it had as its basis something other than court administration, and therefore trumped the court rule regarding physical and mental examinations); *Lapeer County Clerk v Lapeer Circuit Court (In re Lapeer County Clerk),* 469 Mich 146, 163-164; 665 NW2d 452 (2003).

II. *GLADYCH* CORRECTLY HELD THAT STATUTES OF LIMITATION ARE SUBSTANTIVE AS THEY REFLECT UNDERLYING POLICY CONSIDERATIONS OTHER THAN MERE COURT ADMINISTRATION.

Statutes of limitation are of legislative creation and reflect underlying policies other than mere court administration. In *Nielsen v Barnett,* 440 Mich 1, 8; 485 NW2d 666 (1992), this Court stated:

> By enacting a statute of limitations, the Legislature determines the reasonable period of time given to a plaintiff to pursue a claim. The policy reasons behind statutes of limitations include: the prompt recovery of damages, penalizing plaintiffs who are not industrious in pursuing claims, security against stale demands, relieving defendants' fear of litigation, prevention of fraudulent claims, and a remedy for general inconveniences resulting from delay.

Statutes of limitation go beyond merely the enforcement of a right or remedy but rather are inextricably linked with the substantive right itself. *McDougall,* 461 Mich at 30 n 15. Well before *Gladych,* this Court recognized that statutes of limitation are substantive:

> Every suitor must have a reasonable time in which to commence an action to enforce his rights, and it is for the Legislature to provide a general rule applicable to all cases falling within a class, and not for the judiciary to declare what is or should be a reasonable time varying with the circumstances of each case as it arises. Important legal and property rights depend upon the rule within which such right must be asserted, or, failing to do it, will be lost; and the necessity of a fixed, certain, and definite rule established by legislative authority is manifest.

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Waggoner v Davenport, 83 Mich 211, 215; 47 NW 100 (1890).

Further illustrating the underlying policy considerations inherent in statutes of limitation, this Court in *Ramsey v Child, Hulswit & Co*, 198 Mich 658, 671; 165 NW 936 (1917) (quoting *Wood v Carpenter*, 101 US 135; 25 L Ed 807; 11 Otto 135 (1879)), stated:

> "Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay extending to the limit prescribed is itself a conclusive bar. The bane and antidote go together."

Statutes of limitations are inextricably intertwined with the rights of the parties and the failure to enforce statutes of limitations deprives defendants of substantive rights. *See Bigelow v Walraven*, 392 Mich 566, 570; 221 NW2d 328 (1974) (statutes of limitations are "not a disfavored plea but a perfectly righteous defense . . .") *Bigelow*, 392 Mich at 570. The Court further stated at 576-577:

> Statutes of limitations are intended to "compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend"; "to relieve a court system from dealing with 'stale' claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured"; and to protect "potential defendants from protracted fear of litigation."
>
> * * *
>
> In contrast, conditioning the setting aside of the default on waiver of the statute of limitations defense defeats the purposes of the time limitation. The road commission will be required to defend against a "stale claim", a claim of which it had no notice until eight years after the accident.
>
> During this period, while the plaintiffs were presumably interviewing witnesses and gathering evidence for trial, the road commission may have passed up similar opportunities because it did not realize it had any exposure. Its ability to cross-examine the plaintiffs' witnesses and to have a "fair opportunity to defend" may have been impaired.

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As reflected above, the statute of limitations defense is a recognized "right" that defendants possess. See also *Driver v Naini*, 490 Mich 239, 254; 802 NW2d 311 (2011) (allowing a plaintiff to add a defendant to a medical malpractice lawsuit where the plaintiff failed identify the defendant on the original NOI, would affect the defendant's "substantial rights" and would deny the defendant of "its right to a statute-of-limitations defense).

Not only do statutes of limitations reflect underlying policy considerations, but they also create substantive legal rights.

Without extensively analyzing the purposes of statutes of limitation or the prior case law, this Court in *Buscaino v Rhodes*, 385 Mich 474, 479; 189 NW2d 202 (1971)[1], concluded that "as a general rule, statutes of limitation are considered to be procedural." In announcing this blanket rule, the Court relied on *Bournias v Atlantic Maritime Co*, 220 F2d 152 (2nd Cir 1955), which dealt with the issue of whether statutes of limitation are procedural or substantive in determining whether to apply state or foreign law pursuant to conflict of laws principles. The Court in *Bournias* recognized that it is not always easy to determine whether a statute is procedural or substantive and that the tests that have been applied are "far from precise." 220 F2d at 155. The Court in *Bournias* limited its conclusion that statutes of limitation were procedural only to that case "without deciding whether the same test would also be controlling in cases involving domestic or other kinds of foreign statutes of limitations." 220 F2d at 156-157.

[1] It should also be noted that in *Buscaino*, it was undisputed that the plaintiff properly filed the complaint within the statute of limitations. The question was whether the filing was sufficient to "commence" the action sufficient to toll the statute of limitations. That is a different issue than is present here where it is clear that the plaintiff failed to commence the action within the legislatively enacted statutes of limitation and is relying on administrative orders tolling the statute of limitations.

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Buscaino was decided before this Court adopted the *McDougall* test for determining whether a statute is substantive or procedural. Relying on the flawed logic and reasoning (or lack thereof) of *Buscaino*, this Court in *Forest v Parmalee*, 402 Mich 348, 358; 262 NW2d 653 (1978), merely assumed, based on *Buscaino*, that statutes of limitation were procedural.

Gladych was the first time after *McDougall* that this Court addressed whether statutes of limitation were procedural or substantive. *Gladych* properly concluded that *McDougall* established a new test for determining whether a statute or rule was substantive or procedural (a test which was supported by recognized scholars and commentators). Under that new test statutes of limitation are substantive because they involve policy considerations other than mere court administration:

> The inherent flaw in the *Buscaino* analysis lies in the fact that *Buscaino* was not concerned with the plain language of the statute. Rather, the Court in *Buscaino*, operating under the erroneous belief that statutes of limitations were merely "procedural" in nature, was concerned with avoiding an apparent conflict between GCR 1963, 101, which provided that "[a] civil action is commenced by filing a complaint with the court" and the requirements of § 5856. [citation omitted]. In order to avoid a conflict between the court rule and the statute, the Court adopted a strained, limited interpretation of § 5856.
>
> This Court has since clarified the distinction between statutes regarding matters of "practice and procedure" and those regarding substantive law in *McDougall, supra.* If the statute concerns a matter that is purely procedural and pertains only to the administration of the courts, the court rule would control. [citation omitted]. If, however, the statute concerns a "principle of public policy, having as its basis something other than court administration . . . the [court] rule should yield." [citations omitted].

Gladych, 468 Mich at 599-600. This Court then went on to analyze the public policy considerations behind statutes of limitations and concluded that statutes of limitation are substantive:

> By enacting a statute of limitations, the Legislature determines the reasonable period of time given to a plaintiff to pursue a claim. The policy reasons behind statutes of limitations include: the prompt recovery of damages, penalizing

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> plaintiffs who are not industrious in pursuing claims, security against stale demands, relieving defendants' fear of litigation, prevention of fraudulent claims, and a remedy for general inconveniences resulting from delay. . . . . [Citations omitted].

Gladych, 468 Mich at 600 (quoting *Nielson, supra*, 440 Mich at 8-9).

Gladych was not the first time that this court had analyzed the public policy purposes behind statutes of limitation. *Waggoner, supra,* 83 Mich at 215 (important legal and property rights depend on statutes of limitations), *Ramsey, supra,* 198 Mich at 671 ("statutes of limitation are vital to the welfare of society"; "an important public policy lies at their foundation"), *Nielsen, supra* and *Bigelow, supra.*

Other jurisdictions, including the United States Supreme Court, have also concluded that statutes of limitations are substantive. The Wisconsin Supreme Court in *John Doe 1 v Archdiocese of Milwaukee,* 303 Wis 2d 34; 734 NW2d 827, 834; (2007), stated that "statutes of limitations are generally viewed as substantive because they can extinguish otherwise valid claims . . . ."

The Florida Supreme Court concluded that statutes of limitations should be treated as substantive for conflict of laws purposes, and noted the traditional position that statutes of limitations are matters of procedure has "been universally assailed by the commentators." *Bates v Cook, Inc,* 509 So2d 1112, 1114 (Fla 1987). Quoting a commentator on this issue, *Bates* stated: "A right which can be enforced no longer by an action at law is shorn of its most valuable attribute." *Id* (quoting Lorenzen, *The Statute of Limitations and the Conflict of Laws,* 28 Yale L J 492 (1919)).

In deciding whether standing was an issue of substantive law, the Florida Supreme Court analogized standing to the statute of limitations defense:

> In this area, the question of standing to assert a claim is analogous to a statute of limitations defense. Both issues relate to whether a cause of action may proceed; neither involves the "machinery for carrying on the suit" once the right to proceed has been determined. The ability to bring an action at law is a "most valuable

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> attribute" of a legal right, a factor favoring the classification of standing as a substantive matter.

Siegel v Novak, 920 So 2d 89, 94 (Fla 2006).

The Supreme of Canada has also concluded that statutes of limitations are substantive for choice of law purposes. *See Sutherland v Kentucky,* 454 Mich 274, 288; 562 NW2d 466 (1997) (citing *Tolofson v Jenson* and *Lucas v Gagnon,* 120 DLR 4th 289 (1994)).

The United States Supreme Court in *Guaranty Trust Co v New York*, 326 US 99, 110-111; 65 S Ct 1464; 89 L Ed 2079 (1945), held that statutes of limitation are substantive for purposes of determining whether to apply state law under the *Erie* doctrine ("[p]lainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly." 326 US at 110).

In *Blaha v A.H. Robins & Co,* 536 F Supp 344, 346 (WD Mich 1982), the U.S. District Court for the Western District of Michigan followed *Guaranty Trust,* stating that "it is well settled that "state statutes of limitations are 'substantive' laws and must be followed by federal courts in diversity actions."

Even before, *McDougall,* substantive law was characterized as that body of law which creates and regulates the rights and duties of the parties. Even under this definition there can be no dispute that statutes of limitations create substantive rights to defendants and regulate the rights of plaintiffs. Certainly, the ability to bring a cause of action is an essential attribute of a legal right. Even under the pre-*McDougall* test, statutes of limitation are substantive. However, after *McDougall* was decided, the Courts had a bright-line rule to determine whether statutes of limitation are substantive. This Court in *Gladych* looked to the well-established policy considerations underlying statutes of limitation and concluded that they go beyond mere court administration and therefore are substantive law.

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III. EVEN IF *GLADYCH* WAS WRONGLY DECIDED, WHICH IT WAS NOT, IT SHOULD NOT BE OVERRULED.

Gladych correctly held that statutes of limitation are substantive in nature. However, if this Court were to conclude otherwise, *Gladych* should not be overturned.

"Stare decisis is generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters judicial reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Robinson v City of Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000). "[T]his Court should respect precedent and not overrule or modify it unless there is substantial justification for doing so." *People v Feezel*, 486 Mich 184, 212; 783 NW2d 67 (2010).

In determining whether a case should be overruled, this Court looks to: (1) whether the decision was wrongly decided, (2) the practicable workability of the opinion and (3) the effect on reliance interests of overruling the opinion. *Robinson*, 462 Mich at 465-468.

When addressing the workability and reliance interest prongs, this Court has considered whether the opinion has made a "mockery of the law" making the law "more confusing and less decipherable to the ordinary citizen." *Paige v City of Sterling Heights*, 476 Mich 495, 510-511; 720 NW2d 219 (2006). An opinion defies practical workability if a person "reading the statute surely would not know that he or she cannot rely on what the statute plainly says." *Paige*, 476 Mich at 510. "Further, it is well to recall in discussing reliance, when dealing with an area of the law that is statutory . . . that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions." *Robinson*, 462 Mich at 467. In addressing the workability factor, courts also look to whether "the decision has been met with criticism" and whether "its application has been contested or difficult." *Ottgen v Katranji*, 511 Mich 223, 240; ___NW2d ___ (2023).

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Gladych should not be overruled because it was not wrongly decided. Second, *Gladych* does not make a mockery of the law but instead furthers the purpose and intent of statutes of limitation. *Gladych* ensures the inviolability of statutes of limitation and that ordinary citizens can rely on them in determining when a potential cause of action against them can no longer be brought. If *Gladych* were overruled citizens would no longer be able to look to statutes of limitation for certainty as to when causes of action are extinguished as they could simply be revived through the adoption of court rules or administrative orders.

Robinson emphasized the importance of adhering to plain statutory language in relation to reliance interests:

> Further, it is well to recall in discussing reliance, when dealing with an area of the law that is statutory . . . that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have not legitimacy in overruling or nullifying the people's representatives.

Robinson, 462 Mich at 467. If this Court were to overrule *Gladych* and hold that it can, through administrative orders, modify statute of limitations because they are procedural, it would be this Court that would be disrupting reliance interests by usurping the lawmaking power of the people and disrupting citizens' legitimate expectations about the rules of law that they are to adhere to and which govern their rights and duties.

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Additionally, the pre-*Gladych* cases referencing the notion that statute of limitations were procedural and not substantive were devoid of any legal analysis supporting that proposition, but relied on non-binding precedent from the federal circuit. *See Buscaino, supra.* Moreover, many of the commentators increasingly called into question the so-called general rule that statutes of limitations are procedural. *See Bates, supra* and Lorenzen, *The Statute of Limitations and the Conflict of Laws, supra*. *Gladych* was not an abrupt departure from long-standing precedent as the pre-*Gladych* cases simply relied on non-binding authority for this proposition without engaging in its own extensive legal analysis.

While numerous cases have cited *Gladych,* no Michigan case was found that criticized its holding that statutes of limitation are substantive and not procedural. While some cases since *Gladych* have cited to the erroneous conclusion in *Buscaino* that statutes of limitation are procedural, these cases have not engaged in any analysis on this issue, nor did they criticize *Gladych's* holding in this regard.

In summary, *Gladych's* holding that statutes of limitation are substantive and not procedural was based on this Court's clarification of the definition of substantive versus procedural law in *McDougall* and the important public policies served by statutes of limitation. Michigan has long-recognized the policies underlying statutes of limitation and that statutes of limitation are more than procedural mechanisms as they create and regulate rights. The ability to bring a cause of action, is an essential attribute of a right. This principle has been recognized by other courts including the U.S. Supreme Court.

Gladych correctly held that statutes of limitation are substantive. Furthermore, reliance interests would be substantially affected if *Gladych* were overturned, because it would undermine citizens' legitimate expectations regarding their rights and duties under the law. No longer would

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citizens be able to look to the words of the statute itself for guidance, but would be at the mercy of courts and not their elected representatives, contrary to fundamental separation of powers principles.

Conclusion

For the reasons set forth above, *Gladych* correctly held that statutes of limitation are substantive and not procedural and it should be reaffirmed.

Respectfully submitted,

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Dated: February 23, 2024

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WORD COUNT CERTIFICATION

Defendant-Appellant DTN Management Company hereby certifies that the foregoing supplemental brief on appeal contains 4,947 countable words pursuant to MCR 7.212(B)(2) and(B)(3) and MCR 7.312.

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