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STATE OF MICHIGAN
IN THE SUPRME COURT

KAREN CARTER,

Plaintiff/Appellee

v

DTN MANAGEMENT CO.,
d/b/a DTNMGT,
a domestic profit corporation,

Defendant/Appellant.

Supreme Court No. 165425

Court of Appeals No. 360772

Trial Court No. 21-228-NO

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PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEFING PURSUANT TO THE COURT'S FEBRUARY 1, 2024 ORDER

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I. INTRODUCTION

Plaintiff/Appellee files this Supplemental Brief pursuant to the Court's February 1, 2024 Order addressing that the Court's decision in *Gladych v New Family Homes* was incorrectly decided and that it should be overturned.

II. ARGUMENT

A. The holding in *Gladych v New Family Homes* that Statutes of Limitations are Substantive in Nature was not proper.

The holding in *Gladych* that statutes of limitations are substantive in nature was based, in part, upon an erroneous distinction made in *McDougall v Schanz* between what constitutes procedural law and what constitutes substantive law. In *McDougall,* the Supreme Court addressed whether MCL 600.2169, part of the RJA, infringed on the judiciary's constitutional authority under Const 1963, art 6, § 5 to "establish, modify, amend and simplify the practice and procedure in all courts of this state."[1] In holding that the statute was constitutional, the Court announced a new test drawing a distinction "between 'practice and procedure' and substantive law."[2] The Court concluded that a statutory rule of evidence violates Const 1963, art 6, § 5 only when " 'no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified....' " and that "[i]f a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration ... the [court] rule should yield."[3] The Court based this decision on a plurality opinion in *Kirby v Larson* and a 1957 law review article.[4]

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1 *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).
2 *Id.* at 36.
3 *Id*. at 30.
4 *Kirby v Larson,* 400 Mich 585, 598; 256 NW2d 400 (1977) (opinion of Williams, J) (quoting 3 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p. 404).

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As Justice Cavanagh stated in his dissent in *McDougall,* the language from Justice Williams' *Kirby* opinion upon which *McDougall's* majority opinion is based was "dicta."[5] "[T]he phrase "[w]e conclude that a statutory rule of evidence violates Const.1963, art. 6, § 5 *only when* " (op. at 156 [emphasis added]) appears nowhere in *Kirby,* nor in the sources from which the quotation in *Kirby* was derived."[6] The test set forth in *McDougall* essentially states that in matters of judicial efficiency alone, the judiciary is supreme; however, when other concerns might arise which may implicate policy decisions, it must be substantive.[7] The problem with such a distinction is that court rules do not exclusively relate to matters of judicial efficiency, rather many of our court rules also relate to policy decisions.[8] As Justice Cavanagh stated in the context of rules of evidence:

> Is a rule that precludes relevant evidence on the grounds of unfair prejudice concerned solely with judicial efficiency, or might it reflect a policy judgment, best made elsewhere, that some evidence, though relevant, is likely to have an undue effect on the outcome of a trial? MRE 403. Are rules limiting the admissibility of character evidence merely rules ensuring efficiency at trial, or do they reflect a policy decision that character is not probative of conduct? MRE 404, 405. Is a rule that bans introduction of subsequent remedial measures merely a tool of judicial efficiency, or does it reflect a policy judgment that the Court will not penalize those who attempt to repair harmful situations by allowing evidence of such remedies? MRE 407.29 Are rules addressing the admissibility of statements made in the course of compromise, payment of medical expenses, and plea negotiations merely tools to speedily move along the judicial forum, or do they reflect substantive policy decisions regarding the advisability of encouraging such discussions? MRE 408, 409, 410. What about a rule prohibiting discussion of the presence of liability insurance? MRE 411. What of requirements as to who may be a witness? MRE 601–607. Impeachment by evidence of conviction of a crime? MRE 609. Recall as well that the viability of the Kirby plurality's discussion regarding such matters is now seriously in question following the majority's opinion. Is there a substantive policy question about when court-appointed experts are required, or how they should be compensated? MRE 706. And in MRE 803, alone, do we find literally dozens of policy judgments regarding the veracity of various items, many of which

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5 *McDougall,* 461 Mich at 56-57 (Cavanagh, J, dissenting).
6 *Id*.
7 *Id*. at 60.
8 *Id*. at 60-61.

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> the Legislature might have an interest in addressing (i.e., public records, prior convictions, documents affecting an interest in property, vital statistics, statements made for the purposes of medical treatment...).
>
> The point of this discussion is not to invite the Legislature to discover that the majority has knocked down the fence that has separated our branches until this day, nor to invite it to graze upon those of our court rules it wishes to modify. The effect of the majority's decision, however, is to invite the Legislature to trample whatever rules of the judiciary might arguably concern something other than judicial efficiency, and the majority's decision herein offers so little to support its conclusion that the matter discussed today is substantive that it invites legislative "questions" far more fanciful than the ones above.[9]

As this Court pointed out in *Employees & Judge of the Second Judicial District Court v Hillsdale Co.*, " 'an indispensable ingredient of the concept of coequal branches of government is that 'each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches.' "[10] If the Legislature is able to impede upon any court rule that arguably relates to something other than judicial efficiency the lines between the legislative branch and judicial branch are blurred.

The problem with the distinction made in *McDougall* is that it departs from both previous Michigan and national law. Michigan courts have traditionally held that procedural provisions address "how" an action is to be brought, while substantive statutes specify "what" actions may be brought.[11] In other words, substantive law creates or restricts an actual right while procedural

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[9] *McDougall v Schanz*, 461 Mich 15, 61–62, 597 NW2d 148, 170–71 (1999) (Cavanagh, J, dissenting).

[10] *Employees & Judge of the Second Judicial Dist Court v Hillsdale Co*, 423 Mich 705, 717, 378 NW2d 744 (1985).

[11] *Clemons v City of Detroit, Dept of Transp*, 120 Mich App 363, 372; 327 NW2d 480 (1982) (citing *Brown v Porter*, 13 Mich App 6, 9-10; 163 NW2d 709 (1968)).

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law enforces that right.[12] This aligns with the national rule as well.[13] The United States Supreme Court in *McGee v International Life Ins Co* defined a procedural statute as one which neither enlarges nor impairs substantive rights but rather relates to the means and procedures for enforcing these rights.[14] The distinction made in *McDougall* even goes against the very definitions of substantive law and procedural law. Substantive law "creates, defines, and regulates rights, duties, and powers of parties;" procedural law concerns "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves."[15]

The Supreme Court in *Gladych* relied upon the erroneous test set forth in *McDougall* in concluding that statutes of limitations are procedural in nature.[16] Prior to the holding in *Gladych*, Michigan courts have traditionally determined statutes of limitations to be generally procedural rather than substantive.[17] The Court of Appeals explained in *Stabile v General Enterprises* that

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[12] *See Rusha v Dept of Corrections*, 307 Mich App 300, 311-312; 859 NW2d 735 (2014) (citations omitted); *see also Phelps v Wayne Circuit Judge*, 225 Mich 514, 517-518; 196 NW 195 (1923) (statute was "a rule of procedure relating only to the remedy"); *Tobin v Providence Hosp,* 244 Mich App 626, 665; 624 NW2d 548 (2001) ("A statute is procedural if it relates to the rules or practice or procedure or the means employed to enforce a right.");

[13] *Pratt v National Distillers & Chemical Corp*, 853 F2d 1329, 1334 (6th Cir 1988) (citations and internal quotation marks omitted) (Procedural laws "are those providing rules of practice, courses of procedure or methods of review, or those prescrib[ing] methods of enforcement of rights or obtaining redress. Laws affecting substantive rights are those which create duties, rights and obligations."); *First United Methodist Church of Hyattsville v United States Gypsum Co*, 882 F2d 862, 865 (4th Cir 1989), *cert denied,* 493 US 1070 (1990) (A statute of limitations "is a procedural device that operates as a defense to limit the remedy available from an existing cause of action.");

[14] *McGee v International Life Ins Co*, 355 US 220, 224 (1957).

[15] *Black's Law Dictionary* (11th ed 2019).

[16] *Gladych v New Family Homes, Inc*., 468 Mich 594, 600; 664 NW2d 705 (2003).

[17] *Gleason v Michigan Dept of Transp*, 256 Mich App 1, 2; 662 NW2d 822 (2003); citing *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978). See also, *Buscaino v Rhodes*, 385 Mich 474, 480, 189 NW2d 202, 205 (1971), overruled by *McDougall v Schanz*, 461 Mich 15, 597 NW2d 148 (1999), and overruled by *Gladych v New Fam Homes, Inc*, 468 Mich 594, 664 NW2d 705 (2003) ("As a general rule, statutes of limitation are considered to be procedural."); *Lothian v City*

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even the Legislature considered statutes of limitation regarding common law matters to be procedural, quoting RJA legislative committee notes, " '[a] general statute of limitations as it applies to personal actions is procedural only and not substantive. It only limits the availability of the remedy and does not destroy the underlying right.' "[18] The *Gladych* decision overturned that long standing tradition. In *Gladych*, this Court found that the filing of a complaint alone was not enough to toll the running of a limitations period pursuant to MCL § 600.5856.[19] In its opinion, the majority in *Gladych* held that the holding in *Buscaino* was flawed and based upon an erroneous belief that statutes of limitations were merely procedural.[20] The majority then relied upon the test set forth in *McDougall* in holding that statutes of limitations are substantive rather than procedural.[21]

In *Gladych*, however, the Court refused to accept the underlying principle of *Buscaino* that statutes of limitations are procedural. Instead, the Court applied the distinction between matters of "practice and procedure" and "substantive law" provided in *McDougall*.[22] In *McDougall*, the Court, admitting that drawing such a line "is difficult and one that must be made on a case-by-case basis," determined that the enactment of MCL § 600.2169, which governed the "admissibility of standard of care testimony in medical malpractice actions involving specialists," was an enactment

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of Detroit, 414 Mich 160, 166, 324 NW2d 9, 13 (1982) ("In general, statutes of limitations are regarded as procedural, not substantive, in nature."); *People v Russo*, 439 Mich 584, 595, 487 NW2d 698, 702 (1992) ("In Michigan, statutes of limitations are generally regarded as procedural and not substantive in nature."); *Stephens v Dixon*, 449 Mich 531, 534, 536 NW2d 755, 756 (1995) ("Statutes of limitation are procedural devices intended to promote judicial economy and the rights of defendants.")

18 *Stabile v Gen Enterprises*, 70 Mich App 711, 717, 246 NW2d 375, 378 (1976) (quoting Committee notes and comment to MCL 600.5801).

19 *Gladych at 607.*

20 Gladych, at 599-600.

21 *Id*.

22 *Id.,* at 600.

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of substantive law.[23] The *Gladych* Court in utilizing the test set forth in *McDougall* reinforced that "if [a] statute concerns a matter that is purely procedural and pertains only to the administration of the courts, the court rule would control…if, however, the statute concerns a "principle of public policy," having as its basis something other than court administration…the [court] rule should yield."[24] In other words, the *Gladych* Court conflated the *McDougall* decision, which related to an evidentiary statute concerning a matter of public importance, to declare a negative maxim for all future Michigan cases. This was improper.

Along with the vast number of state jurisdictions who still consider statutes of limitations to be procedural, the 6th Circuit also has decided likewise. In fact, it recently strained to even understand the *Gladych* procedural/substantive division. In *Czewski v KVH Industries, Inc*., the federal court examined a choice of law rule and had to determine whether the appropriate statute of limitations was procedural or substantive.[25] The 6th Circuit agreed with the district court, rejecting Plaintiff's argument that as a result of the *Gladych* holding statutes of limitations are substantive for all purposes in Michigan courts. Instead, the *Czewski* Court affirmed the lower court and "followed 'Michigan's traditional rule that statutes of limitations are procedural in nature.'" In a footnote, the Court added the following:

> Notably, although *Gladych* was issued more than a decade ago, Czewski has not directed us to a single decision wherein a court has interpreted the case as ruling that statutes of limitations are substantive for all purposes under Michigan law. To the contrary, following *Gladych*, many Michigan courts continued to follow the general rule that limitations periods are procedural in nature. *See*, e.g. *Hatcher v State Farm Mut. Auto. Ins. Co.*, 269 Mich App. 596, 605-606; 712 NW2d 744, 750 (2005); *Waisanen v Superior Twp.*, 305 Mich App 719, 730; 854 NW2d 213, 219 (2014).[26]

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23 *McDougall*, 461 Mich at 35.
24 *Gladych*, 468 Mich at 600.
25 *Czewski v KVH Industries, Inc*, 607 Fed Appx 478 (2015).
26 *Czewski*, at fn. 2.

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B. *Gladych v New Family Homes* and *McDougall v Schanz* should both be overturned.

In determining whether to overrule precedent, this Court considers the following factors set forth in *Robinson v City of Detroit*: "(1) 'whether the earlier decision was wrongly decided,' (2) 'whether the decision at issue defies practical workability,' (3) 'whether reliance interests would work an undue hardship,' and (4) 'whether changes in the law or facts no longer justify the questioned decision.'"[27] The decision in *Gladych* was clearly based upon the erroneous test set forth in *McDougall* for determining whether a statute is procedural or substantive. *Gladych* is contrary to decades of precedent as demonstrated above and for these reasons *Gladych* was wrongly decided. Michigan had, prior to this Court's decision in *Gladych*, held that statutes of limitation are generally to be considered procedural, and not substantive.[28] That prior doctrine is widely accepted, more embracing in its scope, and followed by most all jurisdictions both federal and state.

The Court in *Gladych* relied on *McDougall's* "practice and procedure" versus "substantive law" analysis and then combined that with statutory interpretation from the Committee Comment to § 600.5856 in deciding that statutes of limitation are substantive. The Court's reliance on *McDougall* and interpretation that statutes of limitations are substantive unnecessarily handcuffs this Court's ability to make decisions that take into account matters of consequence that it may face such as a global pandemic.

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[27] *North American Brokers, LLC v Howell Public Schools*, 502 Mich 882; 913 NW2d 638, 641 (2018) (McCormack, CJ, concurring) (quoting *Robinson v Detroit*, 462 Mich 439, 464; 653 NW2d 307 (2000)).

[28] *Gleason v Michigan Dept of Transp; Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978); *Lothian v City of Detroit*, 414 Mich 160, 166; 324 NW2d 9 (1982); *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995).

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As explained in the dissent of *McDougall*, the distinction between substantive and procedural law adopted by the majority in *McDougall* and *Gladych* also defies practical workability. The test set forth in *McDougall* essentially states that in matters of judicial efficiency alone, the judiciary is supreme; however, when other concerns might arise which may implicate policy decisions, it must be substantive.[29] Court rules do not exclusively relate to matters of judicial efficiency, rather many of our court rules also relate to important policy decisions. The practical effect of *McDougall* and *Gladych* permit the legislature to intrude upon the province of the judiciary with impunity which defies separation of power principles. Lastly, the *Gladych* decision has not become so imbedded, accepted, or fundamental to society that overruling it would produce significant dislocations as prior to the *Gladych* decision, statutes of limitations were considered procedural in nature.

III. CONCLUSION AND REQUEST FOR RELIEF

For the reasons stated, *supra,* Ms. Carter respectfully requests this Court overrule its decisions in *Gladych* and *McDougall* respectively.

Respectfully Submitted,

Dated: February 29, 2024

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Pursuant to MCR 7.212(B) and MCR 7.312, this brief contains 3,306 countable words.

[29] *Id*. at 60.