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STATE OF MICHIGAN

IN THE SUPREME COURT

KAREN CARTER,

Plaintiff-Appellee

v

DTN MANAGEMENT COMPANY,

Defendant-Appellant
_____/

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

DEFENDANT-APPELLANT DTN MANAGEMENT COMPANY'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

The Court of Appeals issued its published opinion on January 26, 2023. This Court has jurisdiction to grant leave to appeal under MCL 600.215, MCR 7.303(B)(1) and MCR 7.305(C)(2) as this Application is being timely filed within 42 days of the Court of Appeals opinion.

OPINION APPEALED FROM AND RELIEF SOUGHT

Defendant, DTN Management Company, seeks leave to appeal the Michigan Court of Appeals' published decision holding that this Court's COVID-19 ("COVID") administrative orders tolled the 3-year statute of limitations for bringing a premises liability and reversing the trial court's decision granting summary disposition in favor of DTN. *Carter v DTN Management Company,* ___ Mich App ___; ___ NW2d ___ (2015). The Court of Appeals opinion is attached hereto as **Exhibit 1** and the trial court's opinion and order is attached hereto as **Exhibit 2** in accordance with MCR 7.305(A)(2).

There is no dispute that but for the COVID administrative orders, Plaintiff, Karen Carter's premises liability action would be time-barred as it was filed more than 3-years after the claim accrued. MCL 600.5805(1).[1]

Although there was no statutory tolling that would allow tolling under these circumstances the Court of Appeals, concluded that the "statute of limitations in this case was tolled by the administrative orders." *Carter,* slip op at pg. 1. This conclusion is contrary to the plain language of the statute, the intent of the Legislature and fundamental separation of powers principles.

[1] Carter's claim accrued on January 10, 2018, when she slipped and fell on ice and this lawsuit was not filed until April 13, 2021, approximately 3 years and 3 months later.

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This Court's administrative orders cannot toll statutes of limitation because statutes of limitation are substantive and not procedural. See *Gladych v New Family Homes, Inc,* 468 Mich 594, 600; 664 NW2d 705 (2003) and *McDougall v Schanz,* 461 Mich 15, 27; 597 NW2d 148 (1999). To hold otherwise violates fundamental separation of powers principles.

DTN respectfully requests that leave be granted. Alternatively, DTN asks that this Court summarily reverse the Court of Appeals and affirm the trial court's opinion and order granting summary disposition in favor of DTN.

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STATEMENT OF QUESTION PRESENTED

Whether this Court's COVID-19 administrative orders tolled the statute of limitations for bringing a personal injury action where this Court's constitutional authority only extends to matters or practice and procedure and where statutes of limitation are substantive legislative enactments.

Court of Appeals says:	Yes.
Trial court says:	No.
Defendant/Appellant DTN says:	No.
Plaintiff/Appellees say:	Yes.

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INTRODUCTION AND REASONS FOR GRANTING LEAVE

This case involves two interrelated issues of jurisprudential significance involving the separation of powers and the authority of the judicial branch to alter or modify unambiguous substantive statutory enactments. In short, this case concerns the fundamental question of whether the judicial branch has the authority to make law.

The issues arise out of a slip-and-fall at a DTN apartment complex on January 10, 2018. Plaintiff, Karen Carter ("Carter") did not file this premises liability lawsuit until April 13, 2021. Under ordinary circumstances, there would be no question that this lawsuit is barred by the running of the 3-year statute of limitations for personal injury actions set forth in MCL 600.5805(1).

Unfortunately, due to the COVID pandemic, the Governor declared a state of emergency. Due to this state of emergency, both the Governor and this Court issued various administrative orders effecting deadlines for commencing actions by excluding any days that fell within the emergency period for purposes of MCR 1.108(1).

Although the statute of limitations deadline did not fall within the state of emergency period (the state of emergency ended on June 20, 2020, and the statute of limitations expired on January 11, 2021), the Court of Appeals held that the administrative orders nonetheless tolled the statute of limitations making Carter's complaint timely.

This Court should grant leave because this case involves fundamental separation of powers principles which are of major significance to the state's jurisprudence. This case also involves fundamental issues of statutory construction and the judiciary's role in interpreting unambiguous statutes.

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"Our very existence as a Nation and State is founded upon a balance of powers between 3 equal and coordinate branches of government." *Gauthier v Campbell,* 360 Mich 510, 515; 104 NW2d 182 (1960).

This Court articulated separation of powers principles in *SBC Mich v PSC,* 482 Mich 90, 97-99; 754 NW2d 259 (2008):

> The people of the state of Michigan have divided the powers of their government "into three branches: legislative, executive and judicial." Furthermore, "[n]o person exercising the powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."
>
> "The legislative power of the State of Michigan is vested in a senate and a house of representatives." Simply put, legislative power is the power to make laws. In accordance with the constitution's separation of powers, this Court "cannot revise, amend, deconstruct, or ignore [the Legislature's] product and still be true to our responsibilities that give our branch only the judicial power." While administrative agencies have what have been described as "quasi-legislative" powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature.
>
> Since the time of *Marbury v Madison,* interpreting the law has been one of the defining aspects of judicial power. "Although we may not usurp the lawmaking function of the legislature, the proper construction of a statute is a judicial function, and we are required to discover the legislative intent." [citations omitted].

Pursuant to separation of powers principles this Court "is not authorized to enact court rules that establish, abrogate, or modify the substantive law." *McDougall,* 461 Mich at 27. "Rather, . . . this court's constitutional rule-making authority extends *only* to matters of practice and procedure." *Id.*

Where 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." *Id* at 31.

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In *Rowland v Washtenaw Cty Rd Comm'n,* 477 Mich 197, 213; 731 NW2d 41 (2007), this Court expressed the relationship between the judicial power and the legislative power by quoting Supreme Court Justice John Marshall Harlan's dissent in *Plessy v Ferguson,* 163 U.S. 537, 558; 16 S Ct 1138; 41 L Ed 256 (1896):

> [T]he courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives.

"An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the legislature." *Roberts v Mecosta,* 466 Mich 57, 63; 642 NW2d 663 (2002) (*Roberts I*). The first step in this process is to examine the language of the statute. *Roberts,* 466 Mich at 63. "If the statute's language is clear and unambiguous, then we assume the Legislature intended its plain meaning and the statute is enforced as written. *Id.*

There is no dispute that Carter's claims are barred if the plain language of the 3-year statute of limitations is enforced.

The Legislature has specifically incorporated tolling mechanisms into the Revised Judicature Act (RJA) illustrating a Legislative intent to only toll statutes of limitations under certain circumstances. No other tolling mechanisms are allowed.

The Court of Appeals' interpretation of the COVID administrative orders is a court-made modification of substantive law that is not permissible. Additionally, this Court's administrative orders cannot affect legislative enactments as this Court's authority only extends to matters of procedure and it cannot make substantive law.

The COVID administrative orders, as interpreted by the Court of Appeals, directly conflict with statutes of limitations which are substantive in nature. The administrative

orders must yield. Holding otherwise, ignores the clear Legislative intent as expressed through the words of the statute and invades the province of the Legislature.

DTN respectfully requests that the Court grant leave to appeal or summarily reverse and affirm the trial court's decision granting summary disposition in favor of DTN.

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STATEMENT OF FACTS

The Incident and Injury

The incident at issue occurred on January 10, 2018. On that day, Carter, a tenant of DTN, was walking to her car to go to work at around 7:30 a.m. when she slipped and fell on a sidewalk. Weather reports from the days leading up to Carter's fall illustrate a pattern of inclement wintry weather that continued on the day of the incident, which included light snow and "ice fog" throughout the early morning hours with temperatures rising slightly above freezing around mid-morning.

Following the incident, Carter presented to Lansing Urgent Care where she was diagnosed with a distal fibular fracture, for which she underwent surgery.

COVID-19 and Administrative Orders

On March 10, 2020, the Governor declared a state of emergency related to COVID-19. On March 23, 2020, this Court issued Administrative Order No. 2020-3 (AO 2020-3), which provided:

> In light of the continuing COVID-19 pandemic and to ensure continued access to courts, the Court orders that:
>
> For all deadlines applicable to the commencement of all civil and probate case types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110 or a motion raising a defense or an objection to an initial pleading under MCR 2.116, and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1).
>
> This order is intended to extend all deadlines pertaining to case initiation and the filing of initial responsive pleadings in civil and probate matters during the state of emergency declared by the Governor related to COVID-19. Nothing in this order precludes a court from ordering an expedited response to a complaint or motion in order to hear and resolve an emergency matter requiring immediate attention. We continue to encourage courts to conduct hearings remotely using two-way interactive video technology or other remote participation tools whenever possible.

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> This order in no way prohibits or restricts a litigant from commencing a proceeding whenever the litigant chooses. Courts must have a system in place to allow filings without face-to-face contact to ensure that routine matters, such as filing of estates in probate court and appointment of a personal representative in a decedent's estate, may occur without unnecessary delay and be disposed via electronic or other means.

AO 2020-3 was amended on May 1, 2020. The only change was to add the following language: "This order in no way prohibits or restricts a litigant from commencing a proceeding whenever a litigant chooses, nor does it suspend or toll any time period that must elapse before the commencement of an action or proceeding."

On June 12, 2020, this Court issued Administrative Order No. 2020-18 (AO 2020-18), which rescinded AO 2020-3 effective June 20, 2020:

> In Administrative Order No. 2020-3, the Supreme Court issued an order excluding any days that fall during the State of Emergency declared by the Governor related to COVID-19 for purposes of determining the deadline applicable to the commencement of all civil and probate case types under MCR 1.108(1). Effective Saturday, June 20, 2020, that administrative order is rescinded, and the computation of time for those filings shall resume. For time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020. For filings with time periods that did not being to run because of the exclusion period, the filers shall have the full periods for filing beginning on June 20, 2020.

Procedural Background

Trial Court

Carter filed this lawsuit on April 13, 2021. DTN moved for summary disposition arguing that Carter's complaint was barred by the 3-year statute of limitations set forth in MCL 600.5805(1). DTN argued that Carter did not get the benefit of COVID tolling because the statute of limitations did not expire during the State of Emergency and

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therefore, Carter only had until January 11, 2021, to file. Alternatively, DTN argued that the Administrative Orders could not toll statutes of limitation, which are substantive in nature.

The trial court agreed with DTN and concluded that the Administrative Orders only adjusted deadlines that expired during the State of Emergency and because the statute of limitations here did not expire during the State of Emergency, Carter did not get the benefit of tolling. The trial court further stated that "extending all statutes of limitation during the state-of-emergency, regardless of when the deadline fell, has the practical effect of improperly tolling the statute of limitations."

Court of Appeals

On appeal, DTN renewed its arguments that the Administrative Orders did not toll the statute of limitations because the statute of limitations deadline fell outside of the State of Emergency period and because statutes of limitations, being enactments of substantive law, could not be tolled by Administrative Orders, under separation of powers principles. The Court of Appeals rejected these arguments and concluded that the statute of limitations was tolled by the Administrative Orders. Specifically, the Court of Appeals stated:

> Because we conclude that the statute of limitations in this case was tolled by the administrative orders, we reverse and remand.

Carter, slip op pg. 1. In reaching this conclusion the Court of Appeals concluded that the Administrative Orders excluded any day, from the statute of limitations time computation under MCR 1.108(1), essentially treating every day of the period as a court holiday, Saturday or Sunday. The Court of Appeals also concluded that this Court had the power to issue the Administrative Orders because the orders were simply modifying

computation of time under MCR 1.108, which it contends is a procedural matter, and were not changing substantive law. DTN timely seeks leave to appeal the Court of Appeals ruling.

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STANDARD OF REVIEW

This Court reviews summary-disposition decisions de novo "to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 317 (1999). Issues of statutory interpretation are reviewed de novo. *SBC Mich,* 482 Mich at 97. Whether a statute or administrative order is constitutional is a question of law which is also reviewed de novo. *See League of Women Voters of Mich v Sec'y of State,* 339 Mich App 257, 272; 981 NW2d 538 (2021).

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ARGUMENT

I. This Court should grant leave because it impermissibly infringed on the Legislative power when it enacted administrative orders tolling statutes of limitations, which are substantive law.

The Court of Appeals has concluded that this Court's COVID administrative orders tolled statutes of limitation during the COVID State of Emergency. In doing so, the Court of Appeals disregarded the plain language of MCL 600.5805(1) and invaded the province of the Legislature to make substantive law. The prerogative of the judiciary is to say what the law is, not to make substantive law. *Marbury v Madison,* 5 US 137, 177; 2 L Ed 60 (1803). While this Court has the power to issue administrative orders and rules regarding practice and procedure, where such orders or rules conflict with substantive law the order must yield to the substantive legislative enactment in keeping with fundamental separation of powers principles. *McDougall, supra,* 461 Mich at 31.

A. Statutes of limitations are substantive.

If a "statute concerns 'a principle of public policy, having as its basis something other than court administration . . . the [court] rule should yield.'" *Gladych, supra,* 468 Mich at 600 (quoting *McDougall,* 461 Mich at 31). "Statutes regarding periods of limitation are substantive in nature." *Gladych,* 468 Mich at 600. In *Nielsen v Barnett,* 440 Mich 1, 8-9; 485 NW2d 666 (1992), this Court noted the various policies underlying statutes of limitations:

> 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 inconvenience resulting from delay.

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Statutes of limitation are unquestionably substantive. Where a court rule or administrative order conflicts with a statute of limitation the court rule or administrative order must yield.

B. The Legislature provides for tolling in specified circumstances, illustrating that the decision of whether to allow tolling in certain circumstances reflects substantive, policy decisions that are within the purview of the Legislature, not the Judiciary. This Court should not read into the statute a tolling mechanism that the Legislature never included.

The Legislature has set forth various statutes of limitation and exceptions to the statutes of limitations under limited circumstances:

MCL 600.5851	minority/insanity tolling
MCL 600.5852	wrongful death savings' statute
MCL 600.5853	exceptions for accrual when outside the state
MCL 600.5854	War; inability to prosecute due to war
MCL 600.5855	Fraudulent concealment/discovery rule

MCL 600.5856 specifically relates to tolling of statutes of limitations and states as follows:

> Sec. 5856. The statutes of limitations or repose are tolled in any of the following circumstances:
>
> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
>
> (b) At the time jurisdiction over the defendant is otherwise acquired.
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that time period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

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The RJA comprehensively establishes "'. . . limitations periods, times of accrual, and tolling for civil cases.'" *Haksluoto v Mt Clemens Reg'l Med Ctr,* 500 Mich 304, 311-312; 901 NW2d 577 (2017) (quoting *Trentadue v Buckler Automatic Lawn Sprinkler Co,* 479 Mich 378, 390; 738 NW2d 664 (2007)). "'The Legislature intended the scheme to be comprehensive and exclusive.'" *Haksluoto,* 500 Mich at 312. "Consequently, any deviation due to tolling . . . is only as provided by statute . . . .'" *Id* at 312.

When the Legislature enumerates a list of conditions or exceptions in a statute "[t]heir enumeration eliminates the possibility of their being other exceptions under the legal maxim *expression unius est exclusion alterius.*" *Matthews v Dep't of Natural Resources,* 288 Mich App 23, 46; 792 NW2d 40 (2010). In *Gladych,* this Court recognized that MCL 600.5856 "provides the specific requirements for tolling the statutes of limitation" and "if those requirements are not met, the period of limitations continues to run." *Gladych,* 468 Mich at 605.

This Court in *Mair v Consumers Power Co,* 419 Mich 74; 348 NW2d 256 (1983), addressed the question of whether a prior administrative action was sufficient to toll the statute of limitations. In concluding that it was not this Court looked to the fact that the Legislature specifically provided for a tolling mechanism but a prior administrated action was not one of the enumerated tolling events. *Mair,* 419 Mich at 85. This Court stated: *"[t]he statutes of limitations, as well as the tolling statute, are of legislative creation. So too should be any further exceptions . . . ."* *Mair,* 419 Mich at 85. [Emphasis added]. This Court went on to state:

> The vast number of administrative agencies and their varying procedures make this area one particularly appropriate for legislative action if any

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> change is desired, and one particularly inappropriate for the ad hoc judgments of the judiciary.
>
> We decline to create an exception to the statute of limitations either through the guise of construction or by outright declaration.

Id at 85.

The Legislature clearly intended to allow tolling only in those circumstances specifically set forth in the RJA. Any other tolling mechanism or exception must be Legislatively created. Administrative Orders or Court of Appeals opinions adding a tolling mechanism other than as specifically set forth in the RJA is an unconstitutional exercise of Legislative power.

Interestingly, the Legislature did consider war and an inability to prosecute an action due to war as a basis for tolling (MCL 600.5854), so there is nothing that would prevent the Legislature from enacting a tolling mechanism in the case of a pandemic, but the Legislature simply did not create such tolling. To the extent that such a tolling mechanism was necessary, that decision should have been left to the people's representatives. Clearly in MCL 600.5854, the Legislature was concerned with the situation where a party would be unable to "use the courts of this state." That situation did not exist during COVID. Throughout the pandemic, parties were still able to initiate lawsuits and file necessary pleadings with the courts. The Administrative Orders, specifically required courts to make the necessary arrangements to allow filings without face-to-face contact.[2]

[2] Justice Viviano recognized this in his dissenting opinion in *Browning v Buko,* 979 NW2d 196, 201 (2022), when he acknowledged that this Court's administrative orders went well beyond prior common law precedent that justified tolling where litigants were unable to use the courts. Justice Viviano stated: "Our administrative orders went well beyond that because they were not limited to situations in which the courts were closed. Defendants thus raise a solid argument that we lacked any legal basis for tolling the statutes and that doing so usurped the Legislature's power."

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The Legislature simply did not allow tolling under the circumstances present here and this Court's Administrative Orders, to the extent they allow the tolling of statutory periods of limitation, are unconstitutional as they invade the province of the Legislature. The Court of Appeals erred in concluding that the Administrative Orders tolled the statute of limitations.

C. Carter's complaint is barred by the plain language of MCL 600.5805(1) and (2).

MCL 600.5805 states in pertinent part:

> Sec. 5805. (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> (2) Except as otherwise provided in this section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person or for injury to a person or property.

There is no dispute that this action accrued on January 10, 2018. There is also no dispute that the period of limitations expired 3-years later on January 11, 2021.[3]

Therefore, according to the plain language of the statute of limitations Carter's complaint is time-barred and was properly dismissed by the trial court.

D. In concluding that the administrative orders tolled the statute of limitations the Court of Appeals has invaded the province of the Legislature.

The "authority to determine rules of practice and procedure rests exclusively with this Court." *McDougall,* 461 Mich at 26. This Court "is not authorized to enact court rules that establish, abrogate, or modify the substantive law." *Id* at 27. "This Court's

[3] January 10, 2021, was a Sunday so the statute of limitations expired on the next business day pursuant to MCR 1.108.

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constitutional rule-making authority extends only to matters of practice or procedure." *Id* at 27. "If 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." *McDougall,* 461 Mich at 31. As stated in *Gladych,* statutes of limitation have a public policy rational other than simply court administration.

The Court of Appeals has attempted to circumvent this constitutional requirement by arguing that the Administrative Orders only related to time computation under MCR 1.108 and therefore the orders were constitutional. This argument is contradicted by the Court of Appeals own holding which specifically stated that "the statute of limitations in this case was tolled by the administrative orders." The only way a statute of limitations can be tolled is through the Legislature as the RJA is a comprehensive and exclusive scheme which is intended to set forth periods of limitations and tolling events. By stating that the orders toll the statute of limitations the Court of Appeals has undermined its contention that the orders simply affected the computation of time.

In reading MCR 1.108 in conjunction with the RJA provisions it is clear that it was intended to provide the courts and litigants with the procedure for computing time with regard to the expiration of statutes of limitation. It is also clear that the intent was to exclude days during which courts were closed (holidays, Saturdays or Sundays). This is consistent with the tolling mechanism set forth in MCL 600.5854, which allowed tolling in situations where parties could not access the courts due to war. MCR 1.108 only intended to exempt from computation days where parties did not have access to courts. The administrative orders issued here, if interpreted in the manner set forth in the Court of Appeals decision, went well beyond this time computation and instead exempted any

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day from computation even though the courts were not closed and even though parties could still commence lawsuits. This went beyond mere procedure and constituted a tolling of statutes of limitations during an emergency period that was never authorized by the Legislature. Accordingly, this Court unconstitutionally exercised Legislative power when it issued the administrative orders.

CONCLUSION AND RELIEF REQUESTED

This Court's rule-making authority only extends to matters of practice and procedure. Where a court rule or administrative order conflicts with a substantive statutory enactment the court rule or administrative order must yield. This is in keeping with fundamental separation of powers principles.

The Legislature set forth a comprehensive and exclusive statutory scheme setting forth periods of limitations and when those periods of limitation may be tolled. This statutory scheme is based on underlying policy considerations regarding the prevention of fraudulent claims, preventing stale claims, relieving defendants fear of litigation and penalizing plaintiffs who are not industrious in pursuing claims. Thus, statutes of limitation are substantive in nature.

The tolling event claimed here is not one of the enumerated tolling events contemplated by the Legislature and neither this Court, through an administrative order, nor the Court of Appeals, can judicially create such tolling. Doing so is contrary to basic principles of statutory construction and fundamental separation of powers principles.

For these reasons, this Court should grant leave to appeal or alternatively summarily reverse the Court of Appeals decision and affirm the trial court's decision granting summary disposition.

Respectfully submitted,

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