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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 COMPANY'S REPLY BRIEF

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I. THIS COURT, IN ENACTING AO 2020-3 AND THE COURT OF APPEALS INTERPRETATION OF AO 2020-3, EXCEEDED ITS RULE-MAKING AUTHORITY BY GOING BEYOND THE MERE COMPUTATION OF TIME AND SUBSTANTIVELY ALTERING THE STATUTE OF LIMITATIONS BY IMPOSING A TOLLING MECHANISM.

There is no doubt that this Court has the power to enact rules relating to practice and procedure. *McDougall v Schanz,* 461 Mich 15, 26; 597 NW2d 148 (1999). It is also clear that this Court does not have the power to legislate. *See McDougall,* 461 Mich at 27. This Court's rule-making authority does not extend to making substantive law. *Id.* Statutes of limitations and the tolling of statutes of limitation are substantive. *Gladych v New Family Homes, Inc,* 468 Mich 594, 600; 664 NW2d 705 (2003). While computation of time, in some instances may be a procedural matter, it ceases to be procedural where it constitutes statutory tolling, as is the case here. In such cases, the rule must yield to the substantive enactment. This is akin to the conflict between the Michigan Rules of Evidence and the expert witness requirements addressed in MCL 600.2169, that was at issue in *McDougall v Schanz,* 461 Mich 15, 28; 597 NW2d 148 (1999). While generally evidentiary rules relate to practice and procedure, where such rules conflict with substantive legislative enactments they must yield. *McDougall,* 461 Mich at 31.

In *McDougall,* this Court concluded that it was improper to mechanically characterize all statutes that resemble "rules of evidence" as relating to practice and procedure. Such a rule overstates the reach of this Court's rule-making authority. *McDougall,* 461 Mich at 29-30. Plaintiff/Appellee here, is urging this Court to adopt a similar mechanical approach to time computation by stating that all rules regarding time computation relate to practice and procedure even if they have the effect of tolling statutes of limitation which are unquestionably substantive. Like in *McDougall,* this argument should be rejected.

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This Court has repeatedly emphasized the comprehensive and exclusive nature of statutes of limitations and tolling statutes. *Trentadue v Gorton,* 479 Mich 378, 389-392; 738 NW2d 664 (2007).

In *Trentadue,* this Court rejected the plaintiff's argument that plaintiff's cause of action was tolled because plaintiff did not discover the basis for the cause of action until well after the statute of limitations had expired. This Court emphasized the comprehensive nature of statutes of limitations and tolling provisions and concluded that because the Legislature did not specifically allow for tolling under these circumstances, the plaintiff did not get the benefit of tolling. *Trentadue,* 479 Mich at 392-393. In reviewing the statutory scheme, this Court concluded that the Legislature intended the statutory scheme to be "comprehensive and exclusive." *Id* at 391. This Court illustrated the comprehensive nature of the statutory scheme:

> The Revised Judicature Act, at MCL 600.5858(2), 600.5838a(2), 600.5839(1), and 600.5855, provides for tolling of the period of limitations in specified situations. These are actions alleging professional malpractice, MCL 600.5858(2); actions alleging medical malpractice, MCL 600.5838a(2); actions brought against certain defendants alleging injuries from unsafe property, MCL 600.5839(1); and actions alleging that a person who may be liable for the claim fraudulently concealed the existence of the claim or the identity of any person who is liable for the claim, MCL 600.5855.[1]
>
> * * *
>
> Here, as we have explained, the relevant sections of the Revised Judicature Act comprehensively establish limitations periods, times of accrual, and tolling for civil cases.
>
> * * *
>
> Since the Legislature has exercised its power to establish tolling based on discovery under particular circumstances, but has not provided for a general discovery rule that tolls or delays the time of accrual if a plaintiff fails to discover the elements of a cause of action during the limitations period, no such tolling is allowed. Therefore, we conclude that courts may not employ an extrastatutory discovery rule to toll accrual in avoidance of the plain language of MCL 600.5827 and we reject the Court's contrary conclusion in *Chase v Sabin,* 445 Mich 190, 191-192; 516 NW2d 60 (1994). *Because the statutory scheme is comprehensive, the Legislature*

[1] For other tolling provisions further illustrating the comprehensive statutory scheme, see MCL 600.5851 (minority/insanity), MCL 600.5852 (wrongful death savings), MCL 600.5853 (exceptions when out-of-state, MCL 600.5854 (War, inability to prosecute due to war), MCL 600.5856 (general tolling).

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> *has undertaken the necessary task of balancing plaintiffs' and defendants' interests and has allowed for tolling only where it sees fit. This is a power the Legislature has because such a statute of limitations bears a reasonable relationship to the permissible legislative objective of protecting defendants from stale or fraudulent claims.* [Emphasis added].

Trentadue, 479 Mich at 388-392. The ability to toll statutes of limitation is a legislative power that can be exercised only by the Legislature. *Id* at 392; see also *Mair v Consumers Power Co,* 419 Mich 74, 85; 348 NW2d 256 (1984) ("The statutes of limitations, as well as the tolling statute, are of legislative creation. So too should be any further exceptions . . . ."). This Court has made clear that only actions/events falling within the statutorily enumerated tolling events can toll statutes of limitations. See *Gladych,* 468 Mich at 599 ("In other words, if one does not perform any actions specified by §5856 [tolling statute], the statute of limitations is not tolled and therefore the period of limitations continues to run after the complaint has been filed.).

Plaintiff/Appellee attempts to distinguish *Mair* by focusing on nonmaterial distinctions. It is true that factually, the case is dissimilar. However, the overriding principle of *Mair* is that absent *statutory* language allowing tolling, tolling does not exist. *See Mair,* 419 Mich at 80-81 ("The tolling statute does not mention administrative actions . . . The statute's history suggests that administrative actions were never contemplated as tolling events . . . The most telling evidence that the Legislature did not contemplate administrative actions as tolling events is the structure of our present tolling statute itself . . . . While it certainly would not have been illogical for the Legislature to provide some nonjudicial proceedings to serve as tolling actions consistent with the overall purpose of the tolling statute, this Court cannot conclude that they intended to do so, yet omitted specific language to that effect.").

The same could be said about the "tolling event" at issue here. The Legislature certainly could have provided tolling in the case of a pandemic. They certainly provided it in other

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circumstances, including war time emergencies. The best evidence that the Legislature did not contemplate tolling in such circumstances is the plain language of the statute of limitations and the tolling statute which fail to make any reference to a pandemic as a tolling mechanism. The Courts cannot read a tolling mechanism into the statute when none was provided for. Furthermore, this Court cannot by rule create a tolling mechanism that is the province of the Legislature to create.

Plaintiff/Appellee cites *Macomb v Farmers Ins Exch,* in an attempt to support her argument, but that case did not address the issue here: whether this Court can by administrative order exclude certain days from the computation of time to effectively toll statutes of limitation. Rather the issue in *Macomb* was whether "1 year" for purposes of the no-fault one-year-back rule under MCL 500.3145(1) should be computed differently than "1 year" for purposes of when an action is commenced. In that case, the complaint was filed on a Monday (August 4, 2014), but the first date of service and the date of the accident was August 2, 2013. The Court of Appeals concluded that the complaint was timely filed within a year and the one-year-back rule did not bar the claims because August 2, 2014 (the one-year anniversary) fell on a Saturday so pursuant to MCR 1.108, the plaintiff had until the next business day to file.

Plaintiff/Appellee also cites to *Haksluoto v Mt Clemens Reg'l Med Ctr,* 500 Mich 304; 901 NW2d 577 (2017), but that case involved the issue of whether the medical malpractice statute of limitations period ". . . is tolled when the NOI is filed on the last day of the limitations period, leaving no whole days of the limitations period to toll." *Haksluoto,* 500 Mich at 307-308. Plaintiff/Appellee improperly cites this case in an attempt to show that Plaintiff/Appellee was entitled to the full time period in which to file her complaint and thus was entitled to tolling. Plaintiff/Appellee mischaracterizes this Court's ruling.

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In *Haksluoto,* this Court discussed the origins of the time computation rule at common law and recognized that MCR 1.108 was intended to memorialize the common law time computation rule of excluding the first day of a particular period and including the last day of the period "to ensure that parties receive the entire amount of time to which they are entitled." *Haksluoto,* 500 Mich at 316.

Here, without tolling, Plaintiff/Appellee had the full 3-year time period in which to commence this action. The action accrued on January 10, 2018 and Plaintiff/Appellee had until January 11, 2021, to commence this action. At no point was the Plaintiff/Appellee prohibited or prevented from commencing this action due to Covid. While Courts were closed to foot traffic, the Courts were open and available for filings through electronic means during this time period. The Administrative Order at issue here does not involve a simple computation of time but rather involves a substantive modification of the statute of limitations by excluding certain dates from the computation of time. Therefore, AO 2020-3 exceeded this Court's rule-making authority and could not toll the statute of limitations here. The Court of Appeals erred by holding otherwise.

II. PLAINTIFF/APPELLEE'S DISCUSSION OF FEDERAL LAW IS IRRELEVANT.

Plaintiff/Appellee cited to one Federal case allowing for judicial tolling of the statutes of limitation. *Am Pipe & Constr v Utah,* 414 US 538; 94 S Ct 756; 38 L Ed 713. This case concerns application of Michigan law and therefore Federal law is not binding. *Peden v Detroit,* 470 Mich 195, 217; 680 NW2d 857 (2004). Additionally, the issue involved in *Am Pipe* was whether an antitrust lawsuit initiated by one party in a representative capacity with regard to other classes could be considered commencement of an action sufficient to toll the statute of limitations as to other class members. That is a fundamentally different issue than the one at issue here.

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Here, under Michigan law, statutes of limitation are substantive in nature and this Court's authority only extends to matters of practice and procedure. AO 2020-3 went beyond mere practice and procedure by excluding certain days from the typical time computation method to effectively toll statutes of limitations. Under Michigan law, only the Legislature can toll statutes of limitation. Therefore, Plaintiff/Appellee's complaint was barred by the running of the statute of limitations.

Conclusion and Relief Requested

The issue at the heart of this case is whether the Court of Appeals erred when it held that AO 2020-3 tolled the statute of limitations. As set forth above and more fully in Defendant/Appellant's Application for Leave to Appeal, the Court of Appeals holding that this Court can, through Administrative Order, enact rules that effectively modify substantive legislative enactments, violates longstanding separation of powers principles and should be reversed.

Respectfully submitted,

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Dated: April 27, 2023

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