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STATE OF MICHIGAN
IN THE SUPREME 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 ANSWER TO DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF ORDER APPEALED FROM

Defendant/Appellant seeks leave to appeal from the Michigan Court of Appeals published opinion dated January 26, 2023, which reversed the trial court's decision to grant Defendant/Appellant's Motion for Summary Disposition and held that the statute of limitations applicable to Plaintiff/Appellee's case was tolled by the administrative orders issued by the Supreme Court during the COVID-19 state of emergency.

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COUNTER-STATEMENT OF JURISDICTION

Plaintiff/Appellee concurs in Defendant-Appellant's statement of appellate jurisdiction.

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Whether the Supreme Court's Administrative Order 2020-3 temporarily modified the computation of time pursuant to MCR 1.108 excluding days that fell during the COVID-19 pandemic thereby tolling the statute of limitations imposed for personal injury actions.

The Circuit Court answered: "No."

Court of Appeals answered: "Yes."

Plaintiff/Appellee's answer: "Yes."

Defendant/Appellant's answer: "No.

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I. INTRODUCTION

This case arises from a premises liability action whereby Plaintiff/Appellee ("Ms. Carter") encountered black ice while walking down the sidewalk located at 1705 Coolidge Road, East Lansing, Michigan 48823 on January 10, 2018. Ms. Carter filed her Complaint on April 13, 2021, pursuant to Michigan Supreme Court Order 2020-3 ("AO-2020-3"). Defendant/Appellant DTN Management Co. filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(7) alleging that Ms. Carter's claims were barred by the three-year statute of limitations, which was ultimately granted by the trial court. Ms. Carter timely filed an appeal as right in the Court of Appeals asserting that the trial court erred by concluding that her Complaint was not timely filed on the basis that AO 2020-3 only modified deadlines that fell during the state of emergency declared by the Governor.

On January 26, 2023, the Court of Appeals issued a published opinion in which it reversed and remanded the matter back to the trial court.[1] The Court of Appeals recognized that AO 2020-3, by its owns terms, "was modifying the computation of days under MCR 1.108 for purposes of determining filing deadlines, which is plainly a procedural matter."[2] The Court of Appeals further recognized that normal application of MCR 1.108(1) may result in more time than permitted by the statute of limitations.[3]

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1 **Appendix 1:** Court of Appeals Opinion dated January 26, 2023.
2 *Id.*
3 *Id.*

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II. COUNTER-STATEMENT OF FACTS

On January 10, 2018, while on her way to work, Ms. Carter exited her apartment building around 7:30 a.m. through the rear entrance.[4] She then began walking on the sidewalk that led from her apartment building to her vehicle that was parked in the parking lot.[5] While walking to her vehicle, Ms. Carter encountered black ice.[6] She was unable to stop her impending fall and slipped and fell on the ice with extreme force and violence, sustaining extensive injuries that decreased her quality of life.[7] The condition of the sidewalk was not immediately noticeable or visible to Ms. Carter.[8] Pursuant to Michigan Supreme Court Order 2020-3, Ms. Carter excluded 102 days from the computation of her statutory time period and filed the present action on April 13, 2021, alleging two counts against Defendant/Appellant's: Negligence and Statutory Liability Under MCL § 554.139.[9]

The Administrative Orders

The relevant administrative orders that tolled Ms. Carter's statutory time period to file her Complaint are Administrative Order 2020-3 and Administrative Order 2020-18.

AO No. 2020-3 states in pertinent part:

> 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).[10]

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4 **Appendix 2:** Plaintiff/Appellee's Complaint at ¶ 14-15.
5 *Id*.
6 *Id*.
7 *Id*. at ¶ 19-21.
8 *Id*. at ¶ 15.
9 *Id*. at ¶ 22-45.
10 **Appendix 3:** Supreme Court Administrative Order 2020-3.

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AO No. 2020-18, which rescinded AO No. 2020-3, states:

> 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 begin to run because of the exclusion period, the filers shall have the full periods for filing beginning on June 20, 2020.
>
> *Staff Comment:* Note that although the order regarding computation of days entered on March 23, 2020, it excluded any day that fell during the State of Emergency declared by the Governor related to COVID-19, which order was issued on March 10, 2020. Thus, the practical effect of Administrative Order No. 2020-3 was to enable filers to exclude days beginning March 10, 2020. This timing is consistent with the executive orders entered by the Governor regarding the tolling of statutes of limitation.[11]

Procedural Summary

On November 1, 2021, Defendant/Appellant filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(7).[12] Defendant/Appellant argued that Ms. Carter brought her claim more than three years after the claim had accrued and was barred by the three-year statute of limitations pursuant to MCL 600.5805.

On March 8, 2022, the Ingham County Circuit Court entered its Order granting Defendant/Appellant's Motion for Summary Disposition pursuant to MCR 2.116(C)(7).[13] The trial court misinterpreted AO 2020-3, and held that it only adjusted deadlines that expired during the

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[11] **Appendix 4:** Supreme Court Administrative Order 2020-18

[12] **Appendix 5:** Defendant Motion for Summary Disposition Pursuant to MCR 2.116(C)(7).

[13] **Appendix 6:** Opinion and Order dated March 8, 2022 Granting Defendant's Motion for Summary Disposition.

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state of emergency.[14] Since Ms. Carter's statute of limitations did not expire during the state of emergency, the trial court held that Ms. Carter's claim was untimely.[15]

Ms. Carter filed a timely appeal with the Court of Appeals arguing that AO 2020-3 applied to *all* deadlines applicable to the commencement of all civil and probate case types and that *any* day that fell during the state of emergency declared by the Governor would not be counted for purposes of computing time pursuant to MCR 1.108. The Court of Appeals, in its January 26, 2023 published opinion, reversed the trial court's decision concluding that the statute of limitations pursuant to MCL 600.5850 was tolled by the administrative orders.

III. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition.[16] Questions of statutory interpretation, construction, and application are also reviewed de novo.[17] Additionally, questions concerning the constitutionality of a statute are reviewed de novo,[18] which is also applicable to questions concerning the constitutionality of administrative orders since administrative orders are interpreted in the same manner as statutes.[19]

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14 *Id*.
15 *Id*.
16 *El-Khalil v Oakwood Healthcare, Inc,* 504 Mich 152, 159, 934 NW2d 665, 670 (2019).
17 *Johnson v Johnson*, 329 Mich App 110, 118, 940 NW2d 807, 812 (2019).
18 *Turunen v Dir of Dep't of Nat Res*, 336 Mich App 468, 482, 971 NW2d 20, 29 (2021).
19 *People v Davis*, 181 Mich App. 354, 356, 448 NW2d 842, 843 (1989) citing *Issa v Garlinghouse*, 133 Mich App 579, 349 NW2d 527 (1984).

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IV. ARGUMENT

A. The Court of Appeals correctly interpreted this Court's Administrative Order 2020-3 as modifying the computation of time pursuant to MCR 1.108.

i. This Court has the Authority to Modify Court Rules such as MCR 1.108.

The authority to determine rules of practice and procedure lies exclusively with the this Court.[20] Michigan's Constitution provides that the Supreme Court shall establish, modify, amend, and simplify the practice and procedure of all courts in the State of Michigan.[21] The Court of Appeals recognized that the Supreme Court generally accomplishes this through the issuance of administrative orders and the promulgation of court rules.[22] Thus, the computation of statutory time periods is a procedural rule that is inherently within the Supreme Court's powers.

In enacting AO 2020-3, this Court modified the computation of time pursuant to MCR 1.108. This Court did not substantively modify the statute of limitations pursuant to MCL 600.5805 because Ms. Carter, as do all other personal injury litigants, are still subject to the three-year statute of limitations imposed by MCL 600.5805; however, the way in which that three-year period is computed was temporarily modified by AO 2020-3. Defendant/Appellant is unable to cite to any authority that would prevent this Court from modifying the Michigan Court Rules.

Instead, Defendant/Appellant cites to *Mair v Consumers Power Co* in an effort demonstrate that this Court has ruled that administrative actions are insufficient to toll the statute of limitations; however, the facts in *Mair* are distinguishable from the facts of this case.[23] Furthermore, this Court's holding in *Mair* only dealt with whether non-judicial activity could toll a statute of limitations.[24]

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20 *Id*.
21 Const. 1963, art. 6, § 5.
22 **Appendix 1**.
23 *Mair v Consumers Power Co*, 419 Mich 74, 348 NW2d 256 (1984).
24 *Id*.

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In *Mair*, the plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging sex discrimination in the course of her employment with the defendant.[25] The EEOC dismissed her complaint and the plaintiff subsequently waited three years and four months after her last day of employment to file a civil suit despite MCL 600.5805 imposing a three-year statute of limitations.[26] The plaintiff argued that the statute of limitations was tolled by MCL 600.5856(2) because her EEOC complaint established jurisdiction over the defendant.[27] This Court stated,

> [f]ollowing as it does a description of how court jurisdiction is obtained by service of process, the subsection 2 phrase "jurisdiction otherwise acquired" more logically refers to the ways of acquiring jurisdiction other than by service of process, such as consent of the defendant. Thus, the structure of the tolling statute precludes the conclusion that the Legislature intended it to include nonjudicial activity as tolling events.[28]

Therefore, this Court was analyzing whether ***non-judicial activity***, such as the filing of an EEOC complaint, would toll a statute of limitations. This is entirely different than this matter because this Court in *Mair* was not analyzing whether judicial activity, such as an administrative order, would toll a statute of limitations. Ms. Carter did not allege that any administrative complaint that she filed tolled her statute of limitations; rather, a judicial Order was issued by this Court that modified the calculation of time, which Ms. Carter relied upon when calculating her statute of limitations.

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25 *Id*. at 77.
26 *Id*. at 77.
27 *Id*. at 78.
28 *Id*. at 82.

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ii. MCR 1.108 Controls When a Statute Provides no Direction as to How to Compute a Given Time Period.

When a statute of limitations does not provide direction as to how a given time period should be calculated, MCR 1.108 controls.[29] The very purpose of MCR 1.108 is to provide a uniform, procedural method of computing time when a statue fails to provide such a method.[30] MCL 600.5850 does not provide a method for computing time for the applicable three-year statute of limitations, thus MCR 1.108(1) controls.

In *Macomb v. Farmers Ins. Exch*., the Court of Appeals analyzed whether MCR 1.108 controlled the computation of time with respect to limitations on the recovery of personal protection insurance benefits pursuant to MCL 500.3145(1).[31] The Court of Appeals found that MCL 500.3145(1) required a court to compute time but did not provide for directions as to how that time was to be computed.[32] MCR 1.108 unambiguously governs the computation of time periods that are proscribed by statute.[33]

This Court has even indicated that MCR 1.108(1) should be consulted when a statute does not provide direction as to how to compute a given time period.[34] The court in *Macomb* specified that there was no substantive question to be addressed. The issue at hand was a "procedural question of how to calculate the designated time period as set forth in a statute that fails to provide a method for its calculation."[35] Therefore, Ms. Carter utilized MCR 1.108 to calculate her three-

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29 *People v Williams*, 475 Mich at 256 n. 4, 716 NW2d 208 (2006).

30 *Macomb v Farmers Ins Exch*, No. 327572, 2016 WL 5121976, at *4 (Mich Ct App Sept 20, 2016) attached as **Appendix 7**.

31 *Id.*

32 *Id*.

33 *Id.*

34 See *Williams*, 475 Mich at 256 n. 4.

35 *McDougall v Schanz*, 461 Mich 15, 26-27, 597 NW2d 148, 154 (1999).

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year statute of limitations, which was modified by AO 2020-3 and excluded the 102 days during which this State was under a state of emergency.

iii. Ms. Carter Would Not Have Had Her Full Three-Year Statutory Time Period Absent AO 2020-3.

Litigants are entitled to the full statutory time periods that are prescribed by statute. In *Haksluoto,* this Court recognized that the manner in which time is counted (counting whole days) "is a method by which we ensure that the party afforded a particular amount of time is provided that entire amount of time."[36] Ms. Carter believes that this was the Court's intention in enacting its administrative orders which is evidenced by the plain language of AO 2020-18.

AO No. 2020-18 states:

> 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 begin to run because of the exclusion period, the filers shall have the ***full periods*** for filing beginning on June 20, 2020.[37]

This Court was clearly attempting to ensure that filers have the *entire amount of time* applicable to their claims in light of the exigent and never-before-seen circumstances in existence at the time in which many courts were closed, did not allow in-person filings, and/or were ill-equipped to handle filings during the shutdown declared by the state of emergency. Similar to court closures that toll the computation of time for various holidays, this Court has the ability to close the courts and toll the computation of time for emergencies such as the COVID-19 pandemic. Litigants throughout the State, including Ms. Carter, are entitled to a full statutory time period to file her litigation, which was greatly impeded by the unprecedented conditions imposed by the COVID-

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36 *Haksluoto v Mt Clemens Reg'l Med Ctr*, 500 Mich 304, 317, 901 NW2d 577, 584 (2017).

37 *Id*.

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19 pandemic. To not compute time otherwise, Ms. Carter and other plaintiffs would be denied the full extent of time to commence litigation.

Interestingly, Defendant/Appellant argues that MCR 1.108 was only intended to exempt from computation days where parties did not have access to courts. Ms. Carter believes that this is precisely why this Court enacted its administrative orders modifying the computation of time pursuant to MCR 1.108. This Court was ensuring that filers had their full statutory periods during a time when access to courts were limited, due to both court closures and social distancing requirements. In March of 2020, we were all living in unprecedented times and were encouraged to stay at home and limit in-person contact to slow the spread of COVID-19. Access to courts were limited due to not only some courts closing or only operating on an emergency basis but also because there were individuals who were immunocompromised who physically could not risk leaving their home to access the court.

iv. Federal Courts Have the Authority to Toll Statues of Limitations Under Certain Circumstances.

The United States Supreme Court has recognized that courts at the federal level have the authority to toll a statute of limitations under certain circumstances, stating, "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose."[38] The United States Supreme Court went on to state that "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme.[39] When examining the context in which this Court issued its

[38] *Am Pipe & Const Co v Utah*, 414 US 538, 559, 94 S Ct 756, 769, 38 L Ed 2d 713 (1974).
[39] *Id*. at 557-58.

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administrative orders, it is clear that this Court was ensuring that filers had their full statutory time periods during a time when access to courts was extremely limited which is not in conflict with the legislative scheme of MCL 600.5805.

Given the unprecedented circumstances that existed during the COVID-19 pandemic, this Court was within its authority to temporarily modify the computation of statutory time periods pursuant to MCR 1.108. This Court did not modify or abrogate substantive law by enacting its administrative orders.

V. CONCLUSION AND REQUEST FOR RELIEF

For the reasons stated, *supra*, Ms. Carter respectfully requests this Court deny Defendant/Appellant's Application for Leave to Appeal.

Respectfully Submitted,

Dated: April 6, 2023

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Pursuant to MCR 7.212(B) and MCR 7.312, this brief contains 3,418 countable words.