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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 BRIEF ON 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 under MCL 600.215, MCR 7.303(B)(1) and MCR 7.305(C)(2). This Court granted Appellant's timely filed Application for Leave to Appeal on June 30, 2023. This Brief is being timely filed within 56 days of the Order granting leave to appeal.

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STATEMENT OF QUESTION PRESENTED

Whether this Court possessed the authority to issue Administrative Order Nos. 2020-3 and 2020-18.

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

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INTRODUCTION

The Court of Appeals in *Carter v DTN,* held that Administrative Orders 2020-3 and 2020-18("Administrative Orders"), tolled the statute of limitations and therefore the Appellee's complaint was not time barred. *Carter v DTN Mgmt,* ___ Mich App ___; ___NW2d ___ (2023) ("Because we conclude that the statute of limitations in this case was tolled by the Administrative Orders, we reverse and remand"). It is undisputed that if it were not for the Administrative Orders the Appellee's complaint would be barred by the statute of limitations.

Pursuant to separation of powers principles, this Court's authority only extends to matters of practice and procedure. *McDougall v Schanz,* 461 Mich 15, 27; 597 NW2d 148 (1999). This Court lacks the authority to enact substantive law. *McDougall,* 461 Mich at 27. The Constitution vests the Legislative power solely in the House of Representatives and the Senate. *SBC Mich v PSC,* 482 Mich 90, 97-99; 754 NW2d 259 (2008). The Legislature through this Constitutional authority has enacted a comprehensive and exclusive scheme setting forth statutes of limitations and when statutes of limitations may be tolled. *Haksluoto v Mt Clemens Reg'l Med Ctr,* 500 Mich 304, 311-312; 901 NW2d 577 (2017). Statutes of limitations reflect underlying policy considerations outside the realm of mere practice and procedure and are therefore substantive Legislative enactments. *Gladych v New Family Homes, Inc,* 468 Mich 594, 600; 664 NW2d 705 (2003).

This Court, when it enacted AO 2020-3 and 2020-18, exceeded its Constitutional authority by modifying substantive legislative enactments and invading the province of the Legislature. Accordingly, the Court of Appeals should be reversed and this matter

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must be remanded to the trial court for entry of summary disposition in favor of Appellant due to the expiration of the statute of limitations.

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

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> 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.
>
> 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

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because the statute of limitations did not expire during the State of Emergency and 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 [emphasis added]. 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

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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 filed an Application for Leave to Appeal to this Court which was granted.

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).

ARGUMENT

I. THIS COURT LACKED THE AUTHORITY TO ISSUE ADMINISTRATIVE ORDERS 2020-3 AND 2020-18.

A. THIS COURT'S RULE-MAKING AUTHORITY ONLY EXTENDS TO MATTERS OF PRACTICE AND PROCEDURE AND CANNOT ALTER OR CHANGE SUBSTANTIVE LEGISLATIVE ENACTMENTS.

"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, supra,* 482 Mich at 97-99:

> 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."

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> "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].

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.*

In *Shannon v Ottawa Circuit Judge,* 245 Mich 220, 222-223, the Court quoted *Saylor v Taylor,* 77 Fed 476, which discussed the judicial power in the context of maritime law:

> "By virtue of this section the courts may make rules of practice, but they cannot create rules of law. They cannot divest or displace rights or liens which owe their existence, not to its process, but to the general maritime law. Rights acquired under the statutes of the United States, or under the general [*223] maritime law, which these courts are created to administer, are rules of property, and it is beyond the potency of judicial power to alter them, or take them away by rules of practice."

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):

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> [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.

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." *McDougall,* 461 Mich at 31.

B. 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.

This Court further illustrated the substantive nature of statutes of limitations in *Lothian v Detroit,* 414 Mich 160, 165-167; 324 NW2d 9 (1982):

> A statutory limitations period represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action. A statute of limitations is a statute of presumption. The fact of 'delay extending to the limit prescribed', without further proof, 'is itself a conclusive bar' to suit. [Citations omitted].
>
> * * *

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> Limitations periods created by statute are grounded in a number of worthy policy considerations. They encourage the prompt recovery of damages; they penalize plaintiffs who have not been industrious in pursuing their claims; they "afford security against stale demands when the circumstances would be unfavorable to a just examination and decision"; they prevent fraudulent claims from being asserted; and they "remedy the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert."

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. It is well established that statutes of limitations create substantial rights on the part of potential defendants. *Driver v Naini,* 490 Mich 239, 255; 802 NW2d 311 (2011). The Judiciary cannot pass rules amending, diminishing, deconstructing or ignoring these substantive rights and still be true to its Constitutionally proscribed role.

C. 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.

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:

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> (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.

The RJA comprehensively establishes "'. . . limitations periods, times of accrual, and tolling for civil cases.'" *Haksluoto, supra,* 500 Mich at 311-312 (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.

In *Trentadue,* 479 Mich at 389-392, 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,

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> 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.
>
> * * *
>
> 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 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. 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.).

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*

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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 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.

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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.[1]

The Legislature simply did not allow tolling under the circumstances present here and this Court's Administrative Orders are unconstitutional as they invade the province of the Legislature. The Court of Appeals erred in concluding that the Administrative Orders were within this Court's authority and that they tolled the statute of limitations.

D. THE ADMINISTRATIVE ORDERS WENT BEYOND MERE TIME COMPUTATION AND INVADED THE PROVINCE OF THE LEGISLATURE.

Appellee has argued, and the Court of Appeals agreed, that the Administrative Orders are not tolling mechanisms but merely involve the computation of time and therefore they were within this Court's authority.

[1] 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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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.

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, went well beyond this time computation and instead exempted any 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.

II. A PANEL OF THE COURT OF APPEALS, ALTHOUGH ADMITTEDLY NOT BINDING ON THIS COURT, RECENTLY CONCLUDED THAT THIS COURT LACKED THE CONSTITUTIONAL AUTHORITY TO ISSUE ADMINISTRATIVE ORDER 2020-3 AND THAT *CARTER* WAS WRONGLY DECIDED.

In *Compagner v Burch,* ___ Mich ___; ___ NW2d ___ (2023), the Court of Appeals affirmed the trial court's decision denying summary disposition on statute of limitations grounds, only because it was bound to do so by *Carter,* but had it not been for *Carter* the

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Court of Appeals would have reversed on the basis that the plaintiff's complaint was barred by the statute of limitations. The Court stated:

> Because we are bound by this Court's decision in *Carter v DTN Mgmt Co,* ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 360772), we affirm. However, for the reasons we will describe in this opinion, we disagree with *Carter's* determination that the Michigan Supreme Court had the constitutional authority to issue AO 2020-3 . . . and but for *Carter* would hold that that our Supreme Court did not have the constitutional authority to issue AO 2020-3 and that plaintiffs' complaint was therefore untimely filed (after the expiration of the applicable statute of repose), and would reverse and remand for entry of summary disposition in favor of defendants. [Citation omitted]. We therefore call for the convening of a conflict panel under MCR 7.215(J)(3) to consider the conflict between our rationale and that of *Carter* relative to the constitutional validity of AO 2020-3.
>
> We note in that regard that our Supreme Court recently had occasion to consider this Court's 2-1 order denying leave to appeal in *Browning v Buko*, unpublished order of the Court of Appeals, entered August 2, 2021 (Docket No. 356874), (JANSEN, J., dissenting), in which the defendants in a medical malpractice action argued that the plaintiff's claim was barred by the applicable statute of repose. The Supreme Court denied leave to appeal. However, Justice VIVIANO (joined by Justice ZAHRA), dissented and would have remanded to the Court of Appeals for consideration of whether various Supreme Court AOs were "invalid because they were an unconstitutional exercise of legislative power." *Browning v Buko*, __ Mich __,___; 510 Mich. 917; 979 NW2d 196, 197, 201 (2022) (VIVIANO, J., dissenting) (concluding that the defendants "raise a solid argument that we lacked any legal basis for tolling the statutes and that doing so usurped the Legislature's power"). Contrary to *Carter*, we conclude that AO 2020-3 (and related AOs) were an unconstitutional exercise of legislative power and were therefore invalid.

The panel in *Compagner* recognized that the argument that the Administrative Orders merely addressed computation of time under MCR 1.108 and therefore were procedural in nature, reflected "linguistic artfulness that ignores reality and creates an exception that would swallow the rule." *Compagner,* slip op at pg. 28.

The problem with the time computation argument, as recognized by *Compagner* and Justice Viviano's dissent in *Browning,* is that the Administrative Orders went too far and were not merely limited to time computation when courts were closed. By excluding

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every day (even days where courts were not closed) from the computation of time this Court effectively tolled all statutes of limitations therefore affecting defendants' substantive rights.

If there is a policy reason for tolling statutes of limitations during a pandemic, even though courts are open, such a determination is for the Legislature and not the Courts. The Legislature has created exceptions in other contexts, such as times of war, so these types of events are clearly within the Legislature's contemplation and the Legislature could have acted to create such a tolling mechanism but it did not. *See e.g., Trentadue,* 479 Mich at 391 ("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 discovery the elements of a cause of action during the limitations period, no such tolling is allowed.").

In rejecting the notion that the Administrative Orders were merely procedural in nature the Court in *Compagner* stated:

> The effects of AO 2020-3, by contrast, are vast, indefinite in duration, purporting to apply throughout the entirety of a state of emergency period that was itself wholly undefined, potentially limitless, repeatedly extended and bounded by nothing beyond the Governor's sole discretion (at least until such time as the Supreme Court itself declared her authority to be invalid and unconstitutional and her EOs to be without any basis in law). AO 2020-3 was of an entirely different scope and nature than is MCR 1.108(1), had the effect of drastically altering the legislatively-enacted statutes of limitations and repose (and related tolling provisions), and it accordingly impermissibly and unconstitutionally intruded on the Legislature's sole and exclusive authority to determine the substantive law of the state of Michigan.

Compagner, slip op at pg. 32-33.

While *Compagner* is non-binding on this Court, its reasoning, as well as Justice Viviano's in his dissent in *Browning,* is persuasive and should be adopted

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as it is consistent with separation of powers principles. Pursuant to its Constitutional authority, this Court is prohibited from amending or altering substantive legislative enactments. In enacting the Administrative Orders this Court exceeded its rule-making authority and invaded the province of the Legislature. Therefore, this Court lacked the authority to issue the Administrative Orders and this case should be reversed and remanded for entry of summary disposition in favor of the Appellant.

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.

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Therefore, this Court did not have the Constitutional authority to issue the Administrative Orders and this case must be remanded to the trial Court for entry of summary disposition because Appellee's complaint is barred by the running of the statute of limitations.

Respectfully submitted,

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Dated: August 25, 2023

BY: */s/David M. Nelson*

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Defendant-Appellant DTN Management Company hereby certifies that its application for leave to appeal contains 5,916 countable words pursuant to MCR 7.212(B)(2) and(B)(3) and MCR 7.312.