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STATE OF MICHIGAN
IN THE SUPRME COURT

KAREN CARTER,

Plaintiff/Appellee

v

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

Defendant/Appellant.

Supreme Court No. 165425

Court of Appeals No. 360772

Trial Court No. 21-228-NO

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PLAINTIFF/APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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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 this Court possessed the authority to issue Administrative Orders 2020-3 and 2020-18.

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. She then began walking on the sidewalk that led from her apartment building to her vehicle that was parked in the parking lot. While walking to her vehicle, Ms. Carter encountered black ice. 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. The condition of the sidewalk was not immediately noticeable or visible to Ms. Carter. 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.

The Administrative Orders

The relevant administrative orders that are at issue in this matter 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).[4]

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

[4] **Appendix 2:** Supreme Court Administrative Order 2020-3.

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> 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.[5]

Procedural Summary

On November 1, 2021, Defendant/Appellant filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(7).[6] 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. Defendant/Appellant also filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10) on November 10, 2021, alleging that Ms. Carter's claims were also barred by the open and obvious doctrine.

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), effectively rendering Defendant/Appellant's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) moot.[7] The trial court misinterpreted AO 2020-3, and held that it only adjusted deadlines that expired during the state of emergency. 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.

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5 **Appendix 3:** Supreme Court Administrative Order 2020-18

6 **Appendix 4:** Defendant Motion for Summary Disposition Pursuant to MCR 2.116(C)(7).

7 **Appendix 5:** Opinion and Order dated March 8, 2022 Granting Defendant's Motion for Summary Disposition.

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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. Defendant/Appellant subsequently filed an Application for Leave to Appeal with this Court, which was ultimately granted on June 30, 2023, to address the question of whether this Court possessed the authority to issue AOs 2020-3 and 2020-18.

III. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition.[8] Questions of statutory interpretation, construction, and application are also reviewed de novo.[9] Additionally, questions concerning the constitutionality of a statute are reviewed de novo,[10] which is also applicable to questions concerning the constitutionality of administrative orders since administrative orders are interpreted in the same manner as statutes.[11]

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8 *El-Khalil v Oakwood Healthcare, Inc,* 504 Mich 152, 159, 934 NW2d 665, 670 (2019).

9 *Johnson v Johnson*, 329 MichApp 110, 118, 940 NW2d 807, 812 (2019).

10 *Turunen v Dir of Dep't of Nat Res*, 336 Mich App 468, 482, 971 NW2d 20, 29 (2021).

11 *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. This Court possessed the Authority to Issue Administrative Orders 2020-3 and 2020-18.

i. The Court Amended the Computation of Time as Provided in MCR 1.108 which is a Procedural Matter.

This Court is well within its authority to amend its own court rule. The authority to determine rules of practice and procedure lies exclusively with this Court.[12] 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.[13] The Court of Appeals recognized that the Supreme Court generally accomplishes this through the issuance of administrative orders and the promulgation of court rules.[14] That is exactly what this Court did when it issued AOs 2020-3 and 2020-18. It temporarily amended MCR 1.108 which is a matter of practice and procedure. This Court has further recognized the need for court rules to govern the procedural notice and statute of limitations issues.[15] "Statutes of limitations should be fairly construed so as to advance the policy they intended to promote and should not be defeated by an overstrict construction."[16] This Court had the authority to modify MCR 1.108 temporarily amending the computation of time in light of the COVID-19 pandemic.

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.[17] The very purpose of MCR 1.108 is to provide a

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12 *Id.*

13 Const 1963, art 6, § 5.

14 **Appendix 1**.

15 *Staff v Johnson*, 242 Mich App 521, 533, 619 NW2d 57, 64 (2000) citing *Herrick v Taylor*, 113 Mich App 370; 317 NW2d 631 (1982).

16 *Herrick v Taylor*, 113 Mich App 370, 374, 317 NW2d 631, 632–33 (1982).

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

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uniform, procedural method of computing time when a statue fails to provide such a method.[18] 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 Insurance Exchange*, 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).[19] The Court of Appeals found that MCR 500.3145(1) required a court to compute time but did not provide for directions as to how that time was to be computed.[20] MCR 1.108 unambiguously governs the computation of time periods that are proscribed by statute.[21] This Court has even acknowledged that MCR 1.108(1) should be consulted when a statute does not provide direction as to how to compute a given time period.[22] 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."[23] Furthermore, as the Court of Appeals recognized, even the normal application of MCR 1.108(1) may result in more time than permitted by a statute of limitations.[24] The same principle is true here, there is no substantive question to be addressed in this matter because AOs 2020-3 and 2020-18 dealt with the question of how a designated time period, such as the one set forth in MCL 600.5850, was to be calculated.

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18 *Macomb v. Farmers Ins. Exch.*, No. 327572, 2016 WL 5121976, at *4 (Mich Ct App Sept. 20, 2016) attached as **Appendix 6**.

19 *Id.*

20 *Id.*

21 *Id.*

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

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

24 **Appendix 1**.

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B. <u>In the Alternative, should this Court find that it did not have the authority to issue AO 2020-3, Equitable Tolling should apply.</u>

This Court has indicated that equitable tolling can apply when the courts themselves create confusion.[25] Equitable tolling, as its name suggests, is an equitable measure that is employed only in compelling circumstances.[26] The Court of Appeals in *United States Fidelity & Guaranty Co. v. Amerisure Ins. Co.*, noted that "Michigan and federal case law provides precedent for the principle that limitation statutes are not entirely rigid, allowing judicial tolling under certain circumstances[.]"[27] Equitable tolling is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods.[28]

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."[29] 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.[30] When examining the context in which this Court issued its administrative orders, it is clear that this Court was ensuring that filers had their full statutory time

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25 *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 406, 738 NW2d 664 (2007).

26 *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 594, 702 NW2d 539, 558 (2005) (Cavanagh, J., dissenting).

27 *United States Fidelity & Guaranty Co v Amerisure Ins Co*, 195 Mich App 1, 6, 489 NW2d 115 (1992).

28 *Boechler, PC v Comm'r of Internal Revenue*, 142 S Ct 1493, 1500, 212 L Ed 2d 524 (2022).

29 *Am Pipe & Const Co v Utah*, 414 US 538, 559, 94 S Ct 756, 769, 38 L Ed 2d 713 (1974).

30 *Id.* at 557-58.

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periods during a time when access to courts was extremely limited during the COVID-19 pandemic which is not in conflict with the legislative scheme of MCL 600.5805.

This Court in *Bryant v Oakpointe Villa Nursing Center*, applied equitable tolling when a plaintiff was understandably confused as to whether her claims sounded in negligence or medical malpractice due to the convoluted case law that existed at the time. This Court stated:

> The equities of this case, however, compel a different result. The distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is one that has troubled the bench and bar in Michigan, even in the wake of our opinion in Dorris. Plaintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights.[31]

This Court in *Trentadue* further indicated that the use of equity in *Bryant* is limited to circumstances in which the ***courts themselves create confusion***.[32] It is important to note that the facts of *Trentadue* are entirely different than the facts that are before this Court. In *Trentadue* the plaintiff argued that her statute of limitations should be tolled based upon the discovery rule.[33] In other words, the plaintiff argued that she was unaware of a cause of action prior to the expiration of the statute of limitations.[34] The Court rejected this contention noting that there was nothing that the plaintiff could have detrimentally relied upon.[35] In contrast, this Court issued an administrative orders that created much confusion because it was subject to conflicting interpretations. One interpretation being that AO 2020-3 applied to any day that fell during the state of emergency declared during the COVID-19 pandemic and the other being that it only applied to deadlines that actually expired during the state of emergency. Ms. Carter detrimentally relied on this Court's

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31 *Bryant v Oakpointe Villa Nursing Ctr*, 471 Mich 411, 432, 684 NW2d 864, 876 (2004).
32 *Trentadue,* 479 Mich. at 406.
33 *Id*. at 388-89.
34 *Id.*
35 *Id.* at 406.

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Order when filing her claims and if this Court finds that AO 2020-3 is unconstitutional and does not apply equitable tolling, Ms. Carter will entirely lose her ability to pursue her claims. "The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff."[36] With this Court being the highest tribunal in the State of Michigan, if litigants cannot rely upon the orders of this Court, what can they truly rely upon?

V. CONCLUSION

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.

Respectfully Submitted,

Dated: September 29, 2023

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Pursuant to MCR 7.212(B) and MCR 7.312, this brief 2,993 countable words.

[36] 51 Am Jur 2d, Limitation of Actions, § 174, p. 563.