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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 ON APPEAL

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I. THIS COURT'S ADMINISTRATIVE ORDERS WENT BEYOND MERE TIME COMPUTATION.

There is a difference between prescribing a method for computing time and exempting a period of days from the time computation. The first is procedural the second is substantive. Simply setting forth a method for computing time is procedural. MCR 1.108 sets forth a method for computing time and sets forth how to compute time when a deadline falls on a court holiday (where the Court is closed) or a weekend (also when a court is closed to filings). MCR 1.108 provides as follows:

> In computing a period of time prescribed or allowed by these rules, by court order, or by statute, the following rules apply:
>
> (1) The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order.

Rather than simply amending the computation of time rules to set forth a different method for computing time, as alleged by the Plaintiff/Appellee, the Administrative Orders made a determination that a whole period of time should be exempted from the time computation rules:

> For all deadlines applicable to the commencement of all civil and probate case types . . . 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).

What this Court did was to make a policy determination that certain days should be excluded from time computation because of the pandemic even though courts were open to the public to accept filings. Such policy determinations are best left to the Legislature. See *Detroit Auto Inter-Insurance Exch v Commissioner of Ins,* 86 Mich App 473, 480; 272 NW2d 689 (1978) (policy considerations are best left to the Legislature, "and the courts will not question the wisdom of the Legislature's determination."). As this Court made a policy determination that days falling

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within the COVID emergency period should be exempted from time computation, this went beyond mere procedure. See *Gladych v New Family Homes, Inc,* 468 Mich 594, 600; 664 NW2d 705 (2003) (enactments that reflect underlying policy considerations are substantive and not procedural); see also *Shannon v Ottawa Circuit Judge,* 245 Mich 220, 222-223; 222 NW 168 (1928) (Courts "cannot divest or displace rights or liens which owe their existence, not to its process, but to the general maritime law.").

By exempting certain days from time computation, this Court created new rights to litigants whose claims would have expired. Stated differently, by exempting certain days from time computation, this Court divested the Defendant of the right to be free from stale claims. This is a determination that is best left to the Legislature through its comprehensive and exclusive system of statutes of limitations which provide for tolling mechanisms in various circumstances. *See Haksluoto v Mt Clemens Reg'l Med Ctr,* 500 Mich 304, 311-312; 901 NW2d 577 (2017).

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.

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In *Macomb,* unlike the situation here, the Court of Appeals simply applied the method for computing time set forth in MCR 1.108. The Court did not exempt days from the computation of time to achieve its desired outcome.

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. EQUITABLE TOLLING DOES NOT APPLY.

"When statutory language is clear and unambiguous, judicial interpretation to vary the plain meaning of the statute is precluded." *United States Fidelity & Guaranty Co v Reliance Ins Co,* 195 Mich App 1, 5; 489 NW2d 115 (1992). Equitable tolling has traditionally been reserved for "unusual circumstances" such as fraud or mutual mistake. *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 590; 702 NW2d 539 (2005). This Court has been reluctant to recognize equitable estoppel "absent intentional or negligent conduct designed to induce a plaintiff from bringing a timely action." *Cincinnati Ins Co v Citizens Ins Co,* 454 Mich 263, 270; 562 NW2d 648 (1997). As stated by this Court in *Devillers*:

> Indeed, if a court is free to cast aside, under the guise of equity, a plain statute . . . simply because the court views the statute as 'unfair," then our system of government ceases to function as a representative democracy. No longer will policy debates occur, and policy choices be made, in the Legislature. Instead, an aggrieved

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> party need only convince a willing judge to rewrite the statute under the name of equity. While such an approach might be extraordinarily efficient for a particular litigant, the amount of damage it causes to the separation of powers mandate of our Constitution and the overall structure of our government is immeasurable.

Devillers, 473 Mich at 591. The statute of limitations scheme was intended to be comprehensive and exclusive. Had the Legislature intended to allow tolling under other circumstances it could have done so but it did not. Allowing tolling in these circumstances would be inconsistent with the Legislative purpose.

Plaintiff/Appellee cites to *Bryant v Oakpointe Villa Nursing Ctr, Inc,* 471 Mich 411; 684 NW2d 864 (2004), in an attempt to support her argument that equitable tolling should be applied because she was "confused" about the statute of limitations.

Here, unlike *Bryant* there is no confusion about the nature of Plaintiff/Appellee's claim. This is a premises liability case. Additionally, there is no confusion about the appropriate statute of limitations for premises liability claims. Even if Plaintiff/Appellee were confused about the statute of limitations it is well-established that ignorance of the law is not a defense. *Young v Young,* 211 Mich App 446, 447; 536 NW2d 254 (1995). Rather than simply filing this lawsuit within the statute of limitations, the Plaintiff/Appellee took a chance and waited to file hoping that she would get the benefit of Covid tolling. This case accrued on January 10, 2018, and therefore the Plaintiff/Appellee had until January 11, 2021, to file her complaint. Despite having knowledge that Farm Bureau denied her liability claim in March 2018, and having retained counsel as of March 29, 2018, the Plaintiff/Appellee did not file her complaint until April 13, 2021, just 10 days before the so-called Covid tolling period was set to expire. In order to get the benefit of equity claimants must still pursue their claims with reasonable diligence. *See Ward v Rooney-Gandy,* 265 Mich App 515, 520; 696 NW2d 64 (2005).

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Here there was no confusion as to the nature of the Plaintiff/Appellee's claim and there was no confusion as to the applicable statute of limitation. If there was some doubt as to the interpretation of the Administrative Orders, the reasonable course of action, to diligently pursue the claim, would have been to file within the statute of limitations rather than assume that the Administrative Orders would save the claim. Consistent with the old proverb: "Better to be safe than sorry." Under these circumstances, equitable tolling does not apply.

Conclusion and Relief Requested

As set forth above and more fully in Defendant/Appellant's Brief on Appeal, this Court exceeded its rule making authority when it modified substantive statutes of limitations by enacting the Administrative Orders.

Respectfully submitted,

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Dated: October 20, 2023

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Pursuant to MCR 7.212(B)(3), the total word count for this Brief is 1867 words.

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