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STATE OF MICHIGAN

IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Patel, P.J., and Borrello and Shapiro, JJ.

KAREN CARTER,

Plaintiff/Appellee,

v

DTN MANAGEMENT CO.

Defendant/Appellant.

SUPREME COURT DOCKET NO. 165425

COURT OF APPEALS DOCKET NO. 360772

INGHAM COUNTY CIRCUIT COURT
CASE NO. 21-000228-NO
HON. WANDA M STOKES

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STATEMENT OF JURISDICTION

Amicus Curiae Michigan Defense Trial Counsel, Inc. (MDTC) agrees with the parties' statements of the basis of jurisdiction.

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STATEMENT OF INTEREST

Michigan Defense Trial Counsel, Inc. (MDTC) is a statewide association of attorneys whose primary focus is the representation of defendants in civil proceedings. MDTC was established in 1979 to enhance and promote the civil-defense bar. It accomplishes that goal by facilitating dialogue among and advancing the knowledge and skills of civil defense lawyers. MDTC appears before this Court as a representative for Michigan's civil defense lawyers and their clients, a significant portion of which could be affected by the issues involved in this case.[1]

[1] None of the parties or their counsel contributed to the authorship of this brief in part or in whole. Nor did any party or their counsel make any monetary contribution intended to fund the preparation or submission of this brief. And no individual or entity aside from MDTC made such a monetary contribution. Further, counsel for MDTC prepared this brief on a *pro bono* basis.

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STATEMENT OF QUESTION PRESENTED

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

Court of Appeals says:	Yes.
Trial Court says:	No.
Defendant/Appellant says:	No.
Plaintiff/Appellee says:	Yes.

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INTRODUCTION

This Court promulgated Administrative Orders (AOs) 2020-3 and 2020-18 to assist litigants in an unprecedented disruption to our courts' administration caused by the COVID-19 pandemic. That was undoubtedly done with the best of intentions. But good intentions cannot constitutionally extend statutes of limitations and repose periods in cases where the *filing deadline* was unaffected by any such disruption. For example, in a birth trauma medical malpractice case where the birth occurred on March 1, 2020, the statute of limitations deadline under MCL 600.5851(7) is the child's tenth birthday, or March 1, 2030. It cannot seriously be asserted that the 102 days in 2020 these Orders remained in effect can have any real impact on whether this hypothetical plaintiff can or will file a claim a decade later. Yet, the Orders, as interpreted and applied by the Court of Appeals below, do exactly that—they would extend this hypothetical plaintiff's limitation or repose deadline, as well as the deadline for any other plaintiffs whose causes of action accrued before or during the 102-day period.

The logic supporting this Court of Appeals decision is deeply flawed. It relies primarily on MCR 1.108(1), which addresses the computation of days and states the *last day* of any period is included, "unless it is a Saturday, Sunday, legal holiday, *or day on which the court is closed pursuant to court order*." (Emphasis added). As this Court knows, AOs 2020-3 and 2020-18 *did not* order the courts to close during this 102-day period or prevent any litigant from filing any pleading. In fact, the Orders expressly stated litigants were not prohibited from filing and encouraged them to do so. Yet, plaintiffs have argued, and the Court of Appeals agreed in this case, that these Orders constitutionally extended the statute of limitations period for 102 days as a procedural measure akin to MCR 1.108(1) despite this interpretation and application blazing a trail for a wholly unprecedented application of the Rule.

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This Court likely did not anticipate such a broad impact in promulgating these Orders in 2020, nor would it have been constitutional to do so. This Court has unequivocally established that statutes of limitations are *substantive* rules of law, not procedural mechanisms. And, while this Court has authority over rules of procedure, it lacks constitutional authority to modify substantive rules of law. That's the Legislature's job.

The bottom line: extending statute of limitations periods across the board by 102 days—regardless of the filing date—is a substantive power reserved for the Legislature. So, to the extent AOs 2020-3 and 2020-18 purport to toll all statutes of limitations by 102 days, regardless of filing date, they are unconstitutional. This Court should accordingly reverse the Court of Appeals and make clear to lower courts that AOs 2020-3 and 2020-18 are no longer relevant to calculating statutory periods of limitations or repose.

ARGUMENT

This Court's Administrative Orders 2020-3 and 2020-18 present an unconstitutional exercise of legislative lawmaking authority to alter statutes of limitations and repose.

A. Current State of the Law.

Prior to March 2020, MCR 1.108(1) was simple both in concept and application – if the last day of any litigation period is a day on which the courts are closed (i.e. a weekend, holiday, or other ordered closure), then litigants have until the next day courts are open to meet the deadline. On March 23, 2020, this Court issued AO 2020-3, which stated:

> 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 casetypes, 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

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> 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 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.[2] [Emphasis added].

On May 1, 2020, this Court amended AO 2020-3 to clarify it did not "suspend or toll any time period that must elapse before the commencement of an action or proceeding."[3] On June 12, 2020, this Court issued AO 2020-18, which rescinded AO 2020-3 as of June 20, 2020.[4] AO 2020-18 specifically stated: "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."[5]

[2] Administrative Order No. 2020-3, 505 Mich cxxvii (2020).
[3] Amended Administrative Order No. 2020-3, 505 Mich cxliv (2020).
[4] Administrative Order No. 2020-18, 505 Mich clviii (2020).
[5] *Id.*

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At least two members of this Court have already weighed in on the constitutionality of AOs 2020-3 and 2020-18. As Justice Viviano wrote in a 2022 dissent, joined by Justice Zahra: "[O]ur court rules and orders cannot trump a statute of limitations. And since nothing in the relevant statutory framework allows for the tolling that occurred here, the only potential grounds for the tolling order is under our equitable powers. But equitable tolling has been largely discredited."[6] Subsequently, the Court of Appeals addressed the issue in several cases, most of which this Court has either granted review or held in abeyance.

The first such case was *Armijo v Bronson Methodist Hospital*,[7] which involved a medical malpractice claim that accrued on March 6, 2018; the plaintiff issued her Notice of Intent (NOI)[8] on February 19, 2020, leaving her 16 days to file suit under the two-year statute of limitations after the 182-day tolling period ending August 19, 2020. Plaintiff filed suit on December 14, 2020 – more than two months after the limitations deadline. Pursuant to Amended Administrative Order 2020-3, the Court of Appeals held the prerequisite NOI tolling period continued to run and had no effect on the applicable limitations period; thus, plaintiff's claims were time-barred. Although the Court of Appeals did not need to address the constitutionality of the Orders to decide the case, Judge Riordan in a separate concurrence noted his agreement with Justice Viviano's dissent in *Browning* addressing that issue.[9]

Next, the Court of Appeals reviewed the instant case, *Carter v DTN Mgmt. Co.*,[10] and held (for the first time) that this Court's Orders were constitutional pursuant to MCR 1.108(1) and the

[6] *Browning v Buko*, __ Mich __; 979 N.W.2d 196 (Mem) (Sep. 9, 2022) (Viviano, J., dissenting).
[7] *Armijo v Bronson Methodist Hosp.*, __ Mich App __; __ NW2d __ (2023).
[8] A statutory prerequisite to filing a medical malpractice case pursuant to MCL 600.2912b.
[9] *Armijo*, __ Mich App at __; __ NW2d __ (Riordan, J., concurring).
[10] *Carter v DTN Mgmt. Co.*, __ Mich App __; __ NW2d __ (2023).

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Court's "superintending control over all state courts."[11] Although this Court does possess this superintending authority, *Carter*'s analysis fails to indicate how this authority permits blanket extensions of substantive statutes of limitations or repose, or how the change was "procedural" under 1.108(1). In fact, if AOs 2020-3 and 2020-18 were procedural under MCR 1.108(1), then the Rule's standard application should have applied here as well – all filings would have been due on their normal deadlines or June 22, 2020, the first day courts "reopened" after this Court rescinded the Orders. But for the language in the Court's Orders, this is what MCR 1.108(1) would require for litigants in any other circumstance, which suggests the Court of Appeals' application has constructed a wholly new Rule.

Finally, the *Carter* Court failed to explain any distinction or "line in the sand" as to how far this Court can go to extend statutes of limitations through MCR 1.108(1). The Rule clearly permits litigants to file the next day courts are open in circumstances when *courts are closed* (an administrative/procedural directive). However, electing not to count days when courts remain open is a substantive amendment to statutes of limitations and repose that presents an entirely different issue, which the *Carter* court did not discuss. Plaintiffs are typically not "refunded" weekends, holidays, and other court closures under MCR 1.108(1), nor does the Rule grant a grace period for days in which courts remain open. It is illogical to suggest these Orders are justified by application of a Rule that operates very differently.

The next case interpreting any applying AOs 2020-3 and 2020-18 was *Linstrom v Trinity Health-Michigan*,[12] another medical malpractice case. The plaintiff's claim stemmed from medical care she received in May 2018. She issued her NOI on March 13, 2020, leaving between 63 and

[11] *Id., slip op.* at 6.
[12] *Linstrom v Trinity Health-Michigan*, __ Mich App __; __ NW2d __ (2023).

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66 days after the 182-day tolling period to file suit. As in *Armijo*, the plaintiff was prohibited under the NOI tolling statute from filing suit on any day the AOs were in effect.[13] The NOI period expired on September 11, 2020, and the plaintiff ultimately filed suit on November 25, 2020 – 75 days later. Nonetheless, the same panel that reviewed *Carter* held AOs 2020-3 and 2020-18 expanded plaintiff's statute of limitations by 102 days, thus she issued her NOI between 165 and 168 days (instead of 63 to 66) early, rendering her complaint timely. Despite *Armijo*'s precedent holding the AOs had no effect on pre-suit requirements and the fact the plaintiff *could not have filed suit* while the AOs were in effect, the *Linstrom* Court justified its holding on the mere fact the two-year statute of limitations (which was tolled until September pursuant to the NOI) would have otherwise ended in May 2020. This holding demonstrates the logical gaps in *Carter*'s holding, particularly with respect to medical malpractice cases and other categories of cases that have prerequisites to filing suit and often utilize various statutes of limitations (wrongful death, minors, incapacitated persons, etc.).

A month later, the Court of Appeals further muddied these waters in *Hubbard v Stier*.[14] There, the plaintiff's claim accrued on February 17, 2018, and she issued her NOI on February 13, 2020. She had four days to file a complaint after the notice period expired on August 13. However, she filed suit on November 3. Following *Armijo*'s precedent, the court held her claim was barred because Amended AO 2020-3 prohibited tolling of pre-suit notice periods. In his concurrence, Judge Shapiro (a member of the *Carter* and *Linstrom* panels) agreed with the result, "but based on a different analysis."[15] He would have held plaintiff was entitled to 53 more days (the number of days between AO 2020-3 and its amendment clarifying the Order did not toll pre-suit notice

[13] MCL 600.2912b(1).
[14] *Hubbard v Stier*, __ Mich App __; __ NW2d __ (2023).
[15] *Hubbard*, __ Mich App at __; __ NW2d __ (Shapiro, P.J., concurring).

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periods), but this extension would not render the complaint timely.[16] In other words, Judge Shapiro would have extended the period despite the fact the plaintiff *could not have filed suit* until August 13, 2020, nearly two months after the AOs were no longer in effect.

Finally, in *Compagner v Burch*,[17] the Court of Appeals published an opinion stating its disagreement with *Carter* and calling for a conflict panel to resolve the issue, which was ultimately not convened.[18] In *Compagner*, yet another medical malpractice case, the plaintiff issued his NOI on December 4, 2020 claiming negligence regarding a November 3, 2014 CT angiogram that was not "discovered" until the plaintiff underwent x-rays on June 30, 2020. Absent the AOs at issue, the claim would have been barred by the six-year statute of repose,[19] and the plaintiff did not even discover the potential claim until after the AOs were no longer in effect. The Court's opinion speaks for itself and states, in relevant part:

> Although plaintiffs posit that the Supreme Court's authority to issue AO 2020-3 axiomatically flowed from the limited, procedural time-computation tweaking that it adopted in MCR 1.108(1), nothing could be further from the truth. The minor, procedural effects of MCR 1.108(1) are minimal in nature, insignificant in temporal duration, designed purely to ensure that filings are not due when the courts are closed, and can properly be characterized as falling within the "practice and procedure" bailiwick of the Supreme Court. Const. 1963, art. 6, § 5. 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 limitation and repose (and related tolling provisions), and it accordingly

[16] *Id.*
[17] *Compagner v Burch*, __ Mich App __; __ NW2d __ (2023).
[18] Order, June 21, 2023 (COA Docket No. 359699)
[19] MCL 600.5838a(2); *Nortley v Hurst*, 321 Mich App 566, 572; 908 NW2d 919 (2017).

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impermissibly and unconstitutionally intruded on the Legislature's sole and exclusive authority to determine the substantive law of the state of Michigan.

Carter fares no better. Respectfully, its entire substantive analysis of this issue was as follows:

> 'By its own terms, AO 2020-3 was modifying the computation of days under MCR 1.108 for purposes of determining filing deadlines, which is plainly a procedural matter. Further, even the normal application of MCR 1.108(1) may result in more time than permitted by the statute of limitations. That is, if the last day of the limitations period is a day on which the court is closed, the period runs until the next day that the court is open. See MCR 1.108(1). The law of counting time favors this approach, i.e., granting more rather than less than time to file than permitted by statute, to ensure that the parties receive the entire amount of time for filing that they are entitled to. See *Haksluoto v Mt. Clemens Regional Med. Ctr.*, 500 Mich. 304, 314-320, 901 N.W.2d 577 (2017). That is precisely what the Supreme Court was trying to accomplish with AO 2020-3, which was issued when there were court closings because of the COVID-19 pandemic.
>
> Further, the Court was also clearly concerned with limiting in-person interactions and protecting court staff and the public from COVID-19. See AO 2020-3 ("Courts must have a system in place to allow filings without face-to-face contact ...."). It is therefore inaccurate to frame this issue as a dichotomous choice between substantive and procedural law. In addition to its authority over procedural rules, the Supreme Court has superintending control over all state courts. See Const. 1963, art. 6, § 4; *Lapeer County Clerk v Lapeer Circuit Judges*, 465 Mich. 559, 569, 640 N.W.2d 567 (2002). Thus, the Supreme Court had authority to manage the operations of Michigan courts amidst a global pandemic. And by excluding days from the computation of time under MCR 1.108, AO 2020-3 undoubtedly lessened the amount of in-person interactions at courts during the early stages of the pandemic. For these reasons, we conclude that the Supreme Court had constitutional authority to issue AO 2020-3.'

Little more needs to be said. While the early days of the pandemic certainly were trying and filled with uncertainty, presenting challenges that had not been experienced in this nation in nearly a century, and while the Supreme Court's intentions were undoubtedly laudable, in retrospect its issuance of AO 2020-3 was plainly unconstitutional. Should this issue reach the Supreme Court, we respectfully suggest that it should acknowledge as much and similarly conclude. For all of the reasons already stated, *Carter* was wrongly decided; the Supreme Court did not have the constitutional authority to issue AO 2020-3 (or the related AOs). Plaintiffs'

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> complaint was therefore untimely filed (after the expiration of the applicable statute of repose) and, but for *Carter*, we would reverse and remand for entry of summary disposition in favor of defendants.[20]

From these opinions, it seems clear that the current state of the law presents an untenable framework for future application. This Court possesses the authority to provide clarity and fairness to all litigants, and, respectfully, the MDTC urges it to do so by finding AOs 2020-3 and 2020-18 unconstitutional and returning the Legislature's intended effect to the Michigan statutes of limitations and repose.

B. The Parties' Dispute.

The parties' dispute in this case is virtually identical to the dispute raised in the cases discussed above. Plaintiff/Appellee argues AOs 2020-3 and 2020-18 were procedural in nature because they modified MCR 1.108(1), and that modification is controlling in this case. Defendant/Appellant argues the Orders were unconstitutional modifications to substantive law and, thus, cannot extend the substantive statutory period of limitations. As with most other plaintiffs addressing this issue, Plaintiff/Appellee alternatively argues equitable tolling should apply to save her case because this Court itself has created the confusion.

C. Under Michigan's Constitution, courts—even this Court—lack authority to modify substantive rules of law enacted by the Legislature.

"The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."[21]

The "legislative power is the power to make laws."[22] It is for the legislators to "establish

[20] *Id., slip op.* at 19-21 (citations and footnotes omitted).
[21] Const 1963, art 3, § 2.
[22] *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 98; 754 NW2d 259 (2008).

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the statutory law because the legislative power is exclusively theirs."[23] Further, "[i]t is axiomatic that the Legislature has the authority to abrogate the common law."[24] "In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter."[25] In other words, courts' power to interpret the common law cannot supersede statutory mandates established by the legislature.

This comports with our well-established separation of powers jurisprudence; the judicial branch "may not usurp the lawmaking function of the legislature."[26] While the Legislature has exclusive authority to make laws, this Court has "the authority to determine rules of practice and procedure."[27] This authority is, however, subject to separation of powers principles.[28] It is a function of which the Legislature may not "meddle or interfere,"[29] but the Court's "rule-making authority extends *only* to matters of practice and procedure."[30]

This Court acknowledges the scope of its authority in MCR 1.103: "The Michigan Court Rules govern *practice and procedure* in all courts established by the constitution and laws of the

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[23] *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 65; 718 NW2d 784 (2006).
[24] *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 389; 738 NW2d 664 (2007).
[25] *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006).
[26] *In re Complaint of Rovas Against SBC Michigan*, 482 Mich at 98, quoting *Webster v Rotary Electric Steel Co*, 321 Mich 526, 531; 33 NW2d 69 (1948).
[27] *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999) (citing Const. 1963, art. 6, § 5, "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."). While the relevant authorities reference court rules, the same analysis can be employed with respect to administrative orders for the reason that, like court rules, administrative orders are promulgated by this Court to govern practice and procedure. MCL 600.223.
[28] *Id*., citing Const. 1963, art. 3, § 2; *In re 1976 PA 267*, 400 Mich 660; 255 NW2d 635 (1977).
[29] *Perin v Peuler (On Rehearing)*, 373 Mich 531, 541; 130 NW2d 4 (1964).
[30] *McDougall*, 461 Mich at 26; 597 NW2d 148 (1999).

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State of Michigan." (Emphasis added). This Court has also acknowledged that "an enactment of substantive law" is "a valid exercise of the Legislature's public policy-making prerogative."[31] Following *McDougall*, this Court further clarified the distinction between procedural and substantive law by holding that "[s]tatutes regarding periods of limitations are substantive in nature."[32]

Importantly, the "separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers,"[33] but an overlap between the branches is only permissible "if the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other[.]"[34] While the Legislature may grant limited authority to the Court to have some overlap of responsibility, it did not do so with respect to AOs 2020-3 and 2020-18. Thus, to the extent this Court intended the Orders to extend statutory periods of limitation or repose, it lacked the constitutional authority to do so.

D. <u>In Michigan, statutes of limitations and respose are substantive law that this Court lacks constitutional authority to modify</u>.

This Court has held that "[s]tatutes regarding periods of limitations are substantive in nature."[35] In 2020, there was no grant of legislative authority to judicially amend any limitations period. Thus, AOs 2020-3 and 2020-18 were and are undoubtedly an unconstitutional exercise of judicial power.

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[31] *McDougall v Schanz*, 461 Mich 15, 19; 597 NW2d 148 (1999).
[32] *Gladych v New Family Homes, Inc*, 468 Mich 594, 600; 664 NW2d 705 (2003).
[33] *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 296; 586 NW2d 894 (1998).
[34] *Taxpayers of Michigan Against Casinos v Michigan*, 478 Mich 99, 105; 732 NW2d 487 (2007) (quotation marks and citation omitted).
[35] *Gladych v New Family Homes, Inc*, 468 Mich 594, 600; 664 NW2d 705 (2003).

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Before 2003, Michigan courts recognized that statutes of limitations were procedural in nature as opposed to substantive.[36] In *Buscaino*, this Court held that the court rule for commencing an action tolled the statute of limitations in MCL 600.5856 because the action was filed within three years, which was within the time for tolling an action under MCL 600.5856.[37] The Court reasoned that the statute of limitations was a matter of procedure and that the court rule did "not affect the validity of the three-year statute of limitations."[38]

But in 2003, this Court recognized the flawed reasoning in *Buscaino* and overruled it in *Gladych v New Family Homes*.[39] There, this Court acknowledged "the distinction between statutes regarding matters of 'practice and procedure' and those regarding substantive law" and recognized that "[i]f the statute concerns a matter that is purely procedural and pertains only to the administration of the courts, the court rule would control."[40] "If, however, the statute concerns a principle of public policy, having as its basis something other than court administration . . . the [court] rule should yield."[41] *Gladych* analyzed MCL 600.5805, the statute of limitations for personal injury actions, and MCL 600.5856, the statute for tolling statutes of limitations or

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[36] *Buscaino v Rhodes*, 385 Mich 474, 480; 189 NW2d 202 (1971). See, e.g., *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978) ("Statutes of limitation are generally considered to be procedural requirements."), citing *Buscaino*, 385 Mich at 480; *Lothian v City of Detroit*, 414 Mich 160, 166; 324 NW2d 9 (1982) ("In general, statutes of limitations are regarded as procedural, not substantive."), citing *Buscaino*, 385 Mich at 480.

[37] *Buscaino*, 385 Mich at 483.

[38] *Id*.

[39] *Gladych*, 468 Mich at 598-605.

[40] *Id*. at 600.

[41] *Id*. (quotation marks and citation omitted; alteration in original; ellipsis in original). There are several policy considerations underlying statutes of limitations, such as 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 inconveniences resulting from delay." *Nielsen v Barnett*, 440 Mich 1, 8-9; 485 NW2d 666 (1992). It is through the enactment of statutes of limitations that "the Legislature determines the reasonable period of time given to a plaintiff to pursue a claim." *Id*. at 8.

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repose.[42] The Court stated section 5805 did not provide "that the statute of limitations somehow becomes irrelevant once the complaint is filed."[43] If it did, then "the mere filing of a complaint under § 5805 [would render] the provisions of § 5856 that effectuate the tolling . . . unnecessary."[44] In other words, "[i]f the period of limitations somehow 'stopped' at the filing of the complaint, as concluded in *Buscaino*, there would be no need to specify tolling requirements."[45]

The *Buscaino* Court "was not concerned with the plain language of [MCL 600.5856.]"[46] "Rather, the Court in *Buscaino*, operating under the erroneous belief that statutes of limitations were merely 'procedural' in nature, was concerned with avoiding an apparent conflict between [MCR 2.101] . . . and the requirements of § 5856."[47] In overruling *Buscaino*, this Court ruled that "[s]tatutes regarding periods of limitations are substantive in nature."[48] In so concluding, the *Gladych* Court ruled that "to the extent § 5856 enacts additional requirements regarding the tolling of the statute of limitations, the statute would supersede the court rule."[49] Under *Gladych*, a claimant would need to meet one of MCL 600.5856's three requirements to properly toll the statute of repose in MCL 600.5838a(2).[50]

Since *Gladych*, this Court has reinforced that sections of the Revised Judicature Act, including MCL 600.5838a, "comprehensively establish limitations periods, times of accrual, and

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[42] *Gladych*, 468 Mich at 598-599.
[43] *Id*. at 598.
[44] *Id*.
[45] *Id*. at 599.
[46] *Id*.
[47] *Id*. at 599-600.
[48] *Id*. at 600.
[49] *Id*. at 600-601.
[50] *Id*. at 605 ("[O]ne must turn to § 5856, which provides the specific requirements for tolling the statute of limitations. If those requirements are not met, the period of limitations continues to run."); see *id*. ("[O]ne must satisfy the requirements of § 5856 in order to toll the limitations period.").

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tolling for civil cases."[51] "Consequently, any deviation due to tolling . . . malpractice actions is only provided by statute, such as in MCL 600.5856[]."[52] The legislature "intended the scheme to be comprehensive and exclusive,"[53] which it has the power to do as the lawmaking branch: "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."[54] Michigan courts recognize that the six-year period of repose is a substantive rule that may be tolled *only* in accordance with MCL 600.5856, and may otherwise be superseded *only* by the discovery rule pursuant to section 5838(2)(a)-(b). Michigan is not alone – courts across the country also recognize statutes of repose as substantive.[55]

Because neither discovery rule requirement to extend the statute of repose is present here, MCL 600.5856's tolling provisions provide the only potential justification for extending the statute

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[51] *Trentadue*, 479 Mich at 390.
[52] *Haksluoto v Mt Clemens Reg Med Center*, 500 Mich 304, 312; 901 NW2d 577 (2017).
[53] *Id*. at 391.
[54] *Trentadue*, 479 Mich at 392 (citation omitted).
[55] See *Boggs v Adams*, 45 F3d 1056, 1060 (CA 7, 1995) ("A statute of repose by contrast is substantive. It extinguishes any right to bring any type of cause of action against a party, regardless of whether such action has accrued."); *Police and Fire Retirement System of City of Detroit v IndyMac MBS, Inc*, 721 F3d 95, 106 (CA 2, 2013) ("[S]tatutes of repose create[] a *substantive* right in those protected to be free from liability after a legislatively-determined period of time . . . . And, as most important here, a statute of repose is subject [only] to legislatively created exceptions.") (Quotation marks and citations omitted; alterations in original); *First United Methodist Church v US Gypsum Co*, 882 F2d 862, 865-866 (CA 4, 1989) ("A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time."); *Huddleston v US*, 485 Fed Appx 744, 745-746 (CA 6, 2012) ("The statute of repose is a substantive requirement, not just a procedural hurdle."); *Mills v Wong*, 155 SW3d 916, 920 (Tenn 2005) ("The running of the statute of repose thus has a substantive effect."); *Harding v KC Wall Prods, Inc*, 831 P2d 958, 967 (Kan 1992) ("A statute of repose limits the time during which a cause of action can arise and usually runs from an act of a defendant. It abolishes the cause of action after the passage of time even though the cause of action may not have yet accrued. It is substantive.").

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of repose in a medical malpractice action.[56] As this Court stated, "if one does not perform any actions specified by § 5856, the statute of limitations is not tolled and therefore the period of limitations continues to run[.]"[57] If a claimant does not satisfy any one of the requirements listed in MCL 600.5856, the statue of repose is not tolled. "[T]he statute provides, without exception, that 'statutes of limitations or repose are tolled' when one of the . . . enumerated actions take place. It follows logically, then, that if one of the . . . enumerated actions does not occur, the statutes of limitations or repose are *not* tolled."[58] And because statutory periods are substantive, courts cannot usurp the Legislature's power to toll such periods.[59]

E. <u>This Court Should Reverse the Court of Appeals' Decision</u>.

There is no dispute that this Court lacks the constitutional authority to amend the various statutes of limitations and repose, themselves – such action would require a legislative amendment process. Although it's been suggested that AOs 2020-3 and 2020-18 are justified under MCR 1.108(1), that doesn't pass muster. MCR 1.108(1) relates to calculating the dates on which a given period ends. But the blanket extension of every affected statutory period of limitations or repose by 102 days isn't merely a method of calculating the date on which the COVID-tolling period ended; rather, it's effectively equivalent to legislatively amending the applicable statutes of limitations to allow for a period of tolling unconnected to the filing date without the Legislature

[56] MCL 600.5856 provides that the statute of repose is tolled in one of three ways: (1) a copy of the summons and complaint are served on the defendant within the time set forth in the Michigan Supreme Court's rules; (2) jurisdiction over the defendant is otherwise acquired; or (3) at the time a notice of intent is given under MCL 600.2912b, the claim would be barred by the statute of repose during the 182-day notice period, in which case the statute of repose is tolled the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

[57] *Gladych*, 468 Mich at 599.

[58] *Id*. *Gladych* referred to a previous version of MCL 600.5856 that enumerated four actions that would toll the statute of limitations or repose. The current version only enumerates three.

[59] *Perin*, 373 Mich at 541.

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enacting it. This is particularly so when this 102-day period does not at all utilize the same methods of application as the Rule purportedly justifying it. In other words, the Orders present a vastly different *scope* and *method of application* such that they do not resemble the purportedly justifying Rule as it is typically applied.

For example, litigants do not get every weekend, holiday, or other court closing tacked back onto their limitations or repose period under MCR 1.108(1); rather, they are only tacked on when courts are closed the *last day* of the period. And, if that's the case, the deadline is only extended to the *next day courts are open*—in that situation, the statute of limitations is not tolled by the number of days tacked on. By contrast, the Orders, as applied by the Court of Appeals below, tack on all 102 days to litigants regardless of weekends, holidays (i.e. Memorial Day, the Fourth of July), and other closures that would never be refunded under the Rule's normal application. Despite the disruption and necessary adjustments, courts largely remained open throughout the 102-day emergency period declared in 2020. In fact, AO 2020-3 expressly *did not* prevent litigants from filing and encouraged litigants *to continue filing* pleadings with the courts, so any plaintiff could have filed suit on just about any weekday throughout the spring and summer of 2020. By contrast, MCR 1.108(1) applies only when courts are closed, not when it is *potentially* inconvenient for litigants to file. While there may be or may have been a small number of cases that were truly impacted by the disruption in 2020, none of the cases implicating these Orders present such circumstances, including the instant case.

In the four medical malpractice cases discussed *supra – Armijo, Linstrom, Hubbard, and Compagner* – the plaintiffs *could not* have filed suit during the 102-day period the Orders remained in effect, either because of the statutory 182-day NOI tolling period or, in *Compagner*, the plaintiff had not yet discovered the claim. In the instant case, plaintiff's claim accrued on January 10, 2018

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and was subject to a three-year limitations period.[60] She filed suit on April 13, 2021. This means she could have filed at any time during the 102-day period or anytime between June 22, 2020 and January 10, 2021 to meet the statutory requirements, but she chose to wait until three months after the statutory deadline for unknown reasons. Under the standard application of MCR 1.108(1), a plaintiff whose limitations deadline expired during the 102-day period would have been due the next day courts were open, or June 22, 2020 – plaintiff had more than six additional months to file and be certain the claim was timely pursuant to statute. These examples demonstrate the Orders are not based on MCR 1.108(1); they create an entirely different Rule, for which the Court of Appeals has, at least to-date, supplied an application that departs from how MCR 1.108(1) has always been applied. In reality, however, the 102-day lifespan of these Orders had no practical effect on the plaintiffs' rights in any of these cases.

Because AOs 2020-3 and 2020-18 certainly amended substantive law (i.e. statutory periods of limitations and repose) and their impact did not at all prejudice plaintiffs, equitable tolling is not warranted in the instant case or any of the medical malpractice cases discussed above. In arguing for equitable relief, Plaintiff/Appellee relies heavily on *Trentadue v Buckler Lawn Sprinkler*,[61] a case in which this Court *denied equitable relief* because the plaintiff did not "detrimentally [rely] on confusing, pre-existing case law."[62] Although the *Trentadue* plaintiff relied heavily on *Bryant v Oakpointe Villa Nursing Centre, Inc*,[63] this Court expressly distinguished the two cases:

> Perhaps most significantly, in *Bryant*, no controlling statute negated the application of equity; rather, this Court's caselaw determined where a claim sounded in medical malpractice or ordinary

[60] MCL 600.5805(1).
[61] *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378; 738 NW2d 664 (2007).
[62] *Id.* at 406.
[63] *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411; 684 NW2d 864 (2004).

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> negligence. [Citation omitted]. To the contrary, in the instant case, the statutory scheme controls limitations periods, accrual, and tolling…."[64]

As in *Trentadue*, statutory periods of limitations, repose, and tolling controlled the instant case and the medical malpractice cases addressing the same issue. In each instance, the plaintiff had the amount of time prescribed by statute to file. In none of these cases have plaintiffs alleged or articulated a single fact suggesting they could not have reasonably filed within the standard period of limitations and, thus, are not entitled to equitable relief. To the extent this Court considers granting a vast wave of equitable relief to plaintiffs claiming reliance the Orders, the MDTC urges the Court to exercise restraint and award such grace only to those litigants who were truly and factually prevented from timely filing their claims, not those who merely procrastinated assuming they had an additional 102 days to file despite knowing (or constructively knowing) statutes of limitations or repose dictate otherwise.

CONCLUSION

Although well-intended, AOs 2020-3 and 2020-18 were unconstitutional usurpations of legislative authority because they effectively modified substantive rules of law (i.e., statutes of limitations and repose). MCR 1.108(1) is a procedural tool that permits courts to be closed on certain days and identifies the procedural course for litigants whose deadlines fall on those days. It cannot and does not justify a 102-day extension to all statutes of limitations or repose. Nor do plaintiffs who inexplicably relied on this extension without being affected by the emergency period whatsoever warrant equitable relief. MDTC respectfully requests that this Court reverse the Court of Appeals' decision in *Carter* and deem time-barred all cases filed after their statutory period of limitations or repose.

[64] *Trentadue*, 479 Mich at 406.

Date: December 8, 2023

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STATE OF MICHIGAN

IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Patel, P.J., and Borrello and Shapiro, JJ.

KAREN CARTER,

Plaintiff/Appellee,

v

DTN MANAGEMENT CO.

Defendant/Appellant.

SUPREME COURT DOCKET NO. 165425

COURT OF APPEALS DOCKET NO. 360772

INGHAM COUNTY CIRCUIT COURT
CASE NO. 21-000228-NO
HON. WANDA M STOKES

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CERTIFICATE OF COMPLIANCE REGARDING WORD COUNT

I certify that the Brief of *Amicus Curiae* Michigan Defense Trial Counsel, Inc. was prepared in accordance with MCR 7.212(B)(5) using Microsoft Word and 12-point Times New Roman font and consists of 6,274 words.

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