STATE OF MICHIGAN

COURT OF APPEALS

BEN OLDS, Personal Representative of the ESTATE OF LINDA S. WALSH,

Plaintiff-Appellant,

v

AMBULATORY SURGERY ASSOCIATES, LLC, doing business as BROOKSIDE SURGERY CENTER,

Defendant,

and

PAIN DOC ANESTHESIOLOGY, PC, and JOHN SHAIRD M.D.,

Defendants-Appellees.

UNPUBLISHED
April 11, 2024

No. 360780
Calhoun Circuit Court
LC No. 2021-000540-NH

Before: HOOD, P.J., and REDFORD and MALDONADO, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals by leave granted[1] the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) (claim is time-barred).[2] We reverse.

[1] *Estate of Linda S Walsh v Ambulatory Surgery Assoc, LLC*, unpublished order of the Court of Appeals, entered September 29, 2022 (Docket No. 360780).

[2] Defendant Ambulatory Surgery Associates, LLC, doing business as Brookside Surgery Center, was also granted summary disposition; however, it is not a party to this appeal.

I. BACKGROUND

This case arises from Dr. Shaird's allegedly negligent treatment of Linda Walsh, who is now deceased. According to the complaint, Walsh began seeing Dr. Shaird in 2008 for treatment of chronic pain, and Dr. Shaird prescribed several different medications during their professional relationship which lasted nine years. Plaintiff alleged that Dr. Shaird continued prescribing the same doses of numerous narcotic drugs despite the facts that Walsh had a history of both alcohol and prescription drug abuse and had recently undergone significant weight loss during that time. Moreover, Walsh had reportedly told family members that she and Dr. Shaird had a sexual relationship. Dr. Shaird last treated Walsh on March 2, 2017, and she was found dead five days later. Following an autopsy, it was determined that the cause of death was an overdose.[3] At the time of her death, Walsh only weighed 100 lbs.

Walsh's estate did not bring this action until February 26, 2021, nearly four years after Walsh's death and well outside the applicable limitations period. However, plaintiff argued that the complaint, nevertheless, was timely filed because of the Michigan Supreme Court's COVID-19 tolling orders. Defendants were unpersuaded and, accordingly, filed a motion seeking summary disposition pursuant to MCR 2.116(C)(7). At the hearing regarding this motion, the trial court expressed frustration with plaintiff's attempt to utilize the tolling orders and made comments suggesting that some showing of need was required to rely on them:

> The issue of whether or not the COVID order issued by the Supreme Court, I'm not going to argue or, it's validity of whether or not they had the authority to do so. It's a very unique circumstance that we had here. But I find it interesting that the plaintiff, in this matter, doesn't indicate there's anything related to this particular case that resulted in, other than, hey, I get some bonus time here because of this, this rule so, I can file late.
>
> To take that order and say a ah, [sic] I get, I get some extra time, even though I missed my date, I'm lucky that this order was entered and that there was COVID although there's no factual circumstance here that gives them a reason to gain benefit from that order. Boy, it, it's a tough pill to swallow and I don't swallow it.

The court granted defendants' motion for summary disposition and denied plaintiff's subsequent motion for reconsideration. This appeal followed.

II. STANDARDS OF REVIEW

"The question whether a cause of action is barred by the applicable statute of limitations is one of law, which this Court reviews de novo." *Frank v Linkner*, 500 Mich 133, 140; 894 NW2d 574 (2017) (quotation marks and citation omitted). When reviewing a motion for summary disposition made pursuant to MCR 2.116(C)(7), this Court considers "all documentary evidence

[3] The exact term used in the complaint was "acute severe combined drug intoxication."

and accept[s] the complaint as factually accurate unless affidavits or other appropriate documents specifically contradict it." *Id*. (quotation marks and citation omitted).

Issues involving "the proper interpretation and application of statutes and court rules" are reviewed de novo. *Safdar v Aziz*, 501 Mich 213, 217; 912 NW2d 511 (2018).

The proper interpretation and application of the Supreme Court's administrative orders is likewise reviewed de novo. *Carter v DTN Mgt Co*, ___ Mich App ___, ___ n 1; __ NW2d ___ (2023), (Docket No. 360772); slip op at 3. "Principles of statutory construction apply to determine the Supreme Court's intent in promulgating rules of practice and procedure." *Linstrom v Trinity Health-Mich*, ___ Mich App ___, ___; ___ NW2d ___ (2023), (quotation marks and citation omitted) (Docket No. 358487); slip op at 6. Accordingly, "interpretation of the Supreme Court's administrative orders begins with the language of the orders to discern the Supreme Court's intent and no further judicial construction is necessary if the language is unambiguous." *Id*.

III. DISCUSSION

The trial court erred by failing to exclude the 102-day stay period from its calculation of when the applicable limitations period expired. Additionally, defendants' argument that the Supreme Court lacked the authority to toll the statute of limitations is without merit.

A medical malpractice claim "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1). Generally, a plaintiff must bring a medical malpractice action within two years of the date that the claim accrued. MCL 600.5805(8). However, MCL 600.5852 extends the limitations period in cases in which the party dies before the period of limitations has run. MCL 600.5852 provides, in relevant part, as follows:

> (1) If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action that survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run.
>
> (2) If the action that survives by law is an action alleging medical malpractice, the 2-year period under subsection (1) runs from the date letters of authority are issued to the first personal representative of an estate. . . .
>
> * * *

In this case, plaintiff's claim of medical malpractice accrued on March 2, 2017, because that was the last date that Walsh was treated by Dr. Shaird. See MCL 600.5838a(1). Pursuant to MCL 600.5805(8), the limitations period for plaintiff's claims would have expired on March 2, 2019 because the statutory period of limitations for plaintiff's claim is generally two years. However, because Walsh died before the period of limitations had run, and the letters of authority were issued to Walsh's estate on December 27, 2018, the period of limitations was extended to December 27, 2020. See MCL 600.5852. Plaintiff filed this complaint on February 26, 2021, which ordinarily would be outside even this extended limitations period.

However, on March 23, 2020, the Michigan Supreme Court issued Administrative Order No. 2020-3, 505 Mich cxxvii (2020) (AO 2020-3), which provides:

> 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 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, *nor does it suspend or toll any time period that must elapse before the commencement of an action or proceeding*. 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. [Emphasis added.]

The italicized portion was added to the order by an amendment made by the Supreme Court on May 1, 2020. See *Hubbard v Stier*, ___ Mich App ___, ___; ___ NW2d ___ (2023), (Docket No. 357791); slip op at 4.

This order was rescinded effective June 20, 2020 by Administrative Order No. 2020-18, 505 Mich clviii (2020) (AO 2020-18). AO 2020-18 provides:

> In Administrative Order No. 2020-3, the Supreme Court issued an order excluding any days that fall during the State of Emergency declared by the Governor related to COVID-19 for purposes of determining the deadline applicable to the commencement of all civil and probate case types under MCR 1.108(1). Effective Saturday, June 20, 2020, that administrative order is rescinded, and the computation of time for those filings shall resume. For time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020. For filings with time periods that did not begin to run because of the exclusion period, the filers shall have the full periods for filing beginning on June 20, 2020.

Therefore, "the exclusion period at issue is the 102 days from March 10, 2020 to June 20, 2020." *Compagner v Burch*, ___ Mich App ___, ___ n 12; ___ NW2d ___ (2023), (Docket No. 359699); slip op at 7.

A. APPLICATION OF ADMINISTRATIVE ORDERS

The trial court misapplied AO 2020-3 by failing to exclude the 102-day tolling period from its calculation of plaintiff's filing deadline.

Defendants argue that AO 2020-3 only applied to deadlines that were set to expire during the emergency period. However, it is clear from the plain language of AO 2020-3 that the Supreme Court intended that all limitation periods pertaining to the initiation of an action be tolled irrespective of whether they were set to expire during the tolling period. AO 2020-3 provides that "*any day* that falls during the state of emergency declared by the Governor . . . *is not included*" with respect to the calculation of "*all deadlines applicable to the commencement of all civil*" actions. (Emphasis added.) The order further clarifies that it "is intended to extend *all deadlines pertaining to case initiation* . . . ." *Id*. (emphasis added). It would have been easy for the Supreme Court to clarify that its intent was only to extend all deadlines set to expire during the state of emergency, and we decline defendants' invitation to read such language into the order. We also note the practical implications that such an interpretation would have had absent the benefit of hindsight: if AO 2020-3 was restricted to those deadlines set to expire during the state of emergency, then filers would have had no way of knowing whether their deadlines were tolled because it was unclear at that time how long the state of emergency would last.

In conclusion, AO 2020-3 clearly and unambiguously tolled all limitations periods pertaining to case initiation, and the trial court, therefore, erred by limiting AO 2020-3's applicability.

B. VALIDITY OF ADMINISTRATIVE ORDERS

Binding caselaw issued by this Court counsels us to conclude that AO 2020-3 was constitutional.

Early this year, a prior panel of this Court affirmed the constitutionality of AO 2020-3 in a published opinion by which we are bound. See MCR 7.215(C)(2). In *Carter v DTN Mgt Co*, the plaintiff brought a premises liability action that would have been time-barred but for the application of AO 2020-3. *Carter*, ___ Mich App at ___; slip op at 1. The defendant argued that AO 2020-3 was null because the Supreme Court did not have the "authority to modify or toll the statute of limitations." *Id*. at 5. This Court explained that the Supreme Court can "establish, modify, amend, and simplify the practice and procedure in all courts of this state" by issuing administrative orders and promulgating court rules, but it also noted that this power is limited in that the Supreme Court cannot "issue orders or enact court rules that establish, abrogate, or modify the substantive law." *Id*. (quotation marks and citations omitted). This Court held that AO 2020-3 fell within the former category, reasoning that "[b]y 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." *Id*. at 6. In other words, the Supreme Court did not alter the amount

of time allowed by statutes of limitations; rather, it altered the manner of counting days toward applicable limitation periods. *Id.*[4]

In this case, defendants argue that recognizing plaintiff's interpretation of AO 2020-3 would mean that the Supreme Court impermissibly invaded the province of the Legislature by altering statutes of limitations. This is precisely the argument this Court rejected in *Carter*; therefore, we reject it again.

IV. CONCLUSION

The trial court's order granting summary disposition in favor of defendants is reversed. This case is remanded for additional proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs. See MCR 7.219(A).

/s/ Noah P. Hood
/s/ Allie Greenleaf Maldonado

[4] This Court's opinion in *Carter* has not gone uncontested, but it continues to control this case's outcome. Compare *Carter*, ___ Mich App at ___; slip op at 3, with *Armijo v Bronson Methodist Hosp*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket Nos. 358728 & 358729); slip op at 5-7 (holding that the Supreme Court's administrative orders issued during the COVID-19 state of emergency did not toll the notice period or two-year statute of limitations for malpractice claims). Prior to this case's submission, the Supreme Court granted leave to appeal in *Carter v DTN Mgt Co*, 511 Mich 1025 (2023), and a majority opinion from a subsequent panel of this Court, while acknowledging that *Carter* controlled, disagreed with its conclusion and called for the convention of a special conflict panel, *Compagner*, ___ Mich App at ___; slip op at 2, 11. This Court declined to convene a conflict panel pursuant to MCR 7.215(J). See *Compagner v Burch*, unpublished order of the Court of Appeals, entered June 21, 2023 (Docket No. 359699). After this case's submission, a panel of this Court issued an opinion purporting to limit *Carter*'s entire holding as dictum. *Toman*, ___ Mich App at ___; slip op at 12-13. In essence, *Toman* concluded that *Carter* failed to follow *Armijo*, that its reading of parts of *Armijo* as nonbinding dicta was "plainly wrong," and that *Carter* was wrongly decided. See *id*. at ___; slip op at 12-13. *Carter*, however, directly addressed the issue raised in this case: the effect of the administrative orders on the period of limitations. See *Carter*, ___ Mich App at ___; slip op at 1, 3-5. In doing so, Carter addressed language in *Armijo* which dealt with the medical malpractice waiting period. *Carter*, ___ Mich App at ___ n 3; slip op at 5 n 3. *Toman* addresses the same issue as *Carter*, yet reaches a different conclusion. *Toman*, ___ Mich App at ___; slip op at 1, 4-13. Essentially, it determined that *Carter's* conclusion that portions of *Armijo* were dicta were wrongly decided and therefore dicta. *Toman*, ___ Mich App at ___, ___; slip op at 10-11, 17. We are bound by *Carter* because it was released first. See MCR 7.215(J)(1) (providing "first-out rule"); *Andrusz v Andrusz*, 320 Mich App 445, 456-457, 457 n 2; 904 NW2d 636 (2017).

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No. 360780
Calhoun Circuit Court
LC No. 2021-000540-NH

Before: HOOD, P.J., and REDFORD and MALDONADO, JJ.

REDFORD, J. (*dissenting*).

From the majority's opinion, I respectfully dissent. I would affirm the trial court's decision. For the reasons explained in *Compagner v Burch*, ___ Mich App ___, ___; ___NW2d ___ (2023), I do not believe that our Supreme Court had the constitutional authority to issue administrative orders that alter the running of legislatively defined statutory limitations periods. Despite agreeing with *Compagner*, I recognize that *Carter v DTN Mgt Co*, ___ Mich App ___, ___; __NW2d ___ (2023), remains binding on this Court respecting the Supreme Court's authority in that regard. The more pressing issue presented in this appeal, however, is whether the Supreme Court's administrative orders grant all litigants including plaintiff in this case an additional 102 days tacked onto the statutory limitations period. As explained by this Court in *Toman v McDaniels*, ___ Mich App ___, ___; ___ NW2d ___ (2023), even if the Supreme Court had the constitutional authority to issue administrative orders that interfere with the running of legislatively defined statutory limitations periods, the Supreme Court's administrative orders'

plain language did not authorize tacking on additional days to statutory limitations periods that fell outside the specified period prescribed by the administrative orders.

This case demonstrates why the *Carter* Court's interpretation and application of our Supreme Court's March 23, 2020 Administrative Order No. 2020-3, 505 Mich cxxvii (2020) (AO 2020-3) is incorrect. The period of limitations for medical malpractice actions is controlled by statute. *Miller v Mercy Mem Hosp Corp*, 466 Mich 196, 199; 644 NW2d 730 (2002). The limitations period for a malpractice action is two years. MCL 600.5805(8). A medical malpractice claim "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1). A medical malpractice action that is not commenced within the statutorily prescribed time limits is time-barred. MCL 600.5838a(2).

Dr. Shaird last treated Walsh on March 2, 2017. She died on March 7, 2017, from acute severe combined drug intoxication. Letters of authority were issued to Walsh's estate on December 27, 2018. Plaintiff filed the complaint on February 26, 2021. Defendants moved for summary disposition under MCR 2.116(C)(7) on the ground that plaintiff's claims were time-barred. Plaintiff opposed the motion, arguing that, although plaintiff filed the complaint outside the two-year wrongful death savings period provided by MCL 600.5852, our Supreme Court's Administrative Order No. 2020-3 (AO 2020-3), 505 Mich cxxvii (2020)[1] entered March 23, 2020, promulgated after Michigan's Governor ordered a state of emergency in relation to the COVID-19 pandemic, and operative until rescinded by Administrative Order No. 2020-18 (AO 2020-18), 505 Mich clviii (2020) effective June 20, 2020, tolled the statute of limitations giving plaintiff until April 8, 2021, to file suit.[2] At the hearing on defendants' motion, the trial court disagreed with plaintiff's argument that the Supreme Court's administrative orders gave plaintiff extra time in which to file the complaint, ruled in favor of defendants, and entered an order dismissing plaintiff's claims against them. Plaintiff moved for reconsideration and the trial court denied the motion.

Plaintiff argues that the trial court erred by granting defendants' motion under MCR 2.116(C)(7) because AO 2020-3 remained operative until rescinded by AO 2020-18 and thereby extended the two-year period plaintiff had to file the complaint by 102 days which, when applied in this case, rendered plaintiff's complaint timely filed. I disagree, and therefore, dissent. *Carter*'s interpretation of AO 2020-3 and the majority's application of it to this case, I respectfully conclude is in error.

I do not agree that plaintiff can tack on an additional 102 days simply because her statutory limitations period overlapped the period of AO 2020-3's operation. That is neither warranted nor just. In *Compagner*, this Court explained the accrual and filing deadlines for medical malpractice claims as follows:

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[1] The Supreme Court amended AO 2020-3 on May 1, 2020. 505 Mich cxliv, cxliv-cxlv (2020).

[2] Plaintiff also asserted that equitable tolling applied because defendants delayed providing medical records to plaintiff.

> A medical malpractice claim "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1). A plaintiff must bring a medical malpractice action within two years of the date the claim accrues, MCL 600.5805(8) and *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 310; 901 NW2d 577 (2017), "or within 6 months after the plaintiff discovers or should have discovered the existence of the claim," MCL 600.5838a(2), whichever is later. However, a plaintiff's ability to bring a medical malpractice action is further limited by the statute of repose, which provides that "the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim." MCL 600.5838a(2); see also *Nortley v Hurst*, 321 Mich App 566, 572; 908 NW2d 919 (2017) ("The statute setting the deadlines for bringing a [medical] malpractice claim makes clear that the six-year period of repose caps the time for bringing a claim within six months of discovery.") *Id*.
>
> A plaintiff in a medical malpractice action is required to provide the defendants with written notice of intent to file a claim not less than 182 days before commencing the action. MCL 600.2912b(1). "At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose," then "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." MCL 600.5856(c). [*Compagner*, ___ Mich App at ___, slip op at 5.]

MCL 600.5852 provides a saving provision in wrongful death actions in cases in which an allegedly injured person dies before the applicable period of limitations has run as follows:

> (1) If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action that survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run.
>
> (2) If the action that survives by law is an action alleging medical malpractice, the 2-year period under subsection (1) runs from the date letters of authority are issued to the first personal representative of an estate. . . .

In this case, plaintiff's decedent's medical malpractice claims accrued at the latest on March 2, 2017, the last date of Dr. Shaird's treatment. MCL 600.5838a(1). The statutory limitations period on Walsh's claims would have expired on March 2, 2019. MCL 600.5805(8). Because she died March 7, 2017, before the expiration of the limitations period, and the letters of authority were issued to Walsh's estate on December 27, 2018, under MCL 600.5852, plaintiff had two years in which to file the complaint because the deadline for filing extended from

December 27, 2018 to December 27, 2020.[3] Plaintiff did not file the complaint until February 26, 2021, and admits that the filing fell outside the two-year wrongful death savings period provided by MCL 600.5852. Plaintiff's late filing resulted in the barring of plaintiff's claims. Plaintiff, however, asserts that AO 2020-3 tolled from March 10, 2020 to June 20, 2020, a period of 102 days, the running of all statutory periods including the period provided under MCL 600.5852, resulting in plaintiff having an additional 102 days beyond the December 27, 2020 deadline in which to file the complaint.

In *Armijo v Bronson Methodist Hosp*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket Nos. 358728, 358729), slip op at 2, this Court noted that our Supreme Court entered AO 2020-3 after Michigan's Governor entered on March 10, 2020, an executive order that declared a state of emergency related to the COVID-19 pandemic. AO 2020-3, entered on March 23, 2020, 505 Mich cxxvii (2020), initially 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 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 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

[3] Plaintiff served defendants a notice of intent (NOI) as required under MCL 600.2912b on June 25, 2020, and the 182-day notice period elapsed on December 24, 2020, before the December 27, 2020 deadline to file suit provided under MCL 600.5852(2); therefore, NOI tolling under MCL 600.5856(c) did not apply to alter the filing deadline in this case.

> decedent's estate, may occur without unnecessary delay and be disposed via electronic or other means.

On May 1, 2020, however, our Supreme Court entered Amended Administrative Order No. 2020-3, 505 Mich cxliv (2020), which provided:

> On order of the Court, the following amendment of Administrative Order No. 2020-3 is adopted, effective immediately.
>
> [Additions to the text are indicated in underlining]
>
> 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).
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> 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.
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> This order in no way prohibits or restricts a litigant from commencing a proceeding whenever the litigant chooses, <u>nor does it suspend or toll any time period that must elapse before the commencement of an action or proceeding</u>. 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.

On June 12, 2020, our Supreme Court entered Administrative Order No. 2020-18, 505 Mich clviii (2020), rescinding its previous administrative order as follows:

> In Administrative Order No. 2020-3, the Supreme Court issued an order excluding any days that fall during the State of

> Emergency declared by the Governor related to COVID-19 for purposes of determining the deadline applicable to the commencement of all civil and probate case types under MCR 1.108(1). Effective Saturday, June 20, 2020, that administrative order is rescinded, and the computation of time for those filings shall resume. For time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020. For filings with time periods that did not begin to run because of the exclusion period, the filers shall have the full periods for filing beginning on June 20, 2020. [*Armijo*, ___ Mich App at ___, slip op at 2-4.[4]]

In *Armijo*, this Court noted that the defendants argued that our Supreme Court lacked authority to modify statutory limitations periods, but the *Armijo* panel opted not to address that constitutional issue as unnecessary for deciding the appeal because the plain language of our Supreme Court's administrative orders were dispositive of the substantive issue presented in that case. *Armijo*, ___ Mich App at ___, slip op at 6. To decide the issue, this Court endeavored to analyze the plain language of the administrative orders. This Court noted that the plain language of AO 2020-3 stated that our Supreme Court " 'intended to extend all deadlines pertaining to case initiation . . . in civil . . . matters during the state of emergency declared by the Governor related to COVID-19 but did not prohibit or restrict a litigant from commencing an action." *Id*. at ___, slip op at 6. This Court stated that the "language of the initial administrative order expressed our Supreme Court's intent to extend statutory deadlines for filing civil matters during the state of emergency" and that amended AO 2020-3 similarly expressed the Court's intention to extend deadlines that fell during the state of emergency. *Id*. at ___, slip op at 6-7. This Court explained that "the administrative orders by their plain language **only applied to deadlines which took place during the state of emergency**[.]" *Id*. at ___, slip op at 7 (emphasis added). The interpretation

[4] In *Compagner*, this Court explained in a footnote in pertinent part:

> Simultaneously with the issuance of AO 2020-18, the Governor issued EO 2020-122, which similarly rescinded EO 2020-58 effective June 20, 2020. The Governor continued the COVID-19 state of emergency—through a series of EOs—through October 27, 2020. On October 2, 2020, the Supreme Court struck down the Governor's authority under the Emergency Management Act of 1976 (EMA) to renew her declaration of a state of emergency or state of disaster based on the COVID-19 pandemic after April 30, 2020, and it further struck down her authority under the Emergency Powers of the Governor Act of 1945, MCR 10.31 *et seq*. (EPGA), concluding that the EPGA was unconstitutional because it purported to delegate to the executive branch the legislative powers of state government. See *In re Certified Questions from the United States District Court, Western District of Michigan, Southern Division*, 506 Mich 332; 958 NW2d 1 (2020). [*Compagner*, ___ Mich App at ___, slip op at 7 n 12.]

of the plain language of the administrative orders enabled the Court to adjudicate the issue presented in *Armijo*.[5]

A week after this Court issued its *Armijo* opinion, another panel of this Court decided *Carter*, and held the opposite, that the administrative orders applied to exclude the 102-day period from calculating any time period related to commencement of civil and probate cases. It concluded that AO 2020-3 provided litigants an additional 102 days to all statutory limitations periods that ran during the period AO 2020-3 remained operative, regardless whether an actual deadline for commencing an action fell within the period. *Carter*, ___ Mich App at ___, slip op at 4.[6] Shortly thereafter, the same panel that decided *Carter* decided *Linstrom v Trinity Health-Mich*, ___ Mich App ___; ___ NW2d ___ (2023) (Docket No. 358487), a medical malpractice action, and applied *Carter*'s conclusion that the administrative orders excluded all days within the state of emergency even when a deadline occurred outside the 102-day period in which AO 2020-3 operated.

In this case, defendants moved to allow supplemental briefing to advise this Court of recent published opinions. Several recent published cases have addressed related issues of computation of time and tolling of limitations periods in relation to AO 2020-3, including, *Wenkel v Farm Bureau Gen Ins Co of Mich*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 358526); *Armijo*; *Carter*; *Linstrom*; and *Hubbard*. This Court granted defendants' motion and permitted each party to file a supplemental brief.[7] Defendants and plaintiff have done so.

Defendants explain in their supplemental brief on appeal that in *Wenkel*, an action to recover no-fault personal injury protection benefits, this Court interpreted AO 2020-3 as applying only to statutory limitations deadlines and deadlines for filing of responsive pleadings that fell during the state of emergency. Defendants' analysis comports with *Wenkel*. See *Wenkel*, ___ Mich App at ___, slip op at 4-5. Defendants next explain that *Armijo* similarly interpreted AO 2020-3 as only applying to those deadlines that actually fell within the period of the state of emergency and the amended AO 2020-3 stated that our Supreme Court intended to extend deadlines pertaining to case initiation. Defendants' analysis comports with this Court's analysis in *Armijo*. See *Armijo*, ___ Mich App at ___, slip op at 6-7.

Defendants acknowledge that, shortly after this Court issued *Armijo*, this Court issued its *Carter* decision which, contrary to *Wenkel* and *Armijo*, held that the tolling period under AO 2020-3 applied to all deadlines that expired after the conclusion of the state of emergency and extended such deadlines by 102 days. Defendants point out that the *Carter* panel disagreed with *Armijo*'s interpretation of AO 2020-3 and declared it mere dicta. Defendants also direct this Court's attention to the fact that the panel did not address *Wenkel*'s similar interpretation of the limited scope of applicability of AO 2020-3. Defendants contend that *Wenkel*'s and *Armijo*'s

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[5] Accordingly, *Armijo's* analysis and interpretation cannot be understood as mere dicta.

[6] *Carter* further held that the administrative orders were constitutional, thus deciding the issue that this Court declined to address in *Armijo*. *Carter*, ___ Mich App at ___, slip op at 6.

[7] *Estate of Linda S Walsh*, unpublished order of the Court of Appeals, entered August 16, 2023 (Docket No. 360780).

interpretations of AO 2020-3 are binding precedent and dispositive, requiring affirmance of the trial court's decision. Defendants' observations in this regard are illuminating.

Since the parties' filing of supplemental briefs, this Court issued its *Toman* opinion. In *Toman*, this Court concluded that *Carter*'s analysis of *Armijo* was faulty and that "*Armijo*'s holding necessarily also encompassed the additional conclusion that the AOs did not toll statutes of limitation that fell outside the exclusion period of the AOs." *Toman*, ___ Mich App at ___; slip op at 9-10. The Court resolved that the "issue of whether AO 2020-3 tolled the statute of limitations was therefore squarely before the Court in *Armijo*, and we conclude that *Armijo*'s conclusion that the AOs did not apply to statutes of limitation expiring after the exclusion period of the AOs was integral to its analysis and holding." *Id*. at ___; slip op at 11. This Court declared that *Armijo* is controlling and binding precedent and *Carter* and *Linstrom* improperly failed to follow *Armijo*. *Id*. at ___; slip op at 12-13. The Court followed *Armijo* and affirmed the trial court's summary disposition ruling in favor of defendants because AO 2020-3 did not apply to the statute of limitations which expired after the exclusion period specified under the AOs.

Analysis of *Carter* reveals that the panel considered the same language but interpreted AO 2020-3's statement regarding "*deadlines*" that "*fall during the state of emergency*" to mean that the suspension applied to all time periods including statutory limitations periods that started before, ran during, and continued to run after the termination of the state of emergency. In my opinion, *Wenkel*'s and *Armijo*'s interpretation is more faithful to the plain language of AO 2020-3. The *Toman* Court determined the same.

Plaintiff counters that *Carter* and *Linstrom* control in this case and require reversal. Plaintiff asserts that application of the principles established in *Carter* to this case results in the extension of the period provided under MCL 600.5852 to April 8, 2021. Plaintiff explains that, because the two-year period had not expired before entry of AO 2020-3, it must benefit from the addition of 102 days. Plaintiff asserts that *Carter* is binding precedent respecting the constitutionality of AO 2020-3, and respecting the addition of 102 days to the applicable statutory limitations period under MCL 600.5852. Plaintiff submits that *Linstrom*, which applied *Carter*, similarly binds this Court. According to plaintiff, under *Carter* and *Linstrom*, the period for filing the complaint was extended by the 102 days tolled by AO 2020-3, and the trial court, therefore, had to add 102 days to the December 27, 2020 deadline provided by MCL 600.5852, but the trial court erroneously refused to apply the extension granted under AO 2020-3. Plaintiff contends that the trial court erred because *Carter* and *Linstrom* held that all cases in which the statute of limitations period had not expired before the declaration of emergency are entitled to COVID-19 tolling and 102-day extension.

Even assuming that our Supreme Court had authority to suspend the running of statutory limitations periods because of the COVID-19 epidemic state of emergency,[8] *Carter*'s and

[8] Our Supreme Court entered its administrative orders based on the state of emergency declared by the Governor. In *In re Certified Questions from US Dist Ct, W Dist of Mich*, 506 Mich 332, 337-338; 958 NW2d 1 (2020), however, the Court held:

Linstrom's interpretation of AO 2020-3 is flawed, particularly as applied in a case like this. Here, all relevant deadlines by which plaintiff had to act fell well outside the 102-day period during which AO 2020-3 existed and months after our Supreme Court rescinded that administrative order by AO 2020-18. The 102-day suspension of *deadlines* during the state of emergency should have no impact on this case nor interfere with the running of the statutory limitations period simply because it overlapped the period during which AO 2020-3 operated.

In *Moll v Abbott Labs*, 441 Mich 1, 23; 506 NW2d 816 (1993), our Supreme Court explained the Legislature's purpose in adopting statutes of limitations:

> 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 relieve defendants of the prolonged fear of litigation; 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. [Quotation marks and citation omitted, alteration in original.]

Our Supreme Court observed that statutes of limitations express the clear intent of the Legislature to promote prompt resolution of claims. *Id*. at 20. "The law imposes on a plaintiff, armed with knowledge of an injury and its cause, a duty to diligently pursue the resulting legal claim." *Id*. at 29. "Statutes regarding periods of limitations are substantive in nature." *Gladych v New Family Homes, Inc*, 468 Mich 594, 600; 664 NW2d 705 (2003). *Carter*'s and *Linstrom*'s interpretation of AO 2020-3 undermines these fundamental principles.

In this case, plaintiff knew of the claims and the applicable limitations period during which ample time and opportunity existed to diligently pursue them. The date on which the statutory

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> first, the Governor did not possess the authority under the Emergency Management Act of 1976 (the EMA), MCL 30.401 *et seq*., to declare a "state of emergency" or "state of disaster" based on the COVID-19 pandemic after April 30, 2020; and second, the Governor does not possess the authority to exercise emergency powers under the Emergency Powers of the Governor Act of 1945 (the EPGA), MCL 10.31 *et seq*., because that act is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution. Accordingly, the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law.

As stated by the Supreme Court, the Governor lacked the constitutional authority to issue executive orders beyond the short term permitted under the EMA and could not extend them to declare a "state of emergency" or "state of disaster" based on the COVID-19 pandemic after April 30, 2020. Since this is so, how can the Court's administrative orders based on acts of the Governor which our Supreme Court later concluded she did not have the authority to issue serve to toll all statutory limitations periods for 102 days irrespective of when such limitations periods began to run and regardless of whether their deadlines fell within such declared state of emergency?

limitations period would expire and by which plaintiff could submit the NOI occurred after AO 2020-3 had come and gone. The deadlines for filing the complaint and the NOI fell outside the COVID-19 tolling period. Under *Carter*'s and *Linstrom*'s interpretation and application of AO 2020-3, all litigants in civil matters get 102 days added to the applicable statutory limitations period if their cause of action accrued before the imposition of the suspension of filing deadlines under AO 2020-3. The plain language of AO 2020-3, however, stated that it "intended to extend all *deadlines* pertaining to case initiation . . . in civil . . . matters *during the state of emergency* declared by the Governor related to COVID-19." AO 2020-3 (emphasis added). The plain language of AO 2020-3 indicates that the order applied to *deadlines* for initial filing of pleadings or motions, objections to pleadings, and "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)." AO 2020-3 (emphasis added). None of the deadlines pertaining to initiation of this civil matter fell within the period of the state of emergency. Consequently, nothing necessitated nor justified suspension of the running of the limitations period or tacking on another 102 days simply because the limitations period ran while the state of emergency existed and AO 2020-3 operated. Accordingly, a 102-day extension to the statutory limitations period makes no sense in this case.

It bears repeating that in *Armijo*, ___ Mich App at ___, slip op at 7, this Court concluded that "the administrative orders by their language only applied to *deadlines* which took place during the state of emergency[.]" (Emphasis added). The initial AO 2020-3 and the amended order specifically state that the "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 . . . ." When a term is not defined in a statute (or as here in an administrative order entered by our Supreme Court), courts may consult dictionary definitions to determine the plain and ordinary meaning of a word. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 578; 609 NW2d 593 (2000). Here the word "deadline" is not defined in AO 2020-3, so we may look to the dictionary for guidance. *Merriam-Webster's Collegiate Dictionary* (11th ed) in relevant part defines "deadline" as "a date or time before which something must be done." *Black's Law Dictionary* (11th ed) similarly defines "deadline" as a "cutoff date for taking some action." By using the term "deadline" in AO 2020-3, as opposed to some other term, our Supreme Court plainly intended that AO 2020-3 applied to the dates by which the specified filings must be done by litigants. The Court in *Carter*, however, considered the same language and interpreted AO 2020-3's statement regarding *deadlines* that "*fall during the state of emergency*" to mean that the suspension applied to any and all periods, including all statutory limitations periods, that started before, ran during, and ran after the termination of the state of emergency. *Carter*'s interpretation disregards the plain, i.e., clear and obvious, limitation set by the term "*deadline*" and the orders' specific reference to filings related to initiation and commencement of actions. *Carter*, therefore, diverges far from the plain language of AO 2020-3. It is not unreasonable for defendants to

question why *Carter* should control, particularly in a case such as the one at bar where no deadline of any sort fell during the state of emergency.[9]

/s/ James Robert Redford

[9] We also incorporate and adopt by reference the analysis set forth by this Court in *Compagner* demonstrating how *Carter* misinterpreted AO 2020-3 and got the constitutional issue wrong as well. *Compagner*, ___ Mich App at ___ - ___, slip op at 10-21. Further, as stated in *Compagner*:

> We are troubled both by the arguably inconsistent manner in which the controlling, published caselaw has developed and by the fact that AO 2020-18—which rescinded AO 2020-3—employed language that appears to have facilitated an interpretation of AO 2020-3 (by this Court in *Carter*) that is inconsistent with the very language of AO 2020-3 itself (and with the earlier, published caselaw interpreting it). Arguably, AO 2020-18 and its interpretation by this Court in *Carter* effectively transformed an order—AO 2020-3—that by its terms indicated that it was intended to apply to deadlines "during the state of emergency" into one that would continue to apply to deadlines that fell well outside the state of emergency. [*Compagner*, ___ Mich App at ___, slip op at 11.]