

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Henry Saad, Mark Cavanagh, and Bill Schuette, Presiding

RICK BEAVERS,

Plaintiff-Appellant,

-vs-

Supreme Court No. 133294

Court of Appeals No. 269007

Lower Court No. 03 309389 NO

BARTON MALOW COMPANY, a Michigan corporation, JOMAR BUILDING COMPANY, INC., a Michigan corporation, SPILLIS CARDELLA, DMJM, an assumed name for DMJA, INC., and ROBERT SMITH, Jointly and Severally,

Defendants-Appellees.

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133294
**DEFENDANTS-APPELLEES' BRIEF IN OPPOSITION TO PLAINTIFF-
APPELLANT'S APPLICATION FOR LEAVE TO APPEAL
OR FOR PEREMPTORY REVERSAL**

Dated: March 13, 2007

FILED

MAR 15 2007

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

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**STATEMENT IDENTIFYING JUDGMENT APPEALED FROM
AND RELIEF SOUGHT AND DEFENDANTS' RESPONSE TO PLAINTIFF'S
"APPLICATION FOR LEAVE TO APPEAL"**

Plaintiff-Appellant Rick Beavers seeks leave to appeal or peremptory reversal of the Court of Appeals' January 18, 2007 opinion, which is attached to his Supreme Court pleadings as Ex. A, and a remand to that Court for consideration of Plaintiff's appeal on the merits. Defendants-Appellees request that this Court deny Plaintiff any relief.

MCR 7.205(F)(3) unambiguously provides that, "[e]xcept as provided in (F)(4) (which applies to criminal defendants; and, therefore, not Plaintiff Beavers), leave to appeal may not be granted if an application is granted more than 12 months after . . . entry of a final judgment or order that could have been the subject of an appeal of right under MCR 7.203(A) . . ."

The Court of Appeals properly found that it had no jurisdiction over Plaintiff's late Application for Leave to Appeal because, after having his prior appeal of right dismissed for failing to prosecute it according to the court rules and a Court of Appeals' order, Plaintiff filed his late Application for Leave to Appeal in the Court of Appeals on March 13, 2006, which is more than 12 months after entry of the January 7, 2005 final order of the Circuit Court that he sought leave to appeal.

The Court of Appeals properly concluded that MCR 7.205 unambiguously does not include a tolling provision for a pending appeal. That Court's opinion is consistent with this Court's opinions in *Grievance Administrator v Underwood*, 462 Mich 188, 194; 612 NW2d 116 (2000), which held that, when a court rule is unambiguous, courts must enforce the meaning expressed without further judicial interpretation or construction. See also, *Devillers v Auto Club Ass'n*, 473 Mich 562, 582-583; 702 NW2d 539 (2005), which held that prior Supreme Court opinions erroneously read a tolling provision into the one-year back rule of MCL 500.3145(1)

that was not included in the statute. The Court of Appeals' opinion in the instant case is also consistent with this Court's opinion in *AFSCME v Detroit*, 468 Mich 388, 400; 662 NW2d 695 (2003), which held that a court may not read any omitted provisions into the court rule.

The opinions on which Plaintiff relies are distinguishable and erroneous because they are contrary to this Court's opinions in *Grievance Administrator v Underwood*, *supra*, and *AFSCME v Detroit*, *supra*.

In addition, the Court of Appeals had no jurisdiction over Plaintiff's late Application for Leave to Appeal because, under MCR 7.205(F)(1), an appellant may file a late application for leave to appeal when an appeal of right was not timely filed. See also, *Hill v Wall Street Systems, Inc*, Court of Appeals No. 234455, rel'd 5/27/03, Plf's Ex. E, p 4, ("this Court [of Appeals] has jurisdiction to grant applications for leave to appeal various orders that a party may not appeal as of right.") Here, Plaintiff had previously filed a timely appeal of right, but lost that appeal because of his failure to pursue that appeal by timely filing his appeal brief. (Court of Appeals' Docket No. 260475¹; Def's Ex.s A and B.)

This Court previously denied Plaintiff's Application for Leave to Appeal from the dismissal of his appeal of right, which also sought review of the merits of his appeal of right. (Plf's Ex. O.) Plaintiff's attempt at a "second bite" of the same apple is precluded. MCR 7.205(F)(1). Furthermore, even if permitted, as the Court of Appeals accurately concluded, that "bite" came too late. MCR 7.205(F)(3); (Plf's Ex. A, pp 2-3.)

Accordingly this Court should deny Plaintiff's Application for Leave to Appeal or for Peremptory Reversal.

¹ The cover page of Plaintiff's pending Application erroneously refers to this docket number instead of the Court of Appeals docket number for this appeal, which is 269007.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. Did the Court of Appeals properly interpret MCL 7.205(F)(3) to accurately conclude that that court rule has no applicable tolling provision; and that, therefore, the Court of Appeals did not have jurisdiction to grant Plaintiff's late Application for Leave to Appeal, which was filed more than 12 months after entry of the final order that Plaintiff sought leave to appeal?**

The Trial Court did not answer.

The Court of Appeals answered "yes."

Defendants-Appellees answer "yes."

Plaintiff-Appellant may contend that the answer is "no."

- II. Should this Court peremptorily reverse, or grant leave to appeal from, the Court of Appeals' refusal to apply the tolling principles of *Riza, Kincade, Bielaskas and Hill*?**

The lower courts did not answer.

Defendants-Appellees answer "no."

Plaintiff-Appellant may contend that the answer is "yes."

- III. Assuming arguendo that the Court of Appeals may toll the limitation period in MCR 7.205(F)(3), is such tolling in this case warranted?**

The lower courts did not answer.

Defendants-Appellees answer "no."

Plaintiff-Appellant may contend that the answer is "yes."

COUNTER-STATEMENT OF FACTS

Plaintiff previously filed a timely appeal of right from the same January 7, 2005 order that is the subject of his current appeal.² The Court of Appeals dismissed that prior appeal for want of prosecution and denied Plaintiff's motion for reinstatement of that appeal. (Def's Ex.s A and B.) This Court subsequently denied Plaintiff's Application for Leave to Appeal. (Plf's Ex. O.) The Court of Appeals' rulings in Plaintiff's prior appeal resulted from the following circumstances.

On February 3, 2005, the Court of Appeals informed the parties that Plaintiff's appeal of right had been placed on the Court's expedited summary disposition track. Supreme Court Administrative Order 2004-5, which was in effect at the time, governed that appeal.³ Thus, the transcript that Plaintiff ordered for his appeal was due to be filed by February 23, 2005. Pursuant to ¶ 8(A)(3), Plaintiff could have waived the transcript for the appeal; and, thus, he was not required to file a transcript to proceed with his appeal.

It is undisputed that the court reporter did not timely file the transcript and that Plaintiff did not file a motion for an order to show cause or to extend time to file transcript within seven days after the transcript was due, that is by March 2, 2005. Therefore, Plaintiff's appellant's brief was due to be filed by March 23, 2005. Plaintiff did not file it by that date.

On April 1, 2005, as required by Administrative Order 2004-5, ¶ 9(B)(4), the Court of Appeals imposed sanctions on Plaintiff's counsel for failing to timely file the appellant's brief. As that Administrative Order also required, the Court of Appeals' April 1, 2005 order advised Plaintiff that:

² Court of Appeals Docket No. 260475.

³ This Court subsequently amended that Administrative Order twice.

If appellant's brief is not filed within 14 days of the original due date or any extension granted, the Clerk's Office is directed to submit this appeal for dismissal and possible assessment of additional costs. Administrative Order 2004-5 ¶9(B)(4). (See, Def's Ex. B.)

However, Plaintiff did not file his appellant's brief within the time indicated in the Court of Appeals' April 1, 2005 order; that is, by April 6, 2005. Nor did Plaintiff file a motion for extension of time by that date. Despite this consistent failure to comply with the Court of Appeals' order, and the fact that the transcript was not necessary for the appeal, Plaintiff continues to blame the court reporter for his plight.

On April 13, 2005, the Court of Appeals dismissed Plaintiff's appeal "for want of prosecution, appellant having failed to timely file the brief on appeal as directed by Administrative Order 2004-5, ¶ 8(A)(5) or ¶ 9(B)(1)." (Def's Ex. A.)

Plaintiff filed a Motion to Reinstate Appeal. On April 28, 2005, the Court of Appeals denied that motion, reasoning and concluding as follows:

The time for filing appellant's brief was not tolled due to the untimely filing of the transcript as appellant failed to file a motion to show cause or to extend the time to file the transcript within seven days after the transcript was due. Administrative Order 2004-5 ¶ 8(A)(3)-(5). Pursuant to Administrative Order 2004-5 ¶ 8(A)(5), appellant's brief was due 28 days after the timely ordered transcript was due. On April 1, 2005, an order was issued warning that the appellant's brief had not been timely filed and directing the Clerk's office to submit the appeal for dismissal if the brief was not filed within 14 days of the original due date or any extension granted. Appellant failed to file a brief in accordance with the April 1, 2005 order, and the matter was submitted for involuntary dismissal on April 12, 2005, more than 14 days after appellant's brief was due. The appeal was properly dismissed on April 13, 2005, in accordance with Administrative Order 2004-5 ¶ 9(B)(4). The filing of an untimely motion to show cause or to extend time on the eve of dismissal was insufficient to forestall the involuntary dismissal. (Def's Ex. B.)

Plaintiff then filed an Application for Leave to Appeal in this Court from the involuntary dismissal of his appeal that resulted from his failure to comply with this Court's Administrative

Order 2004-5 and his failure to heed the Michigan Court of Appeals' warning that could have prevented the involuntary dismissal of his appeal, which was assigned docket number 128827.

Plaintiff fails to point out that his Supreme Court Application also contended that "leave to appeal should be granted to consider the trial court's conclusion that Defendants owed no 'duty' to exercise reasonable care." (Def's Ex. C, Plaintiff's Application, Statement of Questions Presented, p v.) The arguments that Plaintiff presented to the Supreme Court on the substantive duty issue are virtually identical to the arguments that Plaintiff presented in his Delayed Application for Leave to Appeal and in Plaintiff-Appellant's Brief on Appeal in the Court of Appeals in the instant case. (Def's Ex. D, Plaintiff's Supreme Court Application, Argument II; Appellants' Brief, pp 11-18.)

In Plaintiff's prior appeal, this Court denied Plaintiff's Application for Leave to Appeal and request for peremptory reversal on November 29, 2005. (Plf's Ex. O.) When this Court denied Plaintiff's Application for Leave to Appeal in his prior appeal of right, the 12-month period of time for filing any permitted delayed application for leave to appeal from the Circuit Court's January 7, 2005 Order in the Court of Appeals had not expired. In fact, Plaintiff had 39 days in which to file such application, which is more time than the 21 days permitted for filing a timely application for leave to appeal. On or about March 13, 2006, Plaintiff filed a Delayed Application for Leave to Appeal in the Court of Appeals, seeking leave to appeal from the January 7, 2005 order granting Defendants summary disposition and without offering a cogent reason for the delay between this Court's denial of leave and the filing of his late Application in the Court of Appeals. That Application was docketed as Court of Appeals No. 269007.⁴

⁴ This is the docket number that should be on the cover sheet of Plaintiff's current Application for Leave to Appeal.

The Court of Appeals granted Plaintiff's Delayed Application for Leave to Appeal on July 11, 2006, but directed the parties "to brief whether the limitation period set forth in MCR 7.205(F)(3), can, and should, be tolled in this case."

Defendants' appeal brief in this appeal contended that MCR 7.205(F)(3)'s limitation cannot, and should not be tolled in this case. Plaintiff's appeal brief contended that the limitation period could be tolled.

The Court of Appeals disagreed with Plaintiff's contention, concluding that the plain language of MCR 7.205(F)(3) required Plaintiff to file his Application for Leave to Appeal within 12 months of January 7, 2005, and that there is no language in the rule regarding the tolling of the time period for a pending appeal of right. (Plf's Ex. 1, p 2.) That Court noted that the rule expressly provided for tolling of the 12-month period during specified motions. (*Id.*) The Court of Appeals also concluded that it could not assume that language with respect to some actions was inadvertently omitted where it was expressly provided for others. (*Id.*) The Court of Appeals held:

By filing the application on March 13, 2006, plaintiff failed to comply with the time limitation set forth in MCR 7.205(F)(3); therefore, this Court does not have jurisdiction to entertain the appeal. (*Id.* at 2-3.)

Thus, the Court of Appeals dismissed Plaintiff's second appeal, that is, this appeal. (*Id.* at 3.)

Plaintiff then filed an Application for Leave to Appeal or for Peremptory Reversal in this Court. Because the Court of Appeals did not err, this Court should deny Plaintiff's requested relief.

STANDARDS OF REVIEW

Interpretation of court rules is a question of law that this Court reviews de novo.

CAM Constr v Lake Edgewood Condo Ass'n, 465 Mich 549, 553; 640 NW2d 256 (2002).

ARGUMENTS

- I. The Court of Appeals properly interpreted MCR 7.205(F)(3) to conclude that that court rule has no applicable tolling provision; and, that therefore, the Court of Appeals did not have jurisdiction to grant Plaintiff's late Application for Leave to Appeal, which was filed more than 12 months after entry of the final order that Plaintiff sought leave to appeal.**

MCR 7.205(F)(1) and (3) provide in pertinent part:

- (1) **When an appeal of right . . . was not timely filed, the appellant may file an application for leave to appeal as prescribed in subrule (B) . . .**
- (3) **Except as provided in subrule (F)(4), leave to appeal may not be permitted if an application for leave to appeal is filed more than 12 months after the later of:**
 - (a) **entry of a final judgment or other order that could have been the subject of an appeal of right under MCR 7.203(A), but if a motion described in MCR 7.204(A)(1)(b) was filed within the time prescribed in that rule, then the 12 months are counted from the entry of the order denying that motion; or**
 - (b) **entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other postjudgment relief was filed within the initial 21-day appeal period or within further time the trial court may have allowed during that 21-day period, then the 12 months are counted from the entry of the order denying that motion. (Emphasis ordered.)**

The legal principles that govern interpretation of a statute also apply to interpretation of a court rule. *Rinas v Mercer*, 259 Mich App 63, 68; 672 NW2d 542 (2003), citing *McCauley v GMC*, 457 Mich 513, 518; 578 NW2d 282 (1998). When the language of the court rule is unambiguous, the Court "must enforce the meaning expressed, without further judicial

interpretation or construction.” *Grievance Administrator v Underwood*, 462 Mich 188, 194; 612 NW2d 116 (2000); *Rinas, supra*. The Court may not read any omitted provision into the court rule. *AFSCME v Detroit*, 468 Mich 388, 400; 662 NW2d 695 (2003); See also, *Devillers v Auto Club Ins Ass’n*, 473 Mich 562, 582-583; 702 NW2d 539 (2005), (where this Court held that prior Supreme Court opinions erroneously read a tolling provision into one-year back rule of MCL 500.3145(1), which the Legislature did not include in that statute.)

MCR 7.205(F)(1) provides that an appellant may file an application for leave to appeal “when an appeal of right . . . was not timely filed.” In this case, Plaintiff did file a timely appeal of right, but, as explained in the Counter-Statement of Facts, lost that appeal after he failed to timely file his appellant’s brief. (Def’s Ex.s A and B.) Therefore, the Court of Appeals had no jurisdiction over Plaintiff’s Court of Appeals’ Application for Leave to Appeal. Therefore, the Court of Appeals did not err in finding that it had no jurisdiction over Plaintiff’s appeal by leave, albeit, for different reasons.

The Court of Appeals relied on MCR 7.205(F)(3) for its decision. (Plf’s Ex. A, pp 2-3.) Because Plaintiff did not file any relevant post-order motions, that rule unambiguously provides that, “[e]xcept as provided in subrule (F)(4), leave to appeal may not be permitted if the application for leave to appeal is filed more than 12 months after . . . entry of a final order or other order that could have been the subject of an appeal of right under MCR 7.203(A).” In this case, on March 13, 2006, Plaintiff filed an Application for Leave to Appeal from the Trial Court’s January 7, 2005 order granting summary disposition, which could have been (and, as explained, was) the subject of an appeal of right under MCR 7.203(A).

MCR 7.205(F)(4) states that “[t]he limitation period does not apply to an application for leave to appeal by a criminal defendant . . .” Because Plaintiff is not a criminal defendant, that

exception does not apply. Therefore, assuming, *arguendo*, that Plaintiff could file an application under MCR 7.205(F)(1) at all, the Court of Appeals properly concluded that the 12-month limitation period set forth in MCR 7.205(F)(3) must be applied.

MCR 7.205(F)(3) does not include any language providing for a tolling period during a pending appeal of right. Because courts may not insert a tolling provision into the court rule, which this Court, by its language of the rule, did not intend, the Court of Appeals did not err by concluding that, under the plain language of the court rule, plaintiff was required to file the application within 12 months of the January 7, 2005 order granting summary disposition in favor of defendants from which he is appealing. (Plf's Ex. A, p 2.) See, *McCauley, supra*; *Rinas, supra*; *Underwood, supra*; *AFSCME, supra*.

The Court of Appeals, interpreting the court rule in the same manner as statute, which it was required to do, also noted that the rule expressly provided for tolling of the 12-month period during the specified motions. *Rinas, supra*; (Plf's Ex. A, p 2.) That Court then properly concluded that it could not assume that [this Court] inadvertently omitted that language with respect to some actions where it was expressly provided for others. (*Id.*), citing *Farrington v Total Petroleum*, 442 Mich 201, 210; 501 NW2d 76 (1993). As the Court of Appeals explained:

'The omission of a provision in one part of a statute that is included in another should be construed as intentional, and provisions not included by [this Court] should not be included by the courts.' (Plf's Ex. A, p 2), citing *Polkton Charter Twp v Pellegroni*, 265 Mich App 88, 103; 693 NW2d 170 (2005) (citations omitted by Court of Appeals.)⁵

⁵ The Court of Appeals' opinion used the word legislature instead of the word court. On pages 6-7 of his Application, Plaintiff attempts to "make hay" out of the Court of Appeals' use of the word "legislature" instead of "court" in its analysis in the last paragraph on page 2 of that Court's opinion. This is simply the Court of Appeals' recognition that the rules of statutory interpretation also apply to interpretation of court rules. Moreover, the Court's inadvertent use of "legislature" instead of "courts" is not a material error.

The Court of Appeals properly applied the current rules of interpretation of court rules to the plain language of MCR 7.205(F)(3) to conclude accurately that Plaintiff's late Application for Leave to Appeal was filed outside the 12 month period permitted by that court rule; and, that, therefore, the Court of Appeals lacks jurisdiction over that Application. Accordingly, this Court should deny Plaintiff's requested relief.

II. This Court should not peremptorily reverse, or grant leave to appeal from, the Court of Appeals' refusal to apply the tolling principles of *Riza, Kincade, Bielaskas and Hill*.

Plaintiff's pending Application for Leave to Appeal ignores the plain language of MCR 7.205(F)(3) and this Court's recent opinions setting forth the proper rules for interpreting court rules.

Instead, Plaintiff relies on a 1981 peremptory order from this Court, a published Court of Appeals' opinion, and two unpublished Court of Appeals' opinions; namely, *Riza v Niagara Machine & Tool Works, Inc*, 411 Mich 915 (1981); *People v Kincade*, 206 Mich App 477, 480; 522 NW2d 880 (1994), *Bielaska v Schulte*, Court of Appeals' Docket No.s 215286, 215287, rel'd 2/9/01, (Plf's Ex. D), and *Hill v Wall Street Systems, supra*, (Plf's Ex. E.)

Plaintiff contends that the Court of Appeals did not even consider those opinions. That is inaccurate, because the undersigned counsel was asked to explain at oral argument in the Court of Appeals why those opinions do not apply.

Starting with *Bielaska, supra* and *Hill, supra*, they are not precedent because they are not published. MCR 7.215(C)(1). Therefore, the Court of Appeals was not required to follow or apply them. In addition, those opinions are not persuasive authority because the Court of Appeals applied a different version of MCR 7.205(F)(3) in them and erroneously inserted a tolling provision into the prior version of MCR 7.205(F)(3), which was not expressed in the

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language of the rule. Therefore, the Court of Appeals did not err by not applying those opinions; and they afford no grounds for granting Plaintiff relief in this Court.

In *People v Kincade, supra*, the Court of Appeals relied on this Court's order in *Riza, supra*, to conclude that the 18-month time limitation of a prior version of MCR 7.205(F) was tolled during the time that the various appellate proceedings connected with the pertinent order were pending. Because Kincade relied on a prior version of MCR 7.205(F), it is distinguishable.

In addition, as noted, it relied on *Riza, supra*. *Riza, supra*, is a peremptory order from this Court, issued in 1981, where prior Justices of this Court read a tolling provision into the prior court rule, GCR 1963, 806.2, which was not expressed in that rule. That court rule no longer applies. Therefore, *Riza* is distinguishable. More importantly, the 1981 Supreme Court's interpretation of the court rule in *Riza* does not comport with this Court's more recent opinions, which require courts to interpret a court rule as expressly written without further judicial interpretation or construction and which preclude a court from reading any omitted provision into the court rule. *Underwood, supra* at 194; *AFSCME, supra* at 203; See also, *Devillers, supra*. Therefore, under current rules of court rule interpretation, *Riza* was erroneously decided.

Because the opinions on which Plaintiff relies erroneously inserted a tolling provision in the predecessor rules to the current MCR 7.205(F)(3), which was not expressed in those rules, those opinions are erroneously decided. See, *Underwood, supra*; *AFSCME, supra*. See also, *Devillers, supra*. The Court of Appeals did not err by applying this Court's more recent decisions concerning interpretation of plain language of court rules instead of applying *Riza, Kincade, Bielaskas* and/or *Hill*.

Instead, as the Court of Appeals accurately concluded, it is the unambiguous language of the court rule, MCR 7.205(F)(3), that must be applied. As explained in the prior argument,

application of the plain language of that rule required dismissal of Plaintiff's appeal in the Court of Appeals for lack of jurisdiction. Because Plaintiff did not file his Delayed Application for Leave to Appeal until more than 12 months after the Trial Court's entry of the January 7, 2005 final order granting summary disposition in Defendants' favor, the Court of Appeals does not have jurisdiction to consider Plaintiff's appeal. MCR 7.205(F)(3).

Therefore, this Court should deny Plaintiff's request for peremptory reversal of the Court of Appeals' January 18, 2007 decision in this case.

The Court should also deny Plaintiff's Application for Leave to Appeal. To the extent that the Court needs to clarify that the plain language of MCR 7.205F+(3) means what it says and to the extent that this Court may find that interpretation of MCR 7.205(F)(3) needs clarification in light of *Riza*, *Kincade*, *Bielaska*, and/or *Hill*, the Court can do so in an order denying Plaintiff's Application for Leave to Appeal. The Court's order can simply indicate that leave to appeal is denied because MCR 7.205(F)(3) does not include a provision tolling its limitations period while a prior appeal of right is pending, Michigan court rules must be interpreted as expressly and plainly written without further judicial interpretation or construction, *Grievance Administrator v Underwood*, *supra* at 194, and Michigan courts may not read any omitted provision into a court rule, *AFSCME v Detroit*, *supra* at 400. See also *Devillers v Auto Club Ins Ass'n*, *supra* at 582-583.

III. Assuming, arguendo, that the Court of Appeals may toll the limitation period in MCR 7.205(F)(3), such tolling in this case is not warranted.

Judicial tolling is a form of equitable relief. Even if the Court of Appeals had authority to read a judicial tolling provision into MCR 7.205(F)(3); and, thus, has the discretion to toll the limitations set forth in that court rule, such equitable relief is not warranted under the facts of this case. The equities in this case clearly are not with Plaintiff.

Plaintiff lost his prior appeal of right because of lack of diligence in properly pursuing that appeal according to the Supreme Court's Administrative Order 2004-5, despite being represented by a well-experienced appellate attorney. (Def's Ex.s A and B.) This is not a case where an in pro per appellant could have claimed ignorance of the rules applicable to his appeal. In that respect, this case is distinguishable from *People v Kincade*, *supra* at 477, 479, where the plaintiff was an indigent criminal defendant proceeding in propria persona.

Plaintiff attempts to blame the dismissal of his prior appeal of right on the fact that the court reporter did not timely file a transcript that he ordered for his appeal. However, the transcript was not required for that appeal because ¶ 8(A)(3) permitted Plaintiff to waive the transcript. In addition, before this Court issued its Administrative Order 2004-5, it had long been the responsibility of appellants to insure timely filing of transcripts for their appeals. See, MCR 7.210(B)(1)(a).

Furthermore, the Court of Appeals notified Plaintiff before dismissing his appeal of right of the defect in that appeal and advised Plaintiff what could be done to avoid dismissal, specifically, filing an appellant's brief within 14 days of the original due date or any extension granted. (See, Def's Ex. B.) Thus, the Court of Appeals granted Plaintiff a 14-day of extension of time to file his brief. No other extensions had been granted. Plaintiff simply ignored this notice and did not file his appellant's brief within 14 days of the original due date as provided in the Court of Appeals' notice.

Moreover, after this Court denied his Application for Leave to Appeal, Plaintiff still had 39 days to file a late application for leave to appeal in the Court of Appeals if MCR 7.205(F)(1) permitted such an application to be filed. However, he let those 39 days lapse because he simply

“overlooked” his purported right to file an application for several months. Plaintiff repeatedly “overlooked” or ignored controlling court rules in this case without any showing of good cause.

Plaintiff’s history of failing to follow the applicable court rules and his lack of diligence in prosecuting his appeal of right, despite warnings from the Court of Appeals, which resulted in the dismissal of that appeal, and his lack of diligence in filing a late Application for Leave to Appeal in the Court of Appeals after this Court denied leave to appeal in his prior appeal of right, do not warrant granting the equitable relief of tolling the limitations period set forth in MCR 7.205(F)(3).

Indeed, Plaintiff’s Application does not set forth any good reason that this Court should toll the limitations period set forth in MCR 7.205(F)(3) if that action were permitted. In the Court of Appeals, the Plaintiff contended that that Court should toll the limitations period to rectify the Trial Court’s alleged substantive error in granting summary disposition in Defendants’ favor. In making that argument, Plaintiff did not identify anything unique about his case that warrants tolling a limitations period. All appellants, whether appealing by right or by leave, claim that the lower court erred to the appellants’ disadvantage. The mere fact that the Plaintiff believes that the Trial Court erred is not grounds for rewarding Plaintiff for his lack of diligence in pursuing his appeal of right by permitting him to pursue his late appeal.

Moreover, the Plaintiff raised the same substantive issue in his late Application for Leave to Appeal filed in the Court of Appeals that he had presented in his prior Michigan Supreme Court Application for Leave to Appeal. (Def’s Ex.s C and D.) This Court denied leave to appeal and did not remand to the Court of Appeals for review on the merits. Thus, this Court found no compelling argument on the merits that warranted review.

In summary, the Court of Appeals appropriately concluded that it cannot toll the limitations period set forth in MCR 7.205(F)(3). Alternatively, this Court should conclude that that limitations period should not be tolled under the unique facts of this case. To do so would improperly reward Plaintiff for his lack of diligence in pursuing his appeal of right after filing that appeal, his failure to comply with this Court's Administrative Order 2004-5, his failure to heed the Court of Appeals' warnings that his appeal would be dismissed, and his failure to take advantage of a two-week extension of time to file his brief before his appeal of right was dismissed.

There clearly are no grounds for this Court to preemptorily reverse the Court of Appeals' January 19, 2007 opinion or to grant Plaintiff leave to appeal. As explained above, to the extent that this Court may find that interpretation of MCR 7.205(F)(3) needs clarification in light of *Riza, supra, Kincade, supra, Bielaska, supra* and *Hill, supra*, the Court can do so in an order denying Plaintiff's Application for Leave to Appeal.

RELIEF REQUESTED

Defendants-Appellees respectfully request that this Honorable Court deny Plaintiff-Appellants' Application for Leave to Appeal or for Preemptory Reversal.

SECRET WARDLE

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Dated: March 13, 2007