

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.

HARVEY M. HOWITT (P 15185)
Attorney for Plaintiff-Appellant
3000 Town Center, Suite 1601
Southfield, MI 48075
(248) 350-3700

MARK R. BENDURE (P 23490)
Attorney of Counsel for Plaintiff-Appellant
645 Griswold, Suite 4100
Detroit, MI 48226
(313) 961-1525

JANET CALLAHAN BARNES (P 29887)
Attorney for Defendants-Appellees
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 851-9500

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

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STATEMENT OF SUPPLEMENTAL QUESTION INVOLVED

This Supplemental Brief addresses the issue that this Court's July 13, 2007 Order stated that the parties shall address at oral argument; namely:

Whether in light of MCR 7.205(F)(3), the following cases were properly decided: *Riza v Niagara Machine & Tool Works, Inc*, 411 Mich 915 (1981); and *People v Kincade (On Remand)*, 206 Mich App 477 (1994)?

Defendants-Appellees answer "no."

SUPPLEMENTAL ARGUMENT

- I. In light of MCR 7.205(F)(3), the following cases were not properly decided: *Riza v Niagara Machine & Tool Works, Inc*, 411 Mich 915 (1981); and *People v Kincade (On Remand)*, 206 Mich App 477 (1994).

Defendants' second argument in their Brief in Opposition to Plaintiff-Appellant's Application for Leave to Appeal or for Peremptory Reversal is, "[t]his Court should not peremptorily reverse, or grant leave to appeal from, the Court of Appeals' refusal to apply the tolling principles of *Riza, Kincade* . . ."

In summary, Defendants argued that *Riza v Niagara Machine & Tool Works, Inc*, 411 Mich 915 (1981), was distinguishable because the Court interpreted and applied GCR 1963, 806.2. They contended that *People v Kincade*, 206 Mich App 477; 522 NW2d 880 (1994), was distinguishable because the Court of Appeals interpreted and applied a prior version of MCR 7.205(F).

Defendants also argued that *Riza* and *Kincade* were not properly decided because the Courts erroneously inserted a tolling provision in the predecessor rules to MCR 7.205(F)(3) that was not expressed in those rules. Defendants relied upon this Court's opinion in *Grievance Administrator v Underwood*, 462 Mich 188, 194; 612 NW2d 116 (2000), in which this Court held that when the language of the court rule is unambiguous, the Court "must enforce the meaning expressed, without further judicial interpretation or construction." Defendants pointed out that in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 582-583; 702 NW2d 539 (2005), this Court held that prior Supreme Court opinions erroneously read a tolling provision into the one-year back rule of MCL 500.3145(2), which the Legislature did not include in that statute.

Based on this Court's opinions in *Underwood* and *Devillers* and the Court of Appeals' opinion in *Rinas, Riza* and *Kincade* were not properly decided because they read a tolling

provision into the predecessor rules to the current version of MCR 7.205(F)(3), which was not stated in the predecessor rules.

Defendants supplement their prior arguments with citation to two recent opinions from this Court, which reaffirm the rule that a court may not engraft exceptions to a statute and/or tolling provisions that are not expressed in that statute. Because the legal principles that govern interpretation of a statute also apply to interpretation of a court rule, the Court's recent decisions support Defendants' position that *Riza* and *Kincade (On Remand)* were not properly decided. See, *Rinas v Mercer*, 259 Mich App 63, 68; 672 NW2d 542 (2003), citing *McCauley v GMC*, 457 Mich 513, 518; 578 NW2d 282 (1998).

Recently, in *Rowland v Washtenaw County Road Comm'n*, 477 Mich 197; 731 NW2d 41 (2007), citing *Ameritech Mich v PSC (In re MCI)*, 460 Mich 396, 411; 596 NW2d 164 (1999), this Court held:

When construing a statute, this Court's primary goal is to give effect to the intent of the Legislature. We begin by construing the language of the statute itself. When the language is unambiguous, we give the words their plain meaning and apply the statute as written.

This Court went on to hold that its prior opinions usurped the Legislature's powers by reading an "actual prejudice" exception to the notice provision that the Legislature set forth in MCL 691.1404, which the Legislature did not state in the unambiguous statute.

More recently, in *Trentadue v Buckler Automatic Lawn Sprinkler*, ___ Mich ___, Docket No.s 128579, Nos. 128623, 128624, and, 128625, rel'd July 25, 2007, this Court held that prior appellate court decisions improperly read a common-law discovery rule provision into MCL 600.5827 to toll accrual of a cause of action, a discovery rule that is not provided for in that statute by the Legislature.

Similarly, in *Riza* and *Kincade (On Remand)*, this Court and the Court of Appeals, respectively, improperly read a tolling provision into the predecessor rules to MRC 7.205(F)(3), which was not provided for in those rules. The engrafted tolling provision extended the time to file a late application for leave to appeal beyond what was intended by the unambiguous language of the court rules. Therefore, *Riza, supra*, and *Kincade (On Remand), supra*, were not properly decided. Accordingly, this Court should overrule those decisions. See, *Robinson v Detroit*, 462 Mich 439, 463-468; 613 NW2d 307 (2000).

In *Robinson, supra* at 467-468, this Court explained:

Further, it is well to recall in discussing reliance, when dealing with an area of the law that is statutory . . . , that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error.

In *Rowland*, this Court held that this language from *Robinson* fully supported overruling prior opinions that engrafted an actual prejudice requirement on MCL 691.1404's notice provision because "this Court in those cases confounded legitimate citizen expectations by misreading and misconstruing a statute." The Court reached a similar conclusion in *Trentadue, supra*.

Similarly, this Court should conclude that its prior decision in *Riza, supra*, and the Court of Appeals' prior decision in *Kincade (On Remand), supra*, "confounded legitimate citizens expectations by misreading and misconstruing [the predecessor rules to MCR 7.205(F)(3)] by misreading and misconstruing" those rules by engrafting a tolling provision in them that was not expressed in them. Accordingly, this Court should conclude that *Riza, supra*, and *Kincade (On Remand), supra*, were not properly decided to the extent that they interpreted the predecessor rules to MCR 7.205(F)(3) as permitting a tolling of the time limit for filing a late application for leave to appeals.

CONCLUSION AND RELIEF SOUGHT

Because *Riza, supra*, and *Kincade (On Remand)* are distinguishable and were erroneously decided, Plaintiff-Appellant Rick Beavers cannot rely upon them to contend that the Court of Appeals erred by dismissing his appeal for lack of jurisdiction after he filed his Application for Leave to Appeal more than 12 months after entry of the order that he sought leave to appeal. Accordingly, this Court should overrule *Riza, supra*, and *Kincade (On Remand)* to the extent that they interpreted the predecessor rules to MCR 7.205(F)(3) as permitting a tolling of the time limit for filing late applications for leave to appeal. The Court also should deny Plaintiff-Appellant's Application for Leave to Appeal because the Court of Appeals made the correct decision in this case.

SECRET WARDLE

BY: Janet C. Barnes
JANET CALLAHAN BARNES (P29887)
Attorney for Defendants-Appellees
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040
(248) 851-9500

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