

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
(Saad, P.J., and Cavanagh and Schuette, JJ.)

Rick Beavers,

Plaintiff-Appellant,

v

Barton Malow Company, et al,

Defendants-Appellees.

Supreme Court No. 133294

Court of Appeals No. 269007

Trial Court No. 03-309389-NO
(Wayne Circuit Court)

**BRIEF OF *AMICUS CURIAE* THE STATE BAR OF MICHIGAN'S
APPELLATE PRACTICE SECTION**

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APPELLATE PRACTICE SECTION

Respectfully submits the Amicus Brief on:

*

Rick Beavers v Barton Malow Company, et al

*

The Appellate Practice Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Appellate Practice Section only and is not the position of the State Bar of Michigan. To date, the State Bar does not have a position on this matter.

The total membership of the Appellate Practice Section is 633.

The position was adopted after an electronic discussion and vote. The number of members in the decision-making body is 23. The number who voted in favor to this position was 17. The number who voted opposed to this position was 5. 1 member declined to vote in this decision.



Report on Public Policy Position

Name of Section: Appellate Practice Section

Contact Person: Paul Bernard

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Other: *amicus curiae* brief in the matter of *Beavers v Barton Malow Company*

Date position was adopted: November 19, 2007 (by electronic vote)

Process used to take the ideological position: Discussion at specially-scheduled Council meetings on August 2, 2007 and September 6, 2007, and at a regularly-scheduled Council meeting on November 16, 2007.

Number of members in the decision-making body: 23

Number who voted in favor and opposed to the position:

- 17 in favor
- 5 opposed
- 0 abstained
- 1 absent

FOR SECTIONS ONLY:

- ✓ This subject matter of this position is within the jurisdiction of the section.
- ✓ The position was adopted in accordance with the Section’s bylaws.
- ✓ The requirements of SBM Bylaw Article VIII have been satisfied.

If the boxes above are checked, SBM will notify the Section when this notice is received, at which time the Section may advocate the position.

Position: The Section adopted an amicus brief in *Beavers v Barton Malow Co*, Supreme Court Docket No. 133294. The brief argues that MCR 7.205(F)(3) should be interpreted in accordance with the long-standing practice of Michigan courts that the time for filing a delayed application for leave to appeal is tolled while a claim of appeal in the same case is pending.

Text of the court rule that is the subject of this report:

MCR 7.205(F). Late Appeal.

(1) When an appeal of right or an application for leave was not timely filed, the appellant may file an application as prescribed in subrule (B), file 5 copies of a statement of facts explaining the delay, and serve 1 copy on all other parties. The answer may challenge the claimed reasons for delay. The court may consider the length of and the reasons for delay in deciding whether to grant the application. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).

(2) In a criminal case, the defendant may not file an application for leave to appeal from a judgment of conviction and sentence if the defendant has previously taken an appeal from that judgment by right or leave granted or has sought leave to appeal that was denied.

(3) Except as provided in subrule (F)(4), leave to appeal may not be granted 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.

(4) The limitation provided in subrule (F)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for directed verdict of acquittal, to withdraw a plea, or to correct an invalid sentence, if the motion was filed within the 6-month period prescribed in MCR 6.310(C), MCR 6.419(B), MCR 6.429(B), and MCR 6.431(A), or if

(a) the defendant has filed a delayed request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 12-month period,

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the delayed request for counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(G)(2), and

(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If the transcript was filed before the order appointing or denying the appointment of counsel, the 42-day period runs from the date of that order.

A defendant who seeks to rely on one of the exceptions in subrule (F)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the register of actions of the lower court, tribunal, or agency, or other documentation showing that the application is filed within the time allowed.

(5) The time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 3.993(C)(2).

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STATEMENT OF BASIS OF JURISDICTION

Appellant Rick Beavers timely filed his application for leave to appeal from the January 18, 2007 judgment of the Court of Appeals, which dismissed his delayed application for leave to appeal as untimely filed. In an order dated July 13, 2007, this Court (1) ordered oral argument on the application for leave to appeal; (2) directed the parties to address, whether in light of MCR 7.205(F)(3), the cases of *Riza v Niagara Machine & Tool Works, Inc*, 411 Mich 915 (1980), and *People v Kincade (On Remand)*, 206 Mich App 477; 522 NW2d 880 (1994), were properly decided; and (3) allowed the parties to file supplemental briefs.

The Appellate Practice Section submits this *amicus curiae* brief in support of Plaintiff/Appellant's position, in conjunction with its Motion for Leave to File Amicus Brief.

STATEMENT OF RELIEF SOUGHT

The Appellate Practice Section requests this Court reverse the Court of Appeals' judgment on the grounds that this Court's long-standing interpretation of MCR 7.205(F)(3) supports equitable tolling of a delayed application for leave to appeal while the underlying claim of appeal is pending before the Court of Appeals and any subsequent application for leave to this Court.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is this Court entitled to interpret its own Court rules in a manner that is not directly supported by the plain language of the rule?

The Appellate Practice Section answers: Yes.

2. Should this Court uphold its long-standing precedent regarding equitable tolling in the Court of Appeals while an appeal is pending?

The Appellate Practice Section answers: Yes.

3. If this Court decides to reverse its long-standing precedent on equitable tolling, should that decision apply prospectively only?

The Appellate Practice Section answers: Yes.

The Appellate Practice Section does not take a position with respect to this Court's question of whether *Riza v Niagara Machine & Tool* and *People v Kincade (On Remand)* were properly decided.

STANDARD OF REVIEW

This Court reviews questions of court rule interpretation de novo. *Marketos v American Employers Ins Co*, 465 Mich 407, 413; 633 NW2d 371 (2001).

STATEMENT OF FACTS

The facts and proceedings most pertinent to the legal issues presented in this *amicus curiae* brief are summarized as follows:

On January 26, 2006, Rick Beavers (“Beavers” or “Appellant”) timely filed a claim of appeal by right in the Court of Appeals arising from an underlying negligence suit. (Court of Appeals Docket Sheet, Docket Number 260475). Because the appeal arose from the trial court’s grant of summary disposition for the defendants, the case was submitted on the newly-instituted “fast track.” (COA Docket Sheet, 260475). Appellant did not timely file his Appellant’s Brief and also failed to procure the transcripts from the court reporter. (COA Docket Sheet, 260475; and COA Opinion at 1). Appellant then filed an untimely motion for extension of time for the submission of the transcripts and the brief, which the Court of Appeals denied. (COA Opinion at 1). The Court of Appeals dismissed the appeal. (COA Docket Sheet, 260475). After filing an unsuccessful motion to reinstate the dismissed appeal, Appellant filed leave to appeal in the Michigan Supreme Court. (COA Opinion at 1). This Court denied Appellant’s application for leave to appeal. (COA Opinion at 2).

Following this protracted round of motions and appeals, Appellant filed a delayed application for leave to appeal in the Court of Appeals. (COA Opinion at 2; COA Docket Sheet, Docket Number 269007). Appellant argued that his time to file a delayed application was tolled while his earlier unsuccessful appeal was pending at the Court of Appeals and at the Michigan Supreme Court. (COA Opinion at 2).

The Court of Appeals rejected this argument, holding in an unpublished per curiam opinion that it did not have jurisdiction to entertain Appellant’s application. (COA Opinion

at 2-3). Appellant then timely-filed an application for leave to appeal from the Court of Appeals' January 18, 2007 judgment. (COA Docket Sheet, 269007). This Court ordered oral argument on the application on July 13, 2007. The clerk's office has scheduled oral argument for December 5, 2007.

ARGUMENT

I. Introduction.

Amicus Curiae the State Bar of Michigan's Appellate Practice Section agrees with Appellant Beavers that the timing for him to file a delayed application for leave to appeal under MCR 7.205(F)(3) was tolled while his underlying appeal was pending. The Appellate Practice Section submits this brief to bring this Court's attention to the potential consequences of reversing this Court's long-standing interpretation of MCR 7.205(F)(3). The Section further advocates that the doctrine of equitable tolling serves a legitimate purpose in the appellate courts and asks this Court to adopt a rule change of MCR 7.205(F)(3) that explicitly recognizes tolling of the time in which to file a delayed application for leave to appeal, in cases such as the one currently before this Court.

II. This Court Should Uphold the Doctrine of Equitable Tolling for Delayed Applications for Leave to Appeal Because Attorneys and Parties have Relied on the Doctrine for 26 Years.

When called on to interpret and apply a court rule, this Court applies the principles that govern statutory interpretation. *Grievance Administrator v Underwood*, 462 Mich 188, 193; 612 NW2d 116 (2000). Accordingly, the Court begins its analysis with the language of the court rule and the rule's place "within the structure of the Michigan Court Rules as a whole." *Id* at 194; *Haliw v City of Sterling Heights*, 471 Mich 700, 705-706; 691 NW2d 753 (2005).

As will be further discussed below, this Court has a unique position in interpreting court rules because this Court promulgates the very rules that it interprets and applies.

See Const 1963, art VI, § 5 (“The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state.”).

The rule at issue in this case is MCR 7.205(F)(3), which governs the filing of delayed applications for leave to appeal in the Court of Appeals. MCR 7.205(F)(3). That subrule provides the following:

(3) Except as provided in subrule (F)(4), leave to appeal may not be granted 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.

MCR 7.205(F)(3). The rule further provides that the general twelve-month filing deadline of subrule (F)(3) does not apply in certain situations regarding the appointment of counsel outside the twelve-month period. MCR 7.205(F)(4).

The Appellate Practice Section recognizes that the language of MCR 7.205(F)(3) does not specifically provide tolling of the delayed application for leave to appeal while an underlying appeal is pending. The Section, however, asks this Court to maintain the equitable tolling rule because it would be unjust for this Court to reverse its own interpretation of the court rules upon which attorneys and parties have relied for 26 years

and because equitable tolling prevents injustice in a limited number of cases that merit the application of the equitable tolling doctrine.

A. *In creating equitable tolling, the Supreme Court interpreted and applied rules that it promulgated.*

The equitable tolling doctrine has been a part of the jurisprudence of this State since 1981, when this Court issued its order in *Riza v Niagara Machine & Tool Works*, 411 Mich 915 (1981). This Court in *Riza* interpreted a previous version of MCR 7.205 that contained identical language to the current rule, except that it provided an eighteen-month period for delayed applications. In spite of the language of the rule, this Court stated that the time for filing appellant's delayed application was "tolled while an appeal was pending pursuant to a claim of appeal." *Id* at 915. This Court's interpretation of the late application rule has remained unchanged in the 26 years since *Riza*.

Although the Appellate Practice Section recognizes that this Court strictly construes statutes, when this Court interprets a rule that it has promulgated the rule of strict construction should be relaxed. Unlike statutes enacted by the Legislature, this Court has the constitutional mandate to promulgate court rules. Const 1963, art VI, § 5. Thus, when this Court interprets and applies the court rules, it is doing so as to words this Court itself has promulgated. This type of interpretation starkly contrasts situations where this Court is interpreting someone else's words, such as those found in statutes or contracts.

For instance, this Court has rejected "judicial tolling" when lower courts had engrafted tolling onto the parties' insurance contract. *See Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 551-552; 702 NW2d 539 (2005). Likewise, this Court has rejected "judicial

tolling” that is not included in the text of a statute that the Legislature has enacted. See *Trentatdue v Gordon*, 479 Mich 378, 388-389; 738 NW2d 664 (2007) (disallowing court-created discovery rule to toll statute of limitations in wrongful death cases). In the context of contract or statutory interpretation, the judicial branch's role is to interpret what the parties or the Legislature intended. *Paige v City of Sterling Heights*, 476 Mich 495, 504; 720 NW2d 219 (2006) (statutory interpretation); *City of Grosse Pointe Park v Mich Mun Liab & Prop Pool*, 473 Mich 188, 218; 472 NW2d 188 (2005) (contract interpretation).

Yet “judicial tolling” of the court rules does not offend the deference the courts give to contracting parties or the Legislature. In *Riza*, this Court interpreted its own intent when it construed GCR 806.2, the predecessor to MCR 7.205(F). In addition to construing its own rule, the Court can provide tolling with respect to its own procedures for the efficient administration of justice in this State. *Clemons v Detroit, Dep't of Transp*, 120 Mich App 363, 370; 327 NW2d 480 (1982). In fact, this Court’s “rule-making power is constitutionally supreme in matters of practice and procedure.” *Kirby v Larson*, 400 Mich 585, 598; 256 NW2d 400 (1977).

There are numerous examples among this Court’s decisions where the Court has interpreted its own rules in a way that seems to go against the plain language of the rules. For instance, this Court broadened the Court of Appeals’ interpretation of the final order rule of MCR 7.202(6)(a)(iii) in *Thurston v Escamilla*, 469 Mich 1009, 1009; 677 NW2d 28 (2004). MCR 7.202(6) includes among its final orders a “post-judgment order affecting the custody of a minor.” MCR 7.202(6)(a)(iii). This Court in *Thurston* clarified the court rule when it held that a motion to change domicile is an order “affecting custody of a minor.”

Id at 1009. This is true even though the party’s motion to change domicile did not mention custody, and even though the rule itself does not mention domicile.

The *Thurston* case is striking for two reasons. First, this Court’s decision in *Thurston* changed the long-standing practice of the Court of Appeals which had held that an order for change of domicile does not “affect the custody of a minor,” and therefore, was not appealable by right. Second, like this Court’s order in *Riza*, the *Thurston* ruling was issued as an order on the application, rather than a full opinion after granting leave to appeal.

In both *Riza* and *Thurston* this Court interpreted the court rules to clarify the rights of parties seeking an appeal in the Court of Appeals. In *Riza*, this Court ensured that the party could file a delayed application for leave; in *Thurston*, the Court ensured that the party could file a claim of appeal by right. In any event, this Court in both cases used its powers to interpret a court rule in a way that gave more rights to the parties, rather than taking away an appeal opportunity from the parties.

In addition to this Court’s orders interpreting the court rules, there are many instances where commonly-accepted appellate practice varies from—or is not clearly stated in—the plain language of the court rules. One example appears in the appellate practice of obtaining a stay pending appeal. According to MCR 7.209, a motion for stay “may not be filed in the Court of Appeals unless such a motion was decided by the trial court.” MCR 7.209(A)(2). The stay motion in the Court of Appeals also “must include a copy of the trial court’s opinion and order, and a copy of the transcript of the hearing on the motion in the trial court.” MCR 7.209(A)(3).

Contrary to the strict requirements of MCR 7.209, appellate practitioners in the Court of Appeals regularly file motions to waive the requirements of MCR 7.209. The Court of Appeals has recognized this well-accepted practice in its internal operating procedures. Court of Appeals IOP 7.209(A)(3). Further, this Court has granted motions to waive the requirements of MCR 7.209. *See, eg, Pompa-Oppenlander*, 461 Mich 1020, 1020; 622 NW2d 524 (2000). This Court's various orders allowing the waiver of the strict requirements of MCR 7.209 demonstrate how actual practice sometimes varies from the plain text of the court rule.

Another example appears with respect to the filing of amicus briefs in the Michigan Supreme Court. The only court rule that plainly allows the filing of amicus briefs at the Supreme Court is limited to amicus briefs in calendar cases. *See* MCR 7.306(D). This Court, however, regularly accepts amicus briefs in cases that are pending on application for leave to appeal. In fact, this Court's own internal operating procedures encourage the filing of amicus curiae briefs at the application stage. Supreme Court IOP I-C.

Because judicially-promulgated rules are different from legislatively-enacted statutes or party-drafted contracts, this Court has liberally construed its own rules for the efficient administration of justice. This Court should only reluctantly retreat from its interpretation of its own rules, including the equitable tolling recognized by this Court in *Riza*.

B. Equitable tolling has worked to prevent injustice in a variety of contexts.

In the 26 years since the *Riza* Court interpreted the predecessor to MCR 7.205 to include a tolling provision, all types of litigants have availed themselves of the tolling

provision: personal injury plaintiffs, insurance companies, criminal defendants, and prosecutors. The need for tolling of the time to file a delayed application for leave has also arisen in a variety of contexts: motion to withdraw from criminal case, untimely motion to set aside judgment, claim of appeal improperly filed because no final order, party failed to file trial court order.

The Court of Appeals followed this Court's lead in *People v Kincade (On Remand)*, 206 Mich App 477, 483; 522 NW2d 880 (1994). *Kincade* involved a series of motions for new trial and delayed applications from the denied motions for new trial. *Id* at 479-480. After the trial court ruled on a final motion for new trial on an ineffective assistance of counsel issue, the defendant filed a claim of appeal by right. *Id* at 480. The Court of Appeals dismissed the appeal because the appellant did not provide a copy of the trial court's order, but the Supreme Court remanded to the Court of Appeals. The Court of Appeals again dismissed the appeal by right (now on remand). *Id*. But in its decision on remand, the Court of Appeals noted that it could consider a delayed application for leave to appeal, citing *Riza*, because the "eighteen-month time limitation of MCR 7.205(F) was tolled during the time the various appellate proceedings connected with the order denying relief from judgment have been pending in this Court or the Supreme Court." *Id* at 483.

In addition, this Court cited *Riza* and *Kincade* when it invoked the tolling provision in *Ameritech Mich v Mich Pub Serv Comm'n*, 461 Mich 930, 930; 606 NW2d 23 (1999), and *Ameritech Mich v Mich Pub Serv Comm'n*, 460 Mich 866, 866; 598 NW2d 338 (1999). In these *Ameritech* cases, this Court denied leave to appeal without prejudice to appellant's ability to seek reinstatement of its appeals in the Court of Appeals if the federal court

declined jurisdiction over the controversy. Thus, this Court permitted tolling during the pendency of the federal suit to avoid an untimely application for leave.

People v Tooson (In re Withdrawal of Attorney), 231 Mich App 504; 586 NW2d 764 (1998), presents another example of where the Court of Appeals allowed tolling of a delayed application. In that case, an appointed criminal attorney wanted to file an *Anders* motion to withdraw (for lack of merit in the appeal), but in the context of an application for leave to appeal, not an appeal as of right. The court stated that because it was not an appeal of right, the motion had to be directed to the trial court. *Id* at 507. Yet the court recognized a formidable dilemma for appointed counsel who could be sanctioned for filing a frivolous application for leave to appeal or disciplined for abandoning the representation. *Id*. The court resolved the dilemma by holding that the motion to withdraw process would toll the running of the period to file a delayed appeal under *Riza*. *Id*.

The Court of Appeals has continued to apply the tolling provision. See, eg, *Wetterholt v Vandenberg*, unpublished memorandum opinion of the Court of Appeals, issued September 8, 1998 (Docket No. 201300) (dismissing an untimely claim of appeal by right, while acknowledging appellant's right to file delayed application for leave 23 months after the trial court order); *Hill v Wall Street Systems, Inc*, unpublished per curiam opinion of Court of Appeals, issued May 27, 2003 (Docket No. 234455) (court dismissed appeal because no final judgment, but allowed untimely delayed application as the time had been tolled while insurance defendant pursued the improper appeal by right); *Mikedis v Perfection Heat Treating Co*, 180 Mich App 189, 194, 203; 446 NW2d 648 (1989) (citing *Riza* for the proposition that party's delayed application for leave to appeal was tolled while

the motion for relief from judgment was pending in the trial court, even though motion filed sixteen months after the trial court's order). These cases provide a few examples of the array of contexts in which the Court of Appeals has applied the equitable tolling provision of *Riza* to prevent injustice.

C. *Judicial economy favors maintaining the tolling doctrine for MCR 7.205(F)(3).*

Beyond these cases underscoring the well-accepted practice of tolling the time to file a delayed application for leave while an underlying appeal is pending, judicial economy also militates in favor of maintaining a tolling doctrine. When an appellate practitioner faces the dismissal of a claim of appeal for any number of reasons (lack of jurisdiction, prior counsel failed to file brief, or some other defect), the tolling provision allows the appellate attorney to file an application for leave to appeal in this Court without fear of losing the ability to file a delayed application for leave to appeal in the Court of Appeals. Otherwise, counsel and parties would be required to make the undesirable and wasteful choice of filing both the application to the Supreme Court and the delayed application for leave at the same time. The filing of two appeals in two different courts on the same case is a needless waste of judicial resources. The judicial economy of tolling explains why our appellate courts have embraced the tolling doctrine for the past 26 years when interpreting MCR 7.205(F)(3).

The notion of judicial economy is, in fact, embedded in the court rules. According to MCR 7.316(B), this Court has the authority to allow the party to take a “nonjurisdictional act” after the expiration of time. Unlike the time for filing a claim of appeal by right, the filing

of an application for leave to appeal is not jurisdictional. *Cipri v Bellingham Frozen Foods, Inc*, 213 Mich App 32, 39; 539 NW2d 526 (1995). The only disclaimer to MCR 7.316(B) is that the Court “will not entertain” a motion to file a delayed application in this Court. There is no mention of the Court not allowing a delayed application in the Court of Appeals.

Indeed, there is no comparable language in the court rules that the Court “shall not” or “will not” allow an untimely delayed application for leave to appeal. The court rule merely states that the application for leave “may not be granted” after the twelve-month filing period. MCR 7.205(F)(3). Contrary to the mandatory words “shall” or “will,” the term “may” is discretionary. *Old Kent Bank v Kal Kustom, Inc*, 255 Mich App 524, 532-533; 660 NW2d 384 (2003). This Court’s use of the phrase “may not be granted” in MCR 7.205 indicates that the court of appeals has discretion to deny a delayed application, but it does not prohibit the Court of Appeals from entertaining the untimely delayed application. The language of MCR 7.316 provides support for this Court’s long-established interpretation of MCR 7.205 in *Riza* and the parties’ reliance on the tolling doctrine for the past 26 years.

III. This Court Should Only Make Changes in Long-Standing Interpretation of Court Rules by Promulgating a New Rule, Not Overturning this Court’s Prior Interpretation of its Own Rules.

A. *This Court should adopt a rule change to incorporate tolling, as proposed by the Appellate Practice Section.*

In order to clarify the rules, to guide the future conduct of counsel, and to bring the text of the rules into line with long-established precedent, this Court should adopt a clarifying amendment to MCR 7.205(F)(3). The Appellate Practice Section proposes the following addition to the current text of MCR 7.205(F)(3):

The 12-month limitation period provided in subrule (F)(3) is tolled for the period of time appeal is pending pursuant to a claim of appeal.

This amended rule would protect the parties and appellate practitioners who have relied on the equitable tolling rule for the past 26 years. The rule change would embody the practical reasons for maintaining this long-standing tolling rule, as discussed previously in the brief, including to preserve judicial economy, to recognize the wide variety of contexts and parties to which tolling has applied, and to prevent injustice. The Appellate Practice Section asks this Court to adopt the proposed rule change simultaneous to issuance of its opinion in the instant case.

B. Any change in long-standing interpretation of court rule should be prospective only.

If this Court chooses to overrule *Riza* and *Kincade* as improper interpretations of MCR 7.205(F)(3), then the new rule announced by this Court should only have prospective application. Where injustice might result from full retroactivity, courts have given their rulings prospective effect only. *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997). Prospective application is appropriate in this case because any holding by this Court that overrules *Riza* is “overrul[ing] settled precedent” and announces a “new rule of law.” *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 713; 620 NW2d 319 (2000).

The parties and attorneys have relied on this Court’s interpretation of MCR 7.205(F)(3) for the past 26 years. It would work an injustice for this Court to hold that, when it previously said that MCR 7.205 allowed tolling, the same rule no longer allows tolling because tolling is not mentioned in the plain language of the court rule. Appellate

practitioners should be able to rely on long-established precedent regarding appellate procedure. Any other result would be an injustice to parties and attorneys who have relied (and should be able to rely) on this Court's prior interpretations of its own court rules. In any event, if this Court decides to overrule precedent in this area, that change in law should be done by promulgating a new court rule that disallows tolling under MCR 7.205(F)(3) for appeals filed after the rule change.

CONCLUSION

This Court should maintain the tolling doctrine in Michigan for delayed applications for leave to appeal, either by confirming the equitable tolling provision announced in *Riza*, or by promulgating an amendment to MCR 7.205(F)(3) that clarifies the existence of the tolling provision.

RELIEF REQUESTED

Amicus Curiae State Bar of Michigan's Appellate Practice Section respectfully requests that this Honorable Court reverse the decision of the Court of Appeals, and adopt the Appellate Practice Section's proposed rule change contained in this Amicus Curiae Brief.

Respectfully submitted,

/s/ Liisa R. Speaker

DATED: November 20, 2007

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PROOF OF SERVICE

I certify that I served this document on this date by enclosing two copies in sealed envelopes with first class postage prepaid, addressed to all counsel of record as listed below, and by depositing them in the United States mail.

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I declare that the statements above are true to the best of my information, knowledge, and belief.

Respectfully submitted,

Dated: November 20, 2007

/s/ Liisa R. Speaker
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