IN THE COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2021

MISC. No. 5

JESSE J. MURPHY, et al.

Appellants

v.

LIBERTY MUTUAL INSURANCE CO.

Appellee

Certified Question from the United States District Court for the District of Maryland (The Honorable Stephanie A. Gallagher)

BRIEF OF APPELLANT

JOSEPH L. KATZ
AIS#: 0512140129
KATZ LAW
6701 Democracy Boulevard, Suite 300
Bethesda, Maryland 20817
(410) 499-2615
joe@joekatzlaw.com

Counsel for Appellants

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APPELLANT'S BRIEF

Appellants, Jesse Murphy and J.M. Murphy Enterprises, Inc., by undersigned counsel, submits this brief, and states as follows:

STATEMENT OF THE CASE

The United States District Court for the District of Maryland submitted the certified question at issue in this case. The question concerns the constitutionality of then-Chief Judge Barbera's April 24, 2020 Administrative Order which purported to broadly toll the statute of limitations in Maryland. If valid, the District Court will recognize it. If *ultra vires* and unconstitutional, it will not. Indeed, this Court is tasked with the heavy burden of deciding the constitutionality of its very own actions, at the request of a United States District Court.

Appellants are a Maryland construction company and its principal. Appellee is a compensated surety who provided payment and performance bonds for the corporate appellant, guaranteed by the individual appellant. Third parties instituted claims against the bonds in the Fall and Winter of 2016/2017, which Appellee paid at various times in the Spring and Summer of 2017. On July 2, 2020, Appellee filed a diversity action for indemnity against Appellants in the United States District Court, contending it met the $75,000 threshold for diversity jurisdiction.

At the request of Appellants, the District Court permitted jurisdictional discovery, which revealed that Appellee did not incur more than $75,000 in damages within the three years prior to July 2, 2020. Thereafter, Appellants moved for dismissal for the lack of subject matter jurisdiction.

Sua sponte, the District Court raised the issue of the Administrative Order's potential invalidity on Maryland constitutional grounds. It declined, however, to rule directly, and chose instead to certify the question of the Order's validity to this Court. In doing so, the District Court expressly balanced "the longstanding principle that 'no man may judge himself'" against the "overwhelming federalism concerns in potentially concluding, on entirely state law grounds, that Chief Judge Barbera did not have the authority to toll the statutes of limitations in the fashion she did." App. 014.

This proceeding ensued.

CERTIFIED QUESTION

Did the Maryland Court of Appeals act within its enabling authority under, *inter alia*, the State Constitution and the State Declaration of Rights when its April 24, 2020 Administrative Order tolled Maryland's statutes of limitation in response to the COVID-19 pandemic? App. 001.

STATEMENT OF FACTS

Per the Clerk of the Court of Appeals' July 20, 2021 letter to counsel, attached hereto is an Appendix containing the "facts relevant to the Questions" as set forth within the Certification Order of the United States District Court of Maryland. The same are incorporated by reference herein as if fully set forth. App. 001-5.

ARGUMENT

I. Statewide Tolling of Limitations by Judicial Administrative Order is Plainly Unconstitutional in Maryland.

[t]hat Maryland's Declaration of Rights expressly establishes the Separation of Powers concept as an explicit Maryland Constitutional command. *Schisler v. State*, 394 Md. 519, 567, 907 A.2d 175, 203 (2006). Specifically, Maryland's Declaration of Rights, § 8, proscribes the delegation of legislative authority as follows:

> the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

Md. Const. Decl. of Rts. § 8.

Moreover, Maryland's Declaration of Rights, § 9, expressly proscribes the suspension of legislation by anyone other than the Legislature:

> [t]hat no power of suspending Laws or the execution of Laws, unless by, or derived from the Legislature, ought to be exercised, or allowed.

Md. Const. Decl. of Rts. § 9.

Indeed, for over a century this Court has vigilantly avoided non-judicial activity. *See, e.g., Consol. Const. Servs., Inc. v. Simpson*, 372 Md. 434, 449, 813 A.2d 260, 269 (2002), *citing Shell Oil Company v. Supervisor of Assessments of Prince George's County,* 276 Md. 36, 46, 343 A.2d 521, 527 (1975) ("This Court has consistently stated that Article 8 prohibits the courts from performing non-judicial functions and prohibits administrative agencies from performing judicial functions."); *Close v. S. Maryland Agric. Ass'n*, 134 Md. 629, 108 A. 209, 215 (1919) (stating that "[i]t is for the Legislature, and

not for the courts, to pass statutes" in holding that judicial officers are not permitted to perform nonjudicial duties under Decl. of Rts., art. 8*); accord People's Couns. for Baltimore Cty. v. Beachwood I Ltd. P'ship*, 107 Md. App. 627, 637, 670 A.2d 484, 489 (1995) ("Courts, at all levels, are enjoined not to substitute their judgment for that of the coordinate branch of government to whom such judgment has been, in our scheme of divided government, primarily entrusted.")

Moreover, this Court has long recognized that it cannot amend the law for the Legislature. *Robey v. Broersma*, 181 Md. 325, 343, 29 A.2d 827, 831 (1943). By its own admission, it lacks authority, in a case where the Legislature has spoken clearly, "to distort its words and to usurp the function of the legislative branch of the government by making judicial law." *Clark v. Tawes*, 187 Md. 195, 199, 49 A.2d 463, 465 (1946). On the contrary, "[a]bsent some constitutional infirmity, a court has no power to declare void an act of the General Assembly." *Mayor & City Council of Baltimore v. State*, 281 Md. 217, 230, 378 A.2d 1326, 1333 (1977). "Courts must be governed by the intention of the Legislature … and cannot legislate for it simply because they may think it ought to have said something else." *Bartlett v. Ligon*, 135 Md. 620, 109 A. 473, 476 (1920)[1]

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[1] Rest assured, the Legislature is well-empowered to enact and immediately effect emergency legislation pursuant to § 16 of the Maryland Constitution:

> No law enacted by the General Assembly shall take effect until the first day of June next after the session at which it may be passed, unless it contains a Section declaring such law an emergency law and necessary for the immediate preservation of the public health or safety and is passed upon a yea and nay vote supported by three-fifths of all the members elected to each of the two Houses of the General Assembly.

It is self-evident that the Judiciary cannot cloak unconstitutional conduct inside the guise of its rule-making authority. "[T]he fact that the Maryland Rules have the force of law does not mean that a rule is a statute." *Consol. Const. Servs., Inc. v. Simpson*, 372 Md. at 450; *see also Porter v. State*, 47 Md. App. 96, 106-110, 421 A.2d 985, 991 (1980) (*concurring opinion*) ("My question could not be more basic. In our form of government, whoever gave the rule makers the supposed power to make such rules? For me, what has been done is not rule making but law making. Upon that distinction hinges everything..... Even more fundamental limitations upon the rule-making function are at stake here. When do rule makers exceed their limited grant of power? When does mere rule making, sometimes legitimately delegated to the executive and judicial branches of government, pass imperceptibly into law making and become thereby an unconstitutional usurpation of the legislative prerogative? The very foundation upon which our system of government is erected is the scrupulous and jealously guarded separation of powers..... I submit, because we have grown so used to deferring to the judicial branch at the level of interpreting the Constitution, where such deference is appropriate, that we have been lulled by habit into deferring to the judicial branch even at the sub-constitutional level, where such deference is dangerously inappropriate..... Whatever the merits of this particular case, there is involved here a far deeper, far more profound issue that desperately cries out for public

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Md. Const. art. XVI, § 2. Moreover, "a legislative determination of emergency is conclusive and not reviewable." *Biggs v. Maryland-Nat'l Cap. Park & Plan. Comm'n*, 269 Md. 352, 355, 306 A.2d 220, 222 (1973) (citing cases).

attention, public concern and public debate - What are the limits of the rule-making function? A haunting refrain from the musical "1776" echoes still: "Is anybody there? Does anybody care?" Only time will tell.")

The Court has long guarded the separation of powers in this State. In the instance of municipal corporations acting outside their lawful authority, this Court has "**not hesitated to exercise [its] rightful authority for the purpose of restraining**" such *ultra vires* conduct and indeed, does so with "**jealous vigilance**." *State Ctr., LLC v. Lexington Charles Ltd. P'ship,* 438 Md. 451, 539–40, 92 A.3d 400, 452 (2014) (emphasis in original), *citing Baltimore v. Gill,* 31 Md. 375, 395 (1869) (emphasis added). Likewise, state regulations are void *ab initio* when they are in direct conflict with a statute. *See Salisbury Univ. v. Joseph M. Zimmer, Inc.*, 199 Md. App. 163, 173, 20 A.3d 838, 844 (2011) (invalidating as *ultra vires* a C.O.M.A.R. regulation in conflict with the "plain language" of a statue.) And this Court has not hesitated to void legislative activity that encroached on the Governor's executive Powers. *See Schisler v. State*, 394 Md. at 576 ("When ... any of the three branches of government takes unto itself powers denied to it or those strictly within the sovereignty of another branch, the courts of this State must step in and declare such encroachments to be constitutionally prohibited.")

Here, the Court's own Administrative Order directly suspended Md. Ann. Code, Cts. & Jud. Proc., § 5-101, which established a three year statute of limitations. App. 018. As such, the Administrative Order is a plain, *ultra vires* violation of Articles 8 and 9 of the Maryland Declaration of Rights.

Today, the Court must rise to its constitutional duty and answer the certified question presented to it in the affirmative; that indeed, the Court acted beyond its constitutional grant of Judicial powers when it suspended the law of limitations enacted by the Legislature.[2]

II. The Administrative Order is Contrary to Decades of Precedent Strictly Construing Limitations as the Sole Province of the Legislature.

Statutes of limitations are perhaps the penultimate legislative act: "they have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate." *Walko Corp. v. Burger Chef Sys., Inc.*, 281 Md. 207, 210, 378 A.2d 1100, 1101 (1977), *citing Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed. 1628 (1945).

This "policy of repose" has long-fostered a rule of strict construction. *Walko Corp. v. Burger Chef Sys., Inc.*, 281 Md. at 210. "The principle of law is indisputable, that when the Statute of Limitations once begins to run, nothing will stop or impede its operation." *Id., citing Ruff v. Bull*, 7 H. & J. 14, 16, 16 Am.Dec. 290 (1825); *also see McMahan v. Dorchester Fert. Co.*, 184 Md. 155, 160, 40 A.2d 313 (1944) ("where the Legislature has not made an exception in express words in the Statute of Limitations, the Court cannot allow any implied and equitable exception to be engrafted upon the statute merely on the

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[2] The proverbial baby does not have to be thrown out with the bathwater. The Administrative Order can be modified *nunc pro tunc*. Moreover, to the extent the courts of this State were closed to the public during the initial 5-6 months of the pandemic, Md. Rule 1-203(a)(2) already has the effect of extending the time to file to the end of the next day that the court reopens. The crucial difference is that Md. Rule 1-203 is a permissible *procedural* function of the Judiciary, whereas the sweeping suspension of § 5-101 is the exclusive reign of the Legislature, not the Judiciary.

ground that such exception would be within the spirit or reason of the statute."); *Garay v. Overholtzer*, 332 Md. 339, 359, 631 A.2d 429, 439 (1993) (citing cases noting "the well established principle that where the legislature has not expressly provided for an exception in a statute of limitations, the court will not allow any implied or equitable exception to be engrafted upon it.").

Md. Ann. Code, Cts. & Jud. Proc., § 5-101 sets forth the general three (3) statute of limitations in Maryland:

> A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

Indeed, "[a] statutory period of limitations represents a policy judgment by the Legislature that serves the interest of a plaintiff in having adequate time to investigate a cause of action and file suit, the interest of a defendant in having certainty that there will not be a need to respond to a potential claim that has been unreasonably delayed, and the general interest of society in judicial economy." *Ceccone v. Carroll Home Servs., LLC*, 454 Md. 680, 691, 165 A.3d 475, 481 (2017) (citing cases). "In enacting the three-year statute of limitations that governs most tort and contract actions, the General Assembly thus made a policy decision as to an appropriate deadline for the filing of such a claim by a reasonably diligent plaintiff." *Id.*

As can be seen, for nearly a hundred years this Court has fiercely avoided even narrow adjustment to the legislative function of limitations. To suspend, toll or otherwise abrogate the statute of limitations during the COVID-19 pandemic was squarely the

province of the Legislature. Respectfully, any perceived inadequacy in § 5-101 on account of the public health emergency was not the Judiciary's prerogative to fix: "to supply omissions transcends the judicial function." *Allen v. State*, 18 Md. App. 459, 467, 307 A.2d 493, 498 (1973), *citing Iselin v. United States*, 270 U.S. 245, 251, 46 S.Ct. 248, 250, 70 L.Ed. 566 (1926). Indeed, in a 2012 dissent former-Chief Judge Barbera herself urged her colleagues against "legislating from the bench." *See Tracey v. Solesky*, 427 Md. 627, 663, 50 A.3d 1075, 1095 (2012), *as amended on reconsideration* (Aug. 21, 2012), *overturned due to legislative action.*

Importantly, this is not an academic matter, but a real and present injury to Appellants' constitutional due process rights: "[s]tatutes of limitations are designed primarily to assure fairness to defendants on the theory that claims, asserted after evidence is gone, memories have faded, and witnesses disappeared, are so stale as to be unjust." *Bertonazzi v. Hillman*, 241 Md. 361, 367, 216 A.2d 723, 726 (1966), *abrograted on other grounds by Antar v. Mike Egan Ins. Agency, Inc.*, 209 Md. App. 336, 58 A.3d 609 (2012).

CONCLUSION

WHEREFORE, Appellant respectfully requests that the Court of Appeals answer the certified question in the negative, thereby abrogating that portion of the Administrative Order that purported to toll or suspend statutes of limitations.

Respectfully submitted,

/s/ Joseph L. Katz
Joseph L. Katz AIS#: 0512140129
KATZ LAW
6701 Democracy Boulevard, Suite 300
Bethesda, Maryland 20817
(410) 499-2615
joe@joekatzlaw.com

Attorney for Appellants

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

This Brief contains **2588** words, excluding the parts of the Brief exempted from the word count by Maryland Rule 8-503 (tables of contents and authorities) and the citation and text required by Rule 8-504(a)(8).

This Brief complies with the font, spacing, and type size requirements stated in Rule 8-112. It was printed using *Times New Roman,* size 13 font.

/s/ Joseph L. Katz
Joseph L. Katz AIS#: 0512140129

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2021, eight (8) copies of this brief were hand-delivered to this Court, and two copies were served via electronic mail and by first class mail, postage pre-paid US mail to counsel for Appellee.

/s/ Joseph L. Katz
Joseph L. Katz AIS#: 0512140129

IN THE COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 2021

MISC. No. 5

JESSE J. MURPHY, et al.

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Certified Question from the United States District Court for the District of Maryland (The Honorable Stephanie A. Gallagher)

APPENDIX OF APPELLANT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LIBERTY MUTUAL INSURANCE CO.	*	
Plaintiff,	*	
v.	*	**Civil Action No.: 1:20-cv-01961-SAG**
JESSE J. MURPHY, et al.,	*	
Defendants.	*	

* * * * * * * * * * * * *

CERTIFICATION ORDER

Pursuant to Maryland Rule 8-305 and the Maryland Uniform Certification of Questions of Law Act (MD. Code, Cts. & Jud. Proc. §§ 12-601 to 12-613), the Court certifies the following question of law to the Court of Appeals of Maryland.

Question of Law to be Answered

Did the Maryland Court of Appeals act within its enabling authority under, *inter alia*, the State Constitution and the State Declaration of Rights when its April 24, 2020 Administrative Order tolled Maryland's statutes of limitation in response to the COVID-19 pandemic?

Facts Relevant to the Questions

1. Three parties of diverse citizenship are engaged in an indemnity lawsuit arising from a payment bond, a performance bond, and a General Indemnity Agreement (the "GIA") in the U.S. District Court for the District of Maryland under diversity jurisdiction.
2. Plaintiff issued payment and performance bonds to defendants, a concrete subcontractor for HASCON, LLC, on a construction project at the Maryland State Police Flight Training Facility at Martin State Airport (the "Project").
3. Defendants signed the GIA at or near the time the bonds issued.

4. Plaintiff has alleged that Defendants defaulted on their obligations at the Project, causing plaintiff to incur losses under the bonds.
5. Plaintiff seeks damages for payments made for claims against the payment bond as well as attorneys' fees incurred before suit was filed and costs to investigate the claims against the bond. Plaintiff also seeks attorneys' fees and costs related to the pending indemnity action.
6. The GIA provides for indemnification by the Defendants, including associated legal fees and costs.
7. After due investigation, Plaintiff paid five claims against the payment bond and alleges it paid these claims because of Defendants' default. The claims paid by plaintiff were as follows:
    a. On or about February 14, 2017, Plaintiff alleges it paid Schuster Concrete Ready Mix, LLC ("Schuster"), a supplier of ready-mix concrete to defendants, $8,361.82.
    b. On or about April 12, 2017, Plaintiff alleges it paid Neff Rental, LLC ("Neff Rental"), an equipment rental supplier for defendants, $17,650.37.
    c. On or about April 12, 2017, Plaintiff alleges paid Barker Steel Mid-Atlantic, LLC ("Barker Steel"), a supplier of rebar steel to defendants, $11,341.11 in full and final resolution of its claim.
    d. On or about August 8, 2017, Plaintiff alleges it paid Maryland Concrete Foundations, Inc., ("Maryland Concrete"), a supplier of rental dumpsters and equipment, $16,200.00 in full and final resolution of its claim.
    e. On or about August 24, 2017, Plaintiff alleges it paid Merritt Development Consultants, Inc. ("Merritt"), a project management services company for defendants $30,100.00 in full and final resolution of its claim.

8. In investigating these and other payment bond claims, Plaintiff alleges that it incurred an additional $11,273.56 in consultant fees that it paid in successive payments on February 8, 2017, March 22, 2017, and April 20, 2017.
9. In investigating and administering these payment bond claims, Plaintiff alleges that it incurred attorneys' fees. Two of five payments for attorneys' fees were made to counsel for Plaintiff before July 2, 2017.
10. Plaintiff alleges that defendants failed to indemnify and reimburse plaintiff for these payments made for bond claims and costs as required by the GIA.
11. Plaintiff filed an indemnity action in the U.S. District Court for the District of Maryland on July 2, 2020, to recover its alleged losses.
12. Defendants, through multiple motions, argued that many of Plaintiff's contractual claims are time-barred and subject to Maryland's three-year statute of limitations under Md. Ann. Code, Court & Jud. Pro. § 5-101 that accrues at the date of payment of the claim, rendering the federal court without subject matter jurisdiction.
13. Plaintiff maintained that the April 24, 2020, Administrative Order and subsequent related orders tolling the statutes of limitation in response to the COVID-19 pandemic (the "Emergency Orders") applied to its case, filed in diversity applying Maryland law, extending the applicable statute of limitations and making all claims timely.
14. In its order and memorandum opinion dated July 2, 2021, the U.S. District Court for the District of Maryland "determined that the Emergency Order is substantive law that tolls Maryland's . . . statute of limitations" so long as the Emergency Orders were validly enacted under, *inter alia*, the Maryland Constitution, the State Declaration of Rights, and other enabling authority.

15. Defendants contend that the Emergency Orders tolling the statutes of limitation overstep the Maryland Court of Appeals' limited authority under the State Constitution "to adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in other courts of this State," and/or constituted an unlawful assumption of legislative power.

16. Plaintiffs counter that the Emergency Orders do not overstep the Maryland Court of Appeals' authority and are a proper exercise of the court's emergency powers.

Statement Pursuant to Section 12-606(a)(3)

The parties hereto, through their counsel, acknowledge that the Court of Appeals of Maryland, acting as the receiving court, may reformulate the question.

Names and addresses of counsel of record

Plaintiff, Liberty Mutual Insurance Co., is represented by:

Shannon J. Briglia, Esquire
Shoshana Elise Rothman, Esquire
SMITH, CURRIE & HANCOCK LLP
1950 Old Gallows Rd., Suite 750
Tysons, VA 22182

Defendants Jesse J. Murphy and J.M. Murphy Enterprises, Inc., are represented by:

Joseph Larry Katz
KATZ LAW
6701 Democracy Boulevard, Suite 300
Bethesda, MD 20817

Party to be Treated as Appellant

Pursuant to Maryland Rule 8-305(b), Jesse J. Murphy and J.M. Murphy Enterprises, Inc., shall be treated as the appellants in the certification procedure.

Instructions to Clerk of this Court

Pursuant to Maryland Rule 8-305(b), the Clerk of this Court is instructed to forward to the Clerk of the Court of Appeals of Maryland the original and seven copies of this Order under this Court's official seal, together with a check in the amount of $61.00, payable to the Clerk of the Court of Appeals of Maryland.

SO ORDERED this 15th day of July, 2021.

/s/
Stephanie A. Gallagher
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LIBERTY MUTUAL INSURANCE CO.	*	
Plaintiff,	*	
v.	*	**Civil Action No.: 1:20-cv-01961-SAG**
JESSE J. MURPHY, et al.,	*	
Defendants.	*	

* * * * * * * * * * * * *

MEMORANDUM OPINION

Liberty Mutual Insurance Co. ("Plaintiff"), sued Jesse J. Murphy and J.M. Murphy Enterprises, Inc. (collectively, "Defendants"), asserting a breach of contract claim involving a construction contract and related surety bonds issued by Developers Surety and Indemnity Company ("Developers").[1] ECF 17, ¶¶ 45-51. Defendants moved to dismiss, asserting that the Court lacked subject matter jurisdiction because several of the disputed bond payments occurred outside the statute of limitations and could not be included in the amount in controversy. ECF 23. Plaintiff opposed the motion, ECF 24, and Defendants replied, ECF 27. Significantly, the parties disagree whether an emergency administrative order issued by Chief Judge Mary Ellen Barbera of the Maryland Court of Appeals (the "Emergency Order"), which tolled limitations periods in Maryland state court due to the COVID-19 pandemic, applies in federal court. In a March 12, 2021 hearing, the Court indicated to the parties that it was considering certifying a question to the Maryland Court of Appeals as to the constitutionality and applicability of the Emergency Order and asked the parties to submit supplemental briefing. ECF 28. Plaintiff and Defendants submitted supplemental briefs, ECF 30, 31, as well as supplemental responses, ECF 32, 33. No further

[1] Plaintiff is the administrator and assignee of Developers, by virtue of a reinsurance agreement between the two entities.

hearing is necessary. *See* Loc. R. 105.6 (D. Md. 2018). For the reasons set forth below, the Court will certify some form of the following question to the Maryland Court of Appeals, subject to additional input from the parties as specified in the Order accompanying this opinion:

> Did the Maryland Court of Appeals act within its enabling authority under, *inter alia*, the State Constitution and the State Declaration of Rights when its April 24, 2020 Administrative Order tolled Maryland's statutes of limitation in response to the COVID-19 pandemic?

I. FACTUAL BACKGROUND

Given the nature of the proposed question of certification, it is not necessary to delve into the factual background of this case in much detail. However, some brief context is necessary to understand why the question of timing—and, thus, the applicability of the Emergency Order—is significant.

This action arises from Developers's provision of bonds guaranteeing Defendants' performance under a 2016 subcontract for concrete work at the Maryland State Police Flight Training Facility at Martin State Airport. ECF 17 ¶ 6. Plaintiff, as Developers's assignee, alleges that, on account of at least five claims against the payment bond in January-February 2017, plus attorney's and consulting fees, Developers incurred $109,300.90 in damages. *Id.* ¶¶ 21-36. Plaintiff claims, further, that Defendants are liable to reimburse Developers for all such damages pursuant to an indemnity agreement. *Id.* ¶¶ 8-13, 38. Defendants, on the other hand, assert that significant portions of the damages sought in the Amended Complaint are time-barred on its face, such that only $43,535.77 in covered costs were paid by Developers within three years of the filing date, the generally applicable limitations period for a contractual dispute. ECF 23 at 4-6. As such, Defendants assert that this Court lacks subject matter jurisdiction, because the amount in controversy fails to meet the $75,000 threshold for federal diversity jurisdiction. *Id.*

Plaintiff counters by arguing that the Emergency Order, which extended certain deadlines on account of the physical closure of Maryland's state courts, served to extend the three-year deadline to file the initial complaint in this United States District Court. ECF 24 at 2-5. The Emergency Order, in relevant part, reads as follows:

> Pursuant to Maryland Rule 16-1003(a)(7), all statutory and rules deadlines related to the initiation of matters required to be filed in a Maryland state trial or appellate court, including statutes of limitations, shall be tolled or suspended, as applicable, effective March 16, 2020, by the number of days that the courts are closed to the public due to the COVID-19 emergency by order of the Chief Judge of the Court of Appeals.

See Section (a), April 24, 2020 Amended Administrative Order Clarifying the Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines.

II. LEGAL STANDARD

The Maryland Uniform Certification of Questions of Law Act provides that the Maryland Court of Appeals may address "question[s] of law certified to it by a court of the United States ... if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute." Md. Code Ann., Cts. & Jud. Proc. § 12-603 (emphasis supplied). The purpose of the Certification Act "is 'to promote the *widest possible* use of the certification process in order to promote judicial economy and the proper application of [Maryland]'s law in a foreign forum.'" *Proctor v. WMATA*, 412 Md. 691, 705 (2010) (citation omitted) (emphasis in *Proctor*).

The Fourth Circuit has endorsed certification of substantial, unresolved questions of state law to a state's highest court, where a certification procedure is available and resolution of the questions is necessary to the case, because certification "ensur[es] the correct legal outcome, aid[s] in judicial economy, and manifest[s] proper respect for federalism." *Sartin v. Macik*, 535 F.3d 284, 291 n. 6 (4th Cir. 2008). The role of a federal court when considering an issue of state law is

to "interpret the law as it believes that state's highest court of appeals would rule." *Abadian v. Lee*, 117 F.Supp.2d 481, 485 (D.Md.2000) (citing *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 957 F.2d 1153, 1156 (4th Cir. 1992), cert. denied, 506 U.S. 824 (1992)); *accord Private Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 312 (4th Cir. 2002) (stating that federal court's task in considering an issue of state law is to "predict how [the state's highest] court would rule if presented with the issue"). Thus, a federal court ordinarily cannot speak with precedential authority on a matter of state law. In several procedural contexts, the Supreme Court has invoked the principles of federalism and comity, stating: "Needless decisions of state law [by federal courts] should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

To this end, the Fourth Circuit has prescribed a two-step inquiry for determining whether certification to the Maryland Court of Appeals is appropriate. First, the referring Court must consider whether the question at hand "may be determinative of an issue in pending litigation." *Antonio v. SSA Sec., Inc.*, 749 F.3d 227, 234 (4th Cir. 2014) (quoting Md. Code Ann., Cts. & Jud. Proc. § 12-603). Second, the Court must look to whether there is a "controlling appellate decision, constitution provision, or statute of [Maryland]." *Id.* (quoting Md. Code Ann., Cts. & Jud. Proc. § 12-603).

III. ANALYSIS

Both parties suggest that this Court need not certify this question to the Maryland Court of Appeals, albeit for different reasons. Defendants argue that the plain language of the Emergency Order, as well as the statutory authority invoked by the Court of Appeals in issuing the Order, plainly limit its application only to Maryland state courts. ECF 31 at 2-6. Plaintiff, on the other

hand, suggests that it can meet the amount in controversy requirement regardless of whether the claims at issue are time-barred, such that it is irrelevant whether the Emergency Order tolled the statute of limitations in this case. ECF 30 at 2-8. These arguments are addressed in turn.

a. Plain Language of the Emergency Order and its Authorizing Statutes

Defendants argue that the Emergency Order, as well as its enabling legislation—Maryland Rules 16-1001 *et seq.* and Article IV, § 18 of the Maryland Constitution—by their plain language apply solely to state courts. Thus, Defendants posit, the emergency order cannot be read to apply to this litigation in federal court because "controlling . . . constitution provision[s], or statute[s] of [Maryland]," *Antonio*, 749 F.3d at 234, foreclose certification. ECF 31 at 4-6. While it is true that the language of all three cited authorities limits the scope of their applicability to state courts, that fact, without more, does not control in the context of a federal court sitting in diversity. The *Erie* doctrine requires the adoption of state substantive law in diversity cases, which the Fourth Circuit has determined includes state statutes of limitation and tolling provisions. *See, e.g.*, *Bonham v. Weinraub*, 413 Fed. App'x. 615, 616 (4th Cir. 2011) (citing Supreme Court jurisprudence to conclude that a state's statute of limitations is "considered substantive law" pursuant to *Erie*, such that if the state's "statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery"); *Rowland v. Patterson*, 882 F.2d 97, 99 (4th Cir. 1989) (relying on "the settled principle that such state tolling provisions are effectively substantive for *Erie* purposes"). The Emergency Order explicitly seeks to toll or suspend "all statutory and rules deadlines . . . including statutes of limitations," and thus would appear, on its face, to be substantive state law applicable in this diversity suit.

Defendants have not cited, and the Court is not aware of, any precedent suggesting that the *Erie* analysis is altered by a state rule's self-described application exclusively to state courts. In

fact, the Supreme Court has long held that a state's own characterization of its laws is not determinative in the *Erie* analysis, and that, instead, a federal court sitting in diversity must determine whether a state provision is "substantive" by examining the practical ramifications of the decision. *See Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). To this end, the longstanding "outcome determinative" test, as well as an assessment of the Emergency Order's effect in light of *Erie*'s twin aims, confirms that it is substantive law that should be applied in this diversity suit. *See id.* at 109 (establishing the "outcome determinative" analysis); *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) ("The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."). The Emergency Order is outcome determinative because, by extending the length of time a litigant has to file suit, it alters the outcomes of cases that would not have otherwise been timely filed. Those suits can now be heard on the merits instead of being dismissed on procedural grounds. The so-called twin aims of the *Erie* doctrine—to discourage forum shopping and to avoid inequitable administration of the laws—are similarly implicated here. If this Court concludes that the Emergency Order was procedural and inapplicable in federal court, it would result in differing, unequal outcomes in the two forums. Plaintiff would be able to bring certain claims in Maryland state court that it could not bring here, which would encourage precisely the sort of forum shopping that *Erie* aims to prevent.

The foregoing *Erie* assessment, concluding that the Emergency Order is state substantive law, is further supported by several federal courts across the country which have considered similar pandemic emergency orders issued by their state's highest courts. To date, those courts have consistently applied those state court tolling orders in calculating limitations periods in diversity

cases. *See, e.g.*, *Bownes v. Borroughs Corp.*, No. 1:20-CV-964, 2021 WL 1921066, at *2 (W.D. Mich. May 13, 2021) (including the Michigan Supreme Court's order tolling the statute of limitations in its timeliness calculations for a filing in federal court); *Murden v. Wal-Mart*, No. 2:20-CV-2505-JPM, 2021 WL 863201, at *2-3 (W.D. Tenn. Mar. 8, 2021) (finding that certain claims fell "squarely within the Tennessee Supreme Court's Administrative Order," which extended statutes of limitation in light of COVID-19, and thus was timely filed in federal court). Most directly on point here, a federal district court in Texas addressed a similar set of orders from the Texas Supreme Court extending various deadlines and limitations periods. *Allen v. Sherman Operating Co., LLC*, No. 4:20-CV-290-SDJ-KPJ, 2021 WL 860458, at *7-11 (E.D. Tex. Feb. 18, 2021). The court in *Allen* conducted an in-depth *Erie* analysis and ultimately concluded that the Texas orders were substantive law, explicitly rejecting the notion that the orders were purely procedural mechanisms with no authority beyond the state courts of Texas. *Id.* Specifically, the *Allen* court concluded that the orders were outcome determinative for much the same reasons this Court has here and identified application of the orders as necessary to avoid forum shopping and ensure equitable administration of the laws. *Id.* at *9. Closer to home, in March of this year, another court in the District of Maryland, sitting in diversity, concluded that Maryland's Emergency Order "tolled statutes of limitation . . . rendering [the plaintiff's] claims timely if adequately pleaded." *Robinson v. City of Mount Rainier*, No. GJH-20-2246, 2021 WL 1222900, at *14 (D. Md. Mar. 31, 2021). As this case law suggests, courts across the country, including at least one other court in this District, have treated state court emergency orders as substantive law, importing and applying their tolling effect in federal court as required by *Erie*.[2]

[2] Defendants point to a single sentence in another opinion from this District, in which the court concluded the Emergency Order was inapplicable to a timeliness question. *See Kumar v. First Abu Dhabi Bank USA N.V.*, No. CV ELH-20-1497, 2020 WL 6703002, at *6 (D. Md. Nov. 13,

For the foregoing reasons, Defendant's contention that the Emergency Order and its authorizing legislation limits the Order's application solely to cases filed in Maryland state court falls short. To find that a state could prevent a federal court from applying what is clearly the substantive law simply by purporting to limit its scope to state courts would flip *Erie* on its head and would fundamentally alter the nature of diversity actions. The Court instead concludes that the Emergency Order must be applied in diversity cases—assuming it is constitutionally valid under Maryland law.

b. Validity of the Emergency Order

Though the Court has determined the Emergency Order is substantive law that tolls Maryland's the statute of limitations, there remains a potential barrier to its application: its potential invalidity. The parties have not identified any case law assessing the Emergency Order's (or other similar administrative actions') validity, and the Court not found any Maryland precedent on point. The Maryland Constitution explicitly empowers the Maryland Court of Appeals to "adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law." Maryland Constitution, Article IV, § 18. Even so, this language only refers to "practice and procedure in the administration of the . . . courts," which does not clearly or definitively include modification of the substantive statutes of limitation passed by the Maryland legislature. In other contexts, Maryland courts have distinguished between legislatively-passed statutes and judicially-enacted

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2020) ("The guidance and protocols of the Maryland State judiciary do not apply here, as the federal judiciary is separate from the State."). This Court is unconvinced that the dicta in that case represents a considered rejection of the substantive analysis set forth above.

rules on separations of powers grounds. *See, e.g.*, *Consol. Const. Servs., Inc. v. Simpson*, 372 Md. 434, 450 (2002) ("[T]he fact that the Maryland Rules have the force of law does not mean that a rule is a statute."). Put simply, the fact that the Emergency Order, unilaterally issued by Chief Judge Barbera, has such a deeply substantive effect—tolling a statutory limitations period for an extended period of time rather than making a mere short-term procedural or administrative change to filing procedures—raises a question as to its constitutional validity.

While "[c]ertification does not constitute 'a panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state,'" *Swearingen v. Owens–Corning Fiberglas Corp.*, 968 F.2d 559, 564 (5th Cir. 1992), the question of the Emergency Order's validity is uniquely ill-suited for resolution by a federal district court because it implicates far-reaching questions as to the functioning and authority of the Maryland state courts, particularly during unprecedented emergencies like the COVID-19 pandemic, *see Bourgeois v. Live Nation Ent., Inc.*, No. CIV.A. ELH-12-58, 2012 WL 2234363, at *8 (D. Md. June 14, 2012) (citing, among other factors, "the potentially far-reaching impact" of a question's resolution as a reason to certify). Defendants' point is well-taken that certification of the validity question would require the Maryland Court of Appeals to determine whether its own actions violated Maryland's Constitution, thus coming into tension with the longstanding principle that "no man may judge himself." However, there are overwhelming federalism concerns implicated by a federal district court potentially concluding, on entirely state law grounds, that Chief Judge Barbera did not have the authority to toll the statutes of limitation in the fashion she did. Such a decision would dramatically alter the Maryland's legal landscape, possibly upending myriad cases in Maryland state court that have up to this point been allowed to proceed due to the tolled limitations period. The Court of Appeals is indisputably better positioned to interpret Maryland's

Constitution on this question and is better equipped to analyze the interplay between the state's laws and the state court's administrative and procedural authority given the far-reaching consequences for the Maryland court system. While it does not make this decision lightly, this Court concludes that certification of the question of the Emergency Order's validity under Maryland's Constitution is appropriate.

c. Attorneys' Fees and the Amount in Controversy

Plaintiff focuses its briefing near-exclusively on a different issue, namely its contention that it can meet the amount in controversy requirement even if the claims at issue are time-barred by virtue of its contract-based claim for attorneys' fees. *See* ECF 30 at 2-8. Regardless of the merits of this argument, it does not impact the Court's analysis as to whether certification is appropriate. Even if it is true that the amount in controversy requirement can be otherwise satisfied, this Court will still eventually have to determine whether the allegedly time-barred claims can be substantively included in this lawsuit. Put differently, the question of whether the Emergency Order is valid and thus has tolled the statute of limitations is not only relevant to subject matter jurisdiction but also to the scope of the claims to be considered by the trier of fact in this Court. Moreover, if the claims are ultimately found not to be time-barred because the Emergency Order is valid, then it is irrelevant whether the amount in controversy can be met without the time-barred claims. It is thus possible that, depending on the Maryland Court of Appeals' decision, it may be unnecessary for the Court to evaluate Plaintiff's argument about its attorneys' fees. For these reasons, the Court will not presently evaluate the merits of Plaintiff's contention and will wait until the Maryland Court of Appeals has taken action on the certified question.

IV. CONCLUSION

For the reasons set forth above, the Court will certify some form of the following question to the Maryland Court of Appeals, subject to additional wording input from the parties:

> Did the Maryland Court of Appeals act within its enabling authority under, *inter alia*, the State Constitution and the State Declaration of Rights when its April 24, 2020 Administrative Order tolled Maryland's statutes of limitation in response to the COVID-19 pandemic?

Additionally, pursuant to Maryland Rule 8-305(b), the parties are directed to submit to the Court proposed relevant factual allegations to be submitted to the Maryland Court of Appeals and to confer as to which party shall be treated as the appellant in the certification procedure. As a final point, the Court will administratively terminate Defendants' presently pending motion to dismiss, ECF 23, subject to reopening once the Maryland Court of Appeals has taken action in response to the certified question. Each of these considerations and next steps will be outlined in a separate Order, which follows.

Dated: July 2, 2021

/s/
Stephanie A. Gallagher
United States District Judge

IN THE COURT OF APPEALS OF MARYLAND

AMENDED ADMINISTRATIVE ORDER

CLARIFYING THE EMERGENCY TOLLING OR SUSPENSION OF STATUTES OF LIMITATIONS AND STATUTORY AND RULES DEADLINES RELATED TO THE INITIATION OF MATTERS AND CERTAIN STATUTORY AND RULES DEADLINES IN PENDING MATTERS

WHEREAS, Pursuant to the Maryland Constitution, Article IV § 18, the Chief Judge of the Court of Appeals is granted authority as the administrative head of the Judicial Branch of the State; and

WHEREAS, The Court of Appeals has approved Chapter 1000 of Title 16 of the Maryland Rules of Practice and Procedure setting forth the emergency powers of the Chief Judge of the Court of Appeals; and

WHEREAS, In instances of emergency conditions, whether natural or otherwise, that significantly disrupt access to or the operations of one or more courts or other judicial facilities of the State or the ability of the Judiciary to operate effectively, the Chief Judge of the Court of Appeals may be required to determine the extent to which court operations or judicial functions shall continue; and

WHEREAS, Due to the outbreak of the novel coronavirus, COVID-19, and consistent with guidance issued by the Centers for Disease Control, an emergency exists that poses a threat of imminent and potentially lethal harm to individuals who may come into contact with a court or judicial facility and personnel; and

WHEREAS, The COVID-19 emergency continues to require comprehensive measures to protect the health and safety of Maryland residents and Judiciary personnel and comply with the guidelines of the Centers for Disease Control, including the stay-at-home orders issued by the Governor and restricted operations of the courts and judicial facilities, and is causing delays in the processing of routine matters; and

WHEREAS, The impact of the restrictions required to respond to the COVID-19 pandemic has had a widespread detrimental impact upon the administration of justice, impeding the ability of parties and potential litigants to meet with counsel, conduct

research, gather evidence, and prepare complaints, pleadings, and responses, with the impact falling hardest upon those who are impoverished; and

WHEREAS, the detrimental impact of the COVID-19 pandemic is so widespread as to have created a general and pervasive practical inability for certain deadlines to be met,

NOW, THEREFORE, I, Mary Ellen Barbera, Chief Judge of the Court of Appeals and administrative head of the Judicial Branch, pursuant to the authority conferred by Article IV, § 18 of the Maryland Constitution, do hereby order this 24th day of April 2020, that:

(a) Pursuant to Maryland Rule 16-1003(a)(7), all statutory and rules deadlines related to the initiation of matters required to be filed in a Maryland state trial or appellate court, including statutes of limitations, shall be tolled or suspended, as applicable, effective March 16, 2020, by the number of days that the courts are closed to the public due to the COVID-19 emergency by order of the Chief Judge of the Court of Appeals; and

(b) Justice requires that the ordering of the suspension of such deadlines during an emergency as sweeping as a pandemic be applied consistently and equitably throughout Maryland, and no party or parties shall be compelled to prove his, her, its, or their practical inability to comply with such a deadline if it occurred during the COVID-19 emergency to obtain the relief that this Administrative Order provides; and

(c) Pursuant to Maryland Rule 16-1003(a)(7), all statutes and rules deadlines to hear pending matters shall be tolled or suspended, as applicable, effective March 16, 2020, by the number of days that the courts are closed to the public due to the COVID-19 emergency by order of the Chief Judge of the Court of Appeals; and

(d) Such deadlines further shall be extended by a period to be described in an order by the Chief Judge of the Court of Appeals terminating the COVID-19 emergency period; and

(e) Any such filings made within the period to be described in (c) shall relate back to the day before the deadline expired; and

(f) To the extent that this Administrative Order conflicts with extant Administrative Orders or local administrative orders, this Administrative Order shall prevail,

except as provided in Section (t) of the Second Amended Administrative Order Expanding Statewide Judiciary Restricted Operations Due to the COVID-19 Emergency, filed on April 14, 2020, and the Administrative Order on Expanding the Statewide Suspension of Jury Trials and Suspending Grand Juries, filed April 3, 2020; and

(g) This Administrative Order will be revised as circumstances warrant.

/s/ Mary Ellen Barbera
Mary Ellen Barbera
Chief Judge
Court of Appeals of Maryland

Filed: April 24, 2020

Pursuant to Maryland Uniform Electronic Legal Materials Act (§§ 10-1601 et seq. of the State Government Article) this document is authentic.

Suzanne Johnson
2020-04-24 16:30-04:00

Suzanne C. Johnson, Clerk

/s/ Suzanne C. Johnson
Suzanne C. Johnson
Clerk
Court of Appeals of Maryland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE:	*	
COURT OPERATIONS UNDER THE EXIGENT	*	MISC. NO. 00-308
CIRCUMSTANCES CREATED BY COVID-19	*	

*****

SECOND AMENDED STANDING ORDER 2020-03

WHEREAS, the Governor of the State of Maryland has declared a state of emergency in response to the spread of the novel coronavirus known as COVID-19; and

WHEREAS, the Centers for Disease Control and Prevention and other public health authorities have advised taking precautions to reduce the possibility of exposure to the virus and slow the spread of the disease; and

WHEREAS, preventing the spread of COVID-19 requires limiting public contact to essential matters; and

WHEREAS, participants in court proceedings are necessarily often in close proximity to each other, it is hereby

ORDERED by the United States District Court for the District of Maryland that, effective immediately, all civil and criminal petit jury selections and jury trials scheduled to commence now through April 24, 2020 before any district or magistrate judge in any U.S. courthouse in the District of Maryland are POSTPONED and CONTINUED pending further Order of the Court; and it is further

ORDERED that with regard to criminal trials, due to the Court's reduced ability to obtain an adequate spectrum of jurors and the effect of the above public health recommendations on the availability of counsel and Court staff to be present in the courtroom, the time period of the continuances implemented by this Order will be excluded under the Speedy Trial Act, as the Court specifically finds that the ends of justice served by ordering the continuances outweigh the best interests of the public and each defendant in a speedy trial, pursuant to 18 U.S.C. § 3161(h)(7)(A); and it is further

ORDERED that all other civil, criminal, and bankruptcy proceedings in the U.S. District Court for the District of Maryland, including court appearances, trials, hearings, settlement conferences, conference calls, naturalization and admission ceremonies, grand jury meetings, and Central Violations Bureau proceedings (misdemeanor and traffic dockets) now scheduled to occur from March 16, 2020, through March 27, 2020, are POSTPONED and will be rescheduled at a later date, unless the presiding judge in an individual case issues an order after the date of this Order directing that a particular proceeding will be held on or before March 27, 2020. All filing deadlines now set to fall between March 16, 2020, and March 27, 2020, are EXTENDED by fourteen (14) days, unless the presiding judge in an individual case sets a different date by an order issued after the date of this Order. Chambers will contact counsel to reschedule proceedings when appropriate; and it is further

ORDERED that due to the unavailability of a grand jury in this District, the 30-day time period for filing an indictment or an information is TOLLED as to each defendant during the time period March 16, 2020 through March 27, 2020, in alignment with 18 U.S.C. § 3161(b); and it is further

ORDERED that the Court will remain open for emergency criminal, civil, and bankruptcy matters related to public safety, public health and welfare, and individual liberty; and it is further

ORDERED that this Order does not toll any applicable statute of limitations. Electronic filing through CM/ECF will remain available, and self-represented litigants may deposit and date-stamp papers in drop boxes at each courthouse between 9:00 a.m. and 4:00 p.m., Monday through Friday. For emergency criminal matters, please contact the assigned duty magistrate judge. For emergency civil matters, please contact the Clerk's Office at (410) 962-3625 or (301) 802-6170. For emergency bankruptcy matters, please contact the Bankruptcy Court Clerk's Office at (410) 962-2688 for Baltimore and (301) 344-8018 for Greenbelt; and it is further

ORDERED that further Orders addressing COURT OPERATIONS UNDER THE EXIGENT CIRCUMSTANCES CREATED BY COVID-19 will be entered as circumstances warrant.

March 14, 2020
Date

James K. Bredar
Chief Judge