STATE OF MICHIGAN

IN THE SUPREME COURT

TIMIKA RAYFORD,

Plaintiff-Appellant,

-vs-

AMERICAN HOUSE ROSEVILLE I, LLC, d/b/a AMERICAN HOUSE EAST I, d/b/a AMERICAN HOUSE,

Defendant-Appellee.

Supreme Court No. 163989

Court of Appeals No. 355232

Macomb County Circuit Court No. 2020-001548-CD

_____/

PROPOSED BRIEF *AMICUS CURIAE* ON BEHALF OF THE MICHIGAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

MARK GRANZOTTO, P.C.

BETH A. WITTMANN (P63233)
Attorney for Amicus Curiae Michigan Association For Justice
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Cases **Page**

Court Rules

Statutes

Other Authorities

STATEMENT REGARDING QUESTIONS PRESENTED

I. SHOULD THIS COURT REVERSE THE COURT OF APPEALS DECISION WHERE THE CONTRACTUAL LIMITATIONS PROVISION THAT MS. RAYFORD WAS REQUIRED TO SIGN AS A CONDITION OF EMPLOYMENT WAS UNENFORCEABLE AS A VIOLATION OF MICHIGAN PUBLIC POLICY?

Amicus Curiae, the Michigan Association for Justice, says "Yes."

Plaintiff-Appellant says "Yes."

Defendant-Appellee says "No."

II. IN THE ALTERNATIVE, SHOULD THIS COURT REVERSE THE COURT OF APPEALS DECISION WHERE THE CONTRACTUAL LIMITATIONS PROVISION IS AN UNCONSCIONABLE CONTRACT OF ADHESION AND THEREFORE UNENFORCEABLE?

Amicus Curiae, the Michigan Association for Justice, says "Yes."

Plaintiff-Appellant says "Yes."

Defendant-Appellee says "No."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS[1]

Timika Rayford filed an application for leave to appeal in this Court on January 27, 2022, seeking review of the Court of Appeals opinion dated December 16, 2021. Among the issues raised in Ms. Rayford's application for leave was the question of whether a document titled "Employee Handbook Acknowledgment" that purported to shorten the limitations period for the filing of a claim under the Elliot Larsen Civil Rights Act is an unconscionable contract of adhesion. Acknowledgment (DX-2, Bates 19b).[2]

On June 23, 2023, this Court issued an order granting oral argument on the application and requested supplemental briefing addressing whether *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234 (2001) correctly held that contractual limitations clauses that restrict civil rights claims do not violate public policy.

Following oral argument held on November 8, 2023, this Court issued an order on May 23, 2024, granting leave to appeal. Among the issues this Court requested to be briefed are: "(1) whether *Clark v DaimlerChrysler Corp*, 268 Mich App 138 (2005), properly extended this Court's holding in *Rory v Continental Ins Co*, 473 Mich 457 (2005), to employment contracts (see also *Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co*, 410 Mich 118 (1981), overruled by *Rory*, 473 Mich 457, and *Herweyer v Clark Hwy Servs, Inc*, 455 Mich 14 (1997), overruled by *Rory*, 473 Mich 457); and (2) if not, whether the contract at issue in this case is an unconscionable contract of adhesion."

---

[1]Pursuant to MCR 7.312(H)(4), the undersigned represents that no counsel for any of the parties was involved in the preparation of this brief. The undersigned further represents that neither party made a financial contribution toward the preparation of this brief.

[2] All references to "DX-__" refer to the appendix filed by the defendant.

ARGUMENT

I. THE CONTRACTUAL LIMITATIONS PROVISION THAT MS. RAYFORD WAS REQUIRED TO SIGN AS A CONDITION OF EMPLOYMENT WAS UNENFORCEABLE AS A VIOLATION OF MICHIGAN PUBLIC POLICY.

The plaintiff in this case has asked the Court to reverse the Court of Appeals decision in *Clark v DaimlerChrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005), which extended this Court's decision in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005) to employment contracts. Because *Clark* was incorrectly decided, amicus curiae joins plaintiff in this request.

In *Rory*, this Court determined that a one-year contractual limitations period contained in an insurance policy was enforceable. In doing so, this Court made it clear that contractually agreed upon limitations periods were to be treated like any other contracts. This meant that an unambiguous provision calling for a shorter statute of limitations is to be enforced. But, as this Court in *Rory* further found, it also meant that such provisions are subject to the traditional limitations that apply to all contract provisions. Specifically, the *Rory* Court recognized that, like any other contract, a contractual provision that shortens the statute of limitations will not be enforced if it violates Michigan laws or public policy and such provisions are also subject to traditional contract defenses. 473 Mich at 470-471, 489.

The *Rory* Court further held that in determining whether a contract violated public policy, "we must look to 'policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.'" 473 Mich at 471, quoting *Terrien v Zwit*, 467 Mich 56, 66-67; 648 NW2d 602 (2002). Based on this standard, this Court should conclude that application of American House's 180-day

contractual limitations period in employment actions violates Michigan public policy and, for that reason, this provision cannot be enforced here.

Despite acknowledging the public policy standard set forth in *Rory*, the Court of Appeals in *Clark* improperly extended the holding in *Rory* to an employment contract provision that reduced the limitations period for bringing a civil rights suit against an employer. *Clark*, 268 Mich App at 142. The employment contract at issue in *Clark* barred lawsuits filed more than six months after the challenged employment action. The *Clark* Court held that, under *Rory*, a court is compelled to enforce an unambiguous contractually-modified period of limitations as written unless it is contrary to law or public policy. *Clark*, 268 Mich App at 141-142. The *Clark* Court concluded, however, that the contractually-modified six-month limitation provision in that case was not contrary to law or public policy. *Id.*, at 142.

The *Clark* Court held that the contract provision was not contrary to law because there are no statutes explicitly prohibiting the contractual modification of limitations periods in the employment context. *Id*., at 142 The *Clark* Court further held that the shortened limitations period contained in the contract did not violate public policy because Michigan has no general policy or statutory enactment prohibiting the contractual modification of limitations periods provided by statute. *Id.*

The Court of Appeals in this case relied upon its decision in *Clark* when affirming the circuit court's order granting summary disposition to defendant American House. Consistent with the holding in *Clark*, the Court of Appeals below held that unambiguous employment contract provisions providing for a shortened limitations period are to be enforced as written "unless the provision violates the law or public policy." Opinion (DX-17, Bates 164b). *Clark*, however, is

incompatible with the holding in *Rory* and was incorrectly decided.

It has been long established that there are constitutional restraints that are applicable to the enforcement of statute of limitations. These constitutional restraints were the subject of this Court's venerable decision in *Price v Hopkin*, 13 Mich 318 (1865), where Justice Thomas Cooley wrote:

> It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought . . . and a statute that fails to do this cannot possibly be sustained as a law of limitations, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law.

Thus, it is a foundation of Michigan public policy, grounded in constitutional principles, that a statute of limitation must afford a party a reasonable time in which to file suit. *McKisson v Davenport*, 83 Mich 211, 215; 417 NW 100 (1890) ("Every suitor must have a reasonable time in which to commence an action to enforce his rights. . ."). The fundamental public policy reflected in such cases as *Price* and *McKisson,* while addressed to statutes fixing the limitations periods, must be equally applicable to contractual agreements that have the effect of shortening the limitations periods established by the Legislature.

This Court has repeatedly recognized that statutes of limitations "are the legislative determination of the *reasonable* period of time given to a plaintiff to pursue a claim in a court of law that could provide legal relief." *Carter v DTN Mgmt Co*, __ Mich __; __ NW3d __ (2024) (emphasis added). This Court emphasized in *Carter* the policy rationale for statutes of limitations, including "the prompt recovery of damages, penalizing plaintiffs who are not industrious in pursuing claims, security against stale demands, relieving defendants' fear of litigation, prevention of fraudulent claims, and a remedy for general inconveniences resulting from delay." *Id.* As acknowledged by this Court in *Carter*, "the Legislature makes the policy determination of the time limit that plaintiffs have

for seeking relief in our courts." *Id.*

Here, the Legislature has directed that a plaintiff alleging discrimination in violation of the Elliot Larsen Civil Rights Act ("ELCRA") has three years to commence an action against an employer. MCL 600.5805(2). In *Garg v Macomb County Cmty Mental Health Servs*, 472 Mich 263, 282 n 8; 696 NW2d 646 (2005), this Court recognized that the three-year limitations period applicable to claims for violations of ELCRA reflects the Legislature's balancing of the benefit of setting of a deadline on stale claims with the cost that some acts of discrimination will go unredressed. Employment discrimination claims brought under state law are brought under ELCRA. Imposing a 180-day limitations period for "any claim or lawsuit" arising out of employment or an application for employment is contrary to the public policy underlying the statutes of limitations applicable to such claims, and fails to afford a reasonable time within which suit may be brought. *McKisson*, 83 Mich at 215. And contrary to *Garg*, the contractually-shortened limitations period will result in the dismissal of legitimate claims and illegal acts of discrimination will go unredressed. Under the standard outlined in *Rory*, the public policy of this state, as reflected in our state constitution, statutes, and common law, does not support allowing employers to shorten the statutory period of limitations for employment actions.

In holding that a shortened limitations period in an employment contract does not violate public policy, the Court of Appeals in *Clark* relied upon this Court's holding in *Rory* that "Michigan has no general policy or statutory enactment" prohibiting shortened limitations periods. *Clark*, 268 Mich App at 142, citing *Rory*, 473 Mich at 471. While this Court did hold in *Rory* that nothing in Michigan's statutes explicitly address contractually shortened limitations periods, the *Rory* Court specifically noted that the Legislature *had* enacted a statute that permits insurance contract provisions

to be evaluated and rejected on the basis of "reasonableness" by the Commissioner of the Office of Financial and Insurance Services. *Rory*, 473 Mich at 474-476. The *Rory* Court found that the Legislature "clearly" assigned the responsibility of evaluating the reasonableness of an insurance contract to the Commission of Insurance, "the person within the executive branch charged with reviewing and approving insurance policies." *Rory*, 473 Mich at 475. The *Rory* Court therefore concluded that the explicit "public policy" of Michigan "is that the reasonableness of insurance contracts is a matter for the executive, not judicial branch of government." *Id.*, at 476.

In extending the *Rory* Court's public policy holding to a contractually-shortened limitations period in an employment contract, the *Clark* Court failed to acknowledge that, unlike the insurance policy at issue in *Rory*, there is no similar "commissioner" within the executive branch of government tasked with the statutory power to evaluate the reasonableness of employment contracts. Whereas the explicit "public policy" of Michigan is that the reasonableness of *insurance contracts* is a matter for the executive branch of government given the statutory creation of an Insurance Commissioner, it follows that the "public policy" of Michigan is that the reasonableness of *employment contracts* must remain a matter for the judicial branch of government. To hold otherwise improperly eliminates *any* safeguards for the imposition of unreasonably shortened limitations periods to employment contracts.

There exists another reason why the *Clark* Court erred in extending the "public policy" holding in *Rory* to employment contracts. The Court of Appeals in *Clark* failed to acknowledge the critical difference between an insurance policy that contractually shortens the limitations period, which was at issue in *Rory*, and a provision in an employment agreement that contractually shortens the period of limitations for commencing a civil rights claim against an employer. The contractual

provision at issue in *Rory* was included in a policy for uninsured motorist insurance benefits and shortened the time period for the insured to bring a claim for uninsured motorist coverage to 1 year from the date of the accident. 473 Mich at 465. As noted by the *Rory* Court, uninsured motorist insurance benefits are optional benefits that are not compulsory coverage mandated by statute. The *Rory* Court therefore found that the rights and limitations of uninsured motorist coverage "are purely contractual" and are construed without reference to the statutory scheme set forth in Michigan's no fault act. *Id.*, at 465-466.

Unlike *Rory*, the contractual provision at issue here and in *Clark* shortened the time period for the plaintiff to bring a *civil rights action* against an employer. Plaintiff's civil rights claim is provided for in ELCRA, MCL 37.2101 *et seq.*, which is a comprehensive statutory scheme designed to protect people from acts of discrimination. *Safiedine v City of Ferndale*, 278 Mich App 476, at 477-478; 753 NW2d 260 (2008), vacated in part on other grounds, 482 Mich 995; 755 NW2d 659 (2008). The Act specifically provides that the opportunity to obtain employment without discrimination "is recognized and declared to be a civil right." MCL 37.2102(1). Michigan's Civil Rights Act mandates that in the "critically important" field of employment discrimination, irrelevant characteristics such as age, race, sex, and marital status should not make a difference in hiring and firing decisions. *Safiedine*, 278 Mich App at 478. As this Court held in *Radtke v Everett*, 442 Mich 368; 501 NW2d 155 (1993):

> The Civil Rights Act "is aimed at 'the prejudices and biases' borne against persons because of their membership in a certain class, and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." *Miller v CA Muer Corp*, 420 Mich 355, 363; 362 NW2d 650 (1984) (citations omitted). Accordingly, the act declares that "[a]n employer shall not … discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of … sex. …" MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). See

> also MCL 37.2202(1)(c); MSA 3.548(202)(1)(c). Hence, the essence of a sex discrimination civil rights suit is that similarly situated people have been treated differently because of their sex. *C Thorrez Industries, Inc v Civil Rights Comm*, 88 Mich App 704, 708; 278 NW2d 725 (1979).

Radtke, 442 Mich at 379.

Given the recognized importance of adjudicating antidiscrimination claims against employers, the imposition of a contractually-shortened period of limitations violates public policy, i.e., "policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Rory*, 473 Mich at 471. There is a fundamental difference between the right to bring an action for violation of civil rights and the right to bring a claim for optional insurance benefits that are not mandated by law or statute.[3]

A finding that the 180-day contractual shortening of the limitations period violates public policy fits neatly in the framework set forth in this Court's recent decision in *Soaring Pine Capital Real Estate & Debt Fund II, LLC v Park St Grp Realty Servs, LLC*, 511 Mich 89; 999 NW2d 8 (2023). In *Soaring Pine*, this Court addressed a "usury savings clause" included in a loan agreement, which required a borrower to pay the maximum legal interest rate if the court determines that the other contractual terms impose an illegal interest rate. This Court held that a usury savings clause is ineffective and would not be enforced if the loan agreement otherwise requires a borrower to pay an illegal interest rate. 511 Mich at 120.

---

[3] It is notable that the specific holding in *Rory* applicable to insurance contracts has been abrogated by regulation. See Mich Admin Code R 500.2211, R 500.2212. Rule 500.2212 declares: "A shortened limitation of action clause unreasonably reduces the risk purported to be assumed in the general coverage of the policy within the meaning of MCL 500.2236(5)." These regulations leave no doubt that shortened limitation periods violate Michigan public policy.

In reaching this conclusion, this Court looked to the public policy behind Michigan's usury laws, which is to protect borrowers from excessive interest rates imposed by lenders and bar recovery to, and penalize, the lender who attempts to enforce an usurious contract. 511 Mich at 102, 110. This Court noted that the statutory scheme "reflects a legislative judgment that, at least as a general matter, there is 'such an inequality in the relation of the lender and borrower that the borrower's necessities deprived him of freedom in contracting and placing him at the mercy of the lender.'" *Id.*, at 110.

This Court ultimately concluded that enforcing a usury savings clause would undermine the public policy reflected in Michigan's usury laws because it would "nullify" the statutory remedies for usury, thereby relieving lenders of their duty to ensure their loans have a legal interest rate. 511 Mich at 94, 120. In so holding, this Court rejected the Court of Appeals' reasoning in affirming the usury savings clause that statutes and contracts must be enforced as written when those clauses violate public policy:

> In holding that usury savings clauses are generally enforceable, the Court of Appeals acknowledged that "[i]t is certainly possible that unscrupulous lenders could take advantage of borrowers by including within a contract a usury-savings clause while still seeking to collect unlawful interest, with the hope (and perhaps expectation) that the unlawful rates will be paid by the borrower and not be challenged in court." *Soaring Pine Capital*, 337 Mich App at 546 n 6. But the Court reasoned that "under the common law of contracts and the statute as written, these clauses are permissible." *Id*. In so reasoning, the Court of Appeals failed to recognize that the usury statutes need not explicitly prohibit usury savings clauses for such clauses to violate public policy. See *Smith*, 502 Mich 624; *Suchodolski*, 412 Mich at 695. The Court of Appeals also failed to appreciate that the general rule of enforcing contracts as written must yield to the public policy reflected by the usury statutes and that the public policy of protecting borrowers reflected in these statutes would be significantly undermined if usury savings clauses were enforceable in all circumstances.
>
> *Soaring Pine*, 511 Mich at 122.

Similarly here, the Court of Appeals erred in enforcing the 180-day contract provision as written when that provision violates the public policy reflected in the Civil Rights Act, which is to protect employees from acts of discrimination by their employers because of "religion, race, color, national origin, age, sex, sexual orientation, gender identity or expression, height, weight, or marital status." MCL 37.2202(1)(a). As in *Soaring Pine*, the public policy of protecting employees reflected in the Civil Rights Act would be significantly undermined if the contractually-shortened period of limitations was enforceable. Moreover, the 180-day provision is unnecessary to protect employers from stale claims. Additionally, as recognized in *Soaring Pine*, the Civil Rights Act need not explicitly prohibit the shortening of the period of limitations for such a contract provision to violate public policy as reflected in the Act itself.

In her well-reasoned dissenting opinion in *Clark*, Judge Janet T. Neff addressed many of these same concerns raised in this brief. In finding that the six-month limitations period included on a "preprinted employment application form" violates public policy, Judge Neff aptly noted that a shortened six-month limitations period is unnecessary to protect employers but imposes an unnecessary and substantial hardship on a plaintiff:

> In many cases, shortening the period of limitations to six months in an employment context imposes a hardship on a plaintiff, thwarting legitimate claims. In the case of a job loss, an employee's foremost concern is maintaining a livelihood—pursuing legal action is secondary, both in priority and time. While six months is conceivably sufficient to file certain actions, in many cases, such as this civil rights action, it is insufficient to properly seek legal counsel, investigate, and file a claim. On the other hand, shortening the limitations period to six months is extreme and unnecessary to protect employers from stale claims and to enable employers to defend against claims.
>
> *Clark*, 268 Mich App at 155.

Judge Neff also correctly noted that in allowing an employer to impose a shortened six-month

limitations period, the *Clark* majority was permitting employers to supplant the Legislature's determination of the reasonable time period in which plaintiffs may file a civil rights claim:

> "Historically, courts have relied on the Legislature to establish limitation periods." *Herweyer, supra* at 23. By sanctioning defendant's unilateral provision for a six-month limitations period (presumably imposed on everyone who completes the job application form), the courts are permitting employers to effectively determine the limitations period and thereby supplant the Legislature's determination. There is nothing in the courts' reasoning to prevent all employers in Michigan from now simply inserting the judicially approved six-month limitations period in preprinted employment application forms, effectively "legislating by imposition" a new severely shortened limitations period for employment-related claims. Such legislation by employer imposition overrides well-established contract principles that have evolved for the orderly conduct of business and is contrary to longstanding public policy. The six-month limitations period in this case should therefore be found unenforceable.
>
> *Clark*, 268 Mich App at 155-156.[4]

Additionally, as noted in the concurring opinion filed in *McMillon v City of Kalamazoo*, 511 Mich 855; 983 NW2d 79 (2023), Justice Elizabeth M. Welch noted the fact that other states have found that contractual provisions shortening the period of limitations for discrimination lawsuits violate public policy:

> Other states have recently found that contractual agreements to shorten the period to bring discrimination lawsuits are invalid. See, e.g., *Ellis v US Security Assoc*, 224 Cal App 4th 1213, 1226 (2014) (holding that a shortened limitations period in plaintiff's job application was unreasonable and against public policy where the plaintiff filed her sexual-harassment claims within one year of receiving her right-to-sue letter from the California Department of Fair Employment and Housing and two years of the incident for the common-law claims—within the statutory limitations period for both types of claims); *Rodriguez v Raymours Furniture Co, Inc*, 225 NJ 343 (2016)

[4] The concern expressed by Judge Neff regarding the imposition of severely shortened limitations periods is not unreasonable or an attempt at fear-mongering. One need only look to this Court's order in *Jackson v State Farm Mut Auto Ins Co*, 472 Mich 942; 698 NW2d 400 (2005), wherein this Court vacated the judgment of the Court of Appeals that had rejected a contractual 30-day notice period set forth in an insurance contract. Barring any oversight of the reasonableness of these terms has led to the imposition of extremely short time periods in which a party must protect the right to file suit.

> (holding that parties may not shorten the statutory limitations period of the state's antidiscrimination law because it violates public policy); *Croghan v Norton Healthcare, Inc*, 613 SW3d 37, 43 (Ky App, 2020) (simultaneously finding that a contractual six-month period to bring claims for age and disability discrimination, hostile work environment, and retaliation under the Kentucky Civil Rights Act violated a statutory limitation on contracts shortening a statute of limitations more than 50%, and that a six month period is unreasonable because it requires a claimant to sue prematurely or without adequate investigation and placed an undue burden on the courts, which effectively abrogated the rights sought to be vindicated).

McMillon, 511 Mich at 858-859.

Consistent with these other states, the contractual limitations provision that Ms. Rayford was required to sign as a condition of employment was unenforceable as a violation of Michigan public policy.

For all of these reasons, the Court of Appeals erred in affirming the circuit court's grant of summary disposition. In employment actions, the enforcement of the 180-day limitations period that defendant seeks to impose would violation Michigan public policy that "[e]very suitor must have a reasonable time in which to commence an action. . ." *McKisson*, 83 Mich at 215. This Court should reverse the Court of Appeals decision and hold that the Court of Appeals in *Clark* improperly expanded the holding in *Rory* to the employment context.

II. THE CONTRACTUAL LIMITATIONS PROVISION IS AN UNCONSCIONABLE CONTRACT OF ADHESION AND THEREFORE UNENFORCEABLE.

The second question presented by this Court assumes that the Court of Appeals in *Clark* properly extended the holding in *Rory* to employment contracts, but asks whether the contract at issue "is an unconscionable contract of adhesion." The plaintiff in this case has requested this Court reverse the Court of Appeals decision and hold that the contract is an unconscionable contract of adhesion and should not be enforced. Amicus curiae joins plaintiff in this request.

As noted above, this Court in *Rory* recognized that a contractual provision that shortens the statute of limitations will not be enforced if it violates Michigan laws or public policy. *Rory*, 473 Mich at 470-471. This Court recognized, too, that such provisions are also subject to traditional contract defenses. *Id.*, at 461, 470-471, 489. This Court noted that traditional contract defenses include duress, waiver, estoppel, fraud, or unconscionability. *Id.*, at 470 n 2, 489.

This Court in *Rory* rejected the contention that the insurance policy at issue in that case was an unenforceable "adhesion contract." 473 Mich at 476-477. The *Rory* Court recognized that the term "adhesion contract" generally was used to refer to contracts drawn up and used by enterprises with strong bargaining power while the "weaker party," who has little choice as to its terms, merely "adheres" to the terms of the contract. *Id.*, at 478-479. The *Rory* Court concluded that an adhesion contract is "simply" a contract that must be enforced according to its plain terms unless one of the traditional contract defenses applies. *Id.*, at 477.

In reaching this conclusion, the *Rory* Court overruled its earlier holding in *Herweyer v Clark Hwy Services, Inc*, 455 Mich 14; 564 NW2d 857 (1997). In *Herweyer*, this Court held that employment contracts differ from bond contracts given the disparity in the contracting parties' bargaining power, and are therefore deserving of close judicial scrutiny:

> We share Justice Levin's concerns. Employment contracts differ from bond contracts. An employer and employee often do not deal at arm's length when negotiating contract terms. An employee in the position of plaintiff has only two options: (1) sign the employment contract as drafted by the employer or (2) lose the job. Therefore, unlike in *Camelot* where two businesses negotiated the contract's terms essentially on equal footing, here plaintiff had little or no negotiating leverage. Where one party has less bargaining power than another, the contract agreed upon might be, but is not necessarily, one of adhesion, and at the least deserves close judicial scrutiny.
>
> *Herweyer*, 455 Mich at 21.

In overruling *Herweyer*, the *Rory* Court held that the holding in *Herweyer* was inconsistent with prior case law and with the principles of freedom of contract and "the liberty of each person to order his or her own affairs by agreement." *Rory*, 511 Mich at 488. The *Rory* Court therefore concluded that an adhesion contract "is simply a type of contract *and* is to be enforced according to its plain terms just like any other contract," which this Court held is "most consistent with traditional contract principles our state has historically honored." *Id.*, at 488-489 (emphasis in original).

The *Rory* Court emphasized, however, that a party may avoid enforcement of an adhesion contract by establishing one of the traditional contract defense, such as fraud, duress, unconscionability, or waiver. *Id.*, at 489. Because the plaintiffs in *Rory* had not argued that any traditional contract defense applied, the Court held that it was required to enforce the plain language of the agreement. *Id.*, at 490.

In addressing the issue of unconscionability in this case, the Court of Appeals below relied on the holding in *Clark*:

> As noted, plaintiff argues that a contract defense exists in this case—that the Acknowledgment is not enforceable because it is unconscionable. For a contract or contract provision to be unconscionable, both procedural and substantive unconscionability must exist. *Clark*, 268 Mich App at 143. "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term." *Id.* at 144. "If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability." *Id.* "Substantive unconscionability exists where the challenged term is not substantively reasonable." *Liparoto Constr, Inc*, 284 Mich App at 30 (quotation marks and citation omitted). "[A] term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience[;]" it is not sufficient that a term is advantageous to one party and foolish for the other. *Clark*, 268 Mich App at 144.
>
> Opinion (DX-17, at 165b).

The Court of Appeals rejected plaintiff's argument that the circumstances support a

determination of procedural and substantive unconscionability. Opinion (DX-17, at 165b-166b). In rendering this decision, the Court of Appeals pointed to the lack of evidence to support that Ms. Rayford had no realistic alternative to employment with defendant at the time she signed the agreement. *Id.* The Court of Appeals held that, even accepting Ms. Rayford's claim that she could not negotiate the terms of the contract and that her bargaining power was "less" than the defendant's, there was no evidence in the record demonstrating that Ms. Rayford "was not free to accept or reject the terms of employment that defendant offered." Opinion (DX-17, at 165b). The Court of Appeals further held that there is nothing in the record to establish that the Acknowledgment was substantively unconscionable, since "Michigan courts have recognized that employment agreements that shorten limitations periods are neither inherently unreasonable, nor so gross as to shock the conscious [sic]." Opinion (DX-17, at 166b), citing *Clark*, 268 Mich App at 144.

The difficulty with the Court of Appeals' conclusion in this regard is that it wholly ignores the procedural posture of this case. The defendant's motion for summary disposition was predicated on MCR 2.116(C)(7) and (C)(8). Defendant filed its motion at the very earliest stage of these proceedings, in lieu of filing an answer to the complaint and before any discovery had been conducted. The record before the Court was therefore devoid of any "evidence" of unconscionability for the simple reason that no discovery had ever occurred.

Ms. Rayford had no opportunity to request documentation from, or depose the employees of, American House to demonstrate that Ms. Rayford had no realistic alternative to acceptance of the contractually-shortened limitation provision. Plaintiff simply was never afforded an opportunity to engage in discovery to determine whether she was free to accept or reject the 180-day contractual provision, had any power to negotiate the terms of the Acknowledgment, or had any meaningful

choice but to accept employment under the terms dictated by defendant. There similarly was no evidence that American House offers its employees a choice of the terms of employment, or that Ms. Raymond would have retained her employment had she rejected the contractual provision that waived the statute of limitations applicable to her filing "any claim or lawsuit" arising out of her employment with the company.

The Court of Appeals decision affirming the dismissal of Ms. Rayford's claims due to the lack of *evidence* of procedural and substantive unconscionability was improper. Rather than summarily dismissing Ms. Rayford's claim, the lower courts should have afforded Ms. Rayford the opportunity to demonstrate that the disparity in relative bargaining power of the parties renders the contract provision substantially unreasonable. This is particularly true where the Court of Appeals seemingly recognized the disparity in relative bargaining power of the parties.

Additionally, contrary to the Court of Appeals decision, the contractually-shortened limitations period is substantively unconscionable. As noted above, the applicable statute of limitations permitted Ms. Rayford's action to be brought within three years. American House, however, exacted a shortened limitations period of 180 days on the basis of a document titled "Employee Handbook Acknowledgment," which Ms. Rayford signed. Acknowledgment (DX-2, Bates 19b). The reduction of the limitations period applicable to Ms. Rayford's civil rights claim by two and a half years is substantively unreasonable.

Judge Neff keenly addressed this issue in her dissenting opinion in *Clark*:

> Defendant's imposition of a six-month limitations period for "any claim or lawsuit relating to plaintiff's service with" defendant is also substantively unreasonable. The Legislature has determined that the appropriate limitations period applicable in this action is three years. The shortened six-month period imposed by defendant places plaintiff at a severe disadvantage in seeking redress for wrongs and is unquestionably

advantageous to defendant by permitting it to wholly avoid employee claims. The six-month limitations period does not further the purpose of promptly apprising a defendant of claims "in order that he may protect himself against fraudulent and unjust claims." 6 ALR3d at 1207. Defendant took advantage of plaintiff's situation "to drive him into an unfair bargain." *Gillam v Michigan Mortgage-Investment Corp*, 224 Mich 405, 410; 194 NW 981 (1923). These circumstances fall squarely within the defense of unconscionability.

Clark, 268 Mich App at 153-154.

For all of these reasons, the Court of Appeals decision should be reversed.

RELIEF REQUESTED

Based on the foregoing, amicus curiae, the Michigan Association for Justice, requests that this Court reverse the December 16, 2021 decision of the Court of Appeals.

MARK GRANZOTTO, P.C.

/s/ Beth A. Wittmann

BETH A. WITTMANN (P63233)
Attorney for Amicus Curiae Michigan
Association For Justice
2684 Eleven Mile Road, Suite 100
Berkley, Michigan 48072
(248) 546-4649

Dated: March 27, 2025.

CERTIFICATION PURSUANT TO MCR 7.312(H)

Beth A. Wittmann, attorney for Amicus Curiae Michigan Association For Justice, hereby certifies pursuant to MCR 7.312(H) that this brief was typed using the Corel Word Perfect word processing program. That program has a function which can calculate the total number of words contained in a document. According to that program function, there are 5,432 allowable words in this brief.

/s/ Beth A. Wittmann
Counsel for Amicus Curiae Michigan
Association For Justice