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In The Supreme Court for the State of Michigan

TIMIKA RAYFORD, PLAINTIFF-APPELLANT, VS. AMERICAN HOUSE ROSEVILLE I, LLC, d/b/a AMERICAN HOUSE EAST I and AMERICAN HOUSE, DEFENDANTS-APPELLEES.	Supreme Court No. 163989 Court of Appeals Case No.: 3552323 Macomb County Case No.: 20-001548-CD Hon. Michael E. Servitto

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

Dated: July 18, 2024,

Respectfully Submitted,

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TABLE OF CONTENTS

STATEMENT OF JURISDICTION 4

QUESTION PRESENTED 5

STATEMENT OF FACTS 6

LAW AND ARGUMENT 6

A. The Court in 6

B. The Contract at Issue in This Case is an Unconscionable Contract of Adhesion 8

C. The Court Should Follow the Analysis in 10

CONCLUSION 13

RECEIVED by MSC 7/18/2024 11:40:43 PM

TABLE OF AUTHORITIES

Cases

Camelot Excavating Co, Inc v St Paul Fire & Marine Ins Co, 410 Mich 118 (1981) 4
Clark v DaimlerChrysler Corp, 268 Mich App 138 (2005) 4
Herweyer v Clark Hwy Servs, Inc, 455 Mich 14 (1997) 4
Logan v. MGM¸ 939 F.3d 824 (6th Cir. 2019) 12
McMillon v. City of Kalamazoo, 983 N.W.2d 79 (Mich. 2023) 4
Rory v Continental Ins Co, 473 Mich 457 (2005) 4
Thompson v. Fresh Products, LLC, 985 F. 3d 509 (6th Cir. 2021) 13
Timko v Oakwood Custom Coating, *Inc.*, 244 Mich. App. 234 (2001) 12

Rules

MCR 7.203(B) 4
MCR 7.205 4
MCR 7.312(E) 7

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STATEMENT OF JURISDICTION

Plaintiff-Appellant submitted her application for leave to appeal to this Court on January 27, 2022. By order dated May 3, 2022, this Court held the application in abeyance pending the decision in *McMillon v. City of Kalamazoo*, 983 N.W.2d 79 (Mich. 2023). *McMillon* having been decided on January 11, 2023, in an order dated June 23, 2023, this Court directed the parties to file supplemental briefs. On November 8, 2023, the Court heard oral argument on Plaintiff-Appellant's application for leave to appeal the December 16, 2021, judgment of the Court of Appeals. On May 23, 2024, this Court granted Plaintiff-Appellant's application for leave to appeal, and directed the parties to file supplemental briefs in accordance with MCR 7.312(E), specifically addressing the issues of: (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.

Plaintiff-Appellant addresses the same herein.

RECEIVED by MSC 7/18/2024 11:40:43 PM

QUESTION PRESENTED

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.

   Plaintiff-Appellant answers: **"Yes."**

   Defendants-Appellees would answer: **"No."**

2. Whether the contract at issue in this case is an unconscionable contract of adhesion.

   Plaintiff-Appellant answers: **"Yes."**

   Defendants-Appellees would answer: **"No."**

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STATEMENT OF FACTS

Plaintiff-Appellant incorporates by reference the "Statement of Facts" submitted with her original application for leave to appeal.

LAW AND ARGUMENT

A. The Court in *Clark v. DaimlerChrysler Corp*., 268 Mich. App. 138 (2005), Did Not Properly Extend the Holding in *Rory v. Continental Ins. Co*., 473 Mich. 457 (2005), to Employment Contracts.

The question before this Court is *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. Plaintiff-Appellant asserts that the court in *Clark* did not properly extend the *Rory* holding to employment contracts, given the fundamental differences between employment contracts and contracts for goods or services.

Contracts for goods or services typically involve a bargained-for exchange, where both parties negotiate terms to achieve mutual benefit. This negotiation ensures that both parties relinquish something of value, creating a balanced contractual relationship. Conversely, employment contracts generally involve an employer offering terms on a "take-it-or-leave-it" basis, placing the employee in a subordinate position. The employee, in seeking to obtain or maintain employment, may have to forgo statutory rights without the employer conceding anything in return. This lack of a reciprocal exchange starkly contrasts with the balanced negotiation seen in contracts for goods or services.

In *Rory*, the Michigan Supreme Court addressed the enforceability of a contractual limitations period in an insurance policy, emphasizing that:

> Unless a contract provision violates law or one of the traditional defenses to enforceability of a contract [e.g., waiver, fraud, unconscionability] applies, a court must construe and apply unambiguous contract provisions as written.

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Rory, 473 Mich. at 461. This ruling was grounded in the context of insurance contracts, which, while often adhesive, still involve a bargained-for exchange where both parties consent to terms affecting their legal rights and obligations.

The extension of *Rory's* rationale to employment contracts in *Clark* disregards the nuanced differences highlighted in Justice Kelly's dissent in *Rory*. Justice Kelly warned against a rigid application of contract law to adhesive contracts, noting that "[i]f the consumer does not read and comprehend the individual clauses of the contract, there can be no agreement on the particular terms in them. There can be no meeting of the minds." *Rory*, 473 Mich. at 508 (Kelly, J., dissenting). This concern is even more pronounced in the context of employment contracts, where employees often have little bargaining power and must accept terms imposed by employers to secure or retain employment.

The court in *Clark* improperly applied the principles from *Rory* to an employment contract, disregarding the key differences between the two types of contracts. By doing so, the court failed to recognize that employment contracts require a different analytical approach due to their inherent imbalance of power and the lack of a true bargained-for exchange. The extension of *Rory* to employment contracts undermines the protection of statutory rights and fails to consider the unique vulnerabilities of employees in the employment relationship.

In *Rory*, this Court overruled both *Camelot Excavating Co., Inc. v. St. Paul Fire & Marine Ins. Co*., 410 Mich. 118 (1981), and *Herweyer v. Clark Hwy Servs., Inc*., 455 Mich. 14 (1997). These precedents recognized the distinct nature of different types of contracts and the need for a contextual approach to enforceability. The *Rory* decision's blanket approach disregarded these nuances, and the extension of this rationale to employment contracts in Clark only exacerbates this oversight.

Given the substantial differences between employment contracts and contracts for goods or services, we respectfully urge this Honorable Court to find that the court in *Clark* improperly extended the holding in *Rory*. Employment contracts often lack the mutual negotiation and balanced exchange present in other contracts, resulting in significant power imbalances and potential forfeiture of statutory rights for employees. By recognizing these fundamentals distinctions, the Court can correct this misapplication and ensure that employment agreements are subject to appropriate judicial scrutiny, thereby protecting the rights and interests of Michigan's workforce.

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B. The Contract at Issue in This Case is an Unconscionable Contract of Adhesion

Even if this Court finds that the Court in *Clark* properly extended the ruling in *Rory* to employment law cases, the contract in this case is an unconscionable contract of adhesion and should not be enforced. An adhesive contract is typically characterized by a significant disparity in bargaining power between the parties, where one party must accept the terms as presented without any realistic opportunity to negotiate. In this case, the employment contract presented by Defendant-Appellee exemplifies these characteristics, making it an adhesive contract.

Procedural unconscionability exists where the weaker party has no realistic alternative but to accept the term. Potential employees, when seeking employment, are driven by the necessity to meet basic needs, pay bills, and fulfill responsibilities. This fundamental requirement for sustenance places employees in a vulnerable position, with little to no leverage to negotiate terms effectively. The disparity in bargaining power means that employees often have no realistic alternative but to accept the terms imposed by employers, including provisions that shorten the statute of limitations. In this scenario, Defendant-Appellee, as the employer, had significant advantages in terms of resources, legal knowledge, and negotiating power, while Plaintiff-Appellant had limited options but to accept the terms to secure employment.

Substantive unconscionability refers to the inequity of a term being so extreme as to shock the conscience. A provision that shortens the statute of limitations in an employment contract is substantively unconscionable because it deprives employees of their statutory rights without any corresponding benefit or bargained-for exchange. The employer is not giving up anything in return; instead, they are merely limiting the employee's ability to seek redress for grievances, thereby skewing the balance of rights and responsibilities entirely in favor of the employer. This inequity is particularly pronounced given that employment is not undertaken for enjoyment but out of necessity, making the imposition of such a term unduly harsh and unjust.

However, even the majority in *Rory* noted that traditional contract defenses applied to the application of contracts of adhesion. The inequities and unequal bargaining power inherent in the employment relationship further underscore the adhesive nature of the contract in question. Employers hold significant advantages, and potential employees are often in a position of need, compelled to accept employment terms as a means of survival which creates a dynamic where employees are unable to negotiate or contest terms effectively, including those that profoundly affect their legal recourse.

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Employment contracts are quintessential contracts of adhesion, reflecting significant imbalances of power and fairness. These contracts are drafted by employers with substantially greater bargaining power and presented to employees on a non-negotiable basis as employees, who are eager or nearly desperate for employment, typically have no real opportunity to negotiate or amend these pre-drafted terms, leading to an inherent imbalance and potential unfairness.

Michigan state law provides statutory protections and specific statutes of limitations for bringing claims, particularly in employment discrimination cases. Allowing employers to contract around these statutory protections undermines the legislative intent and public policy objectives. Laypersons, often with no legal training, cannot be expected to fully comprehend the implications of shortening the statute of limitations ("SOL"). Employers, aware of this lack of understanding, sometimes wait until the SOL has expired before advising employees of the shortened period they unknowingly agreed to, effectively barring legitimate claims and denying employees their rightful day in court. The practice of embedding adhesive terms in employment contracts is pervasive.

While this Court recognized in *McMillon* that whether an employee agreed to provisions in an employment agreement is a question of fact, many federal courts applying Michigan law have not followed this principle consistently. These courts continue to send cases to arbitration and uphold shortened SOLs based merely on the presence of an employee's signature on a document, or even in its absence, by establishing that the employer required every employee to sign it. Plaintiff-Appellant's counsel currently handles four cases against the same employer, none of which appear in the court record due to forced arbitration clauses. These "policies" masquerading as contracts are designed to limit employees' access to judicial recourse, instead funneling them into arbitration—a forum often perceived as more favorable to employers. Such practices not only suppress the visibility of claims but also impede the enforcement of public policy goals aimed at protecting employees from discrimination and other workplace injustices.

This practice further tilts the scales against employees, making it even more challenging for them to seek judicial redress. Given these circumstances, Plaintiff-Appellant implores this Court to intervene. Employment law has historically been extremely anti-plaintiff, creating substantial barriers for employees seeking justice. The inherent power imbalance in employment relationships, coupled with the pervasive use of adhesion contracts, necessitates judicial scrutiny and intervention. Employees should not be further disadvantaged by adhesive terms that strip them of statutory protections and limit their access to courts.

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It is essential to uphold the legislative intent behind employment statutes and ensure that employees retain their rightful ability to seek redress through the judicial system. In conclusion, employment contracts are inherently contracts of adhesion, reflecting significant imbalances of power and fairness. Allowing employers to contract around state laws and statutory protections undermines public policy and legislative intent. Laypersons cannot be expected to understand the implications of shortened SOLs, and the pervasive use of arbitration clauses further restricts their access to justice.

Provisions shortening SOLs is procedurally unconscionable because the employee had no realistic alternative but to accept it and substantively unconscionable because it imposes an extreme and unfair disadvantage on the employee. The contract's adhesive nature further supports the conclusion that the provision should be invalidated as unconscionable, ensuring that employees' statutory rights are preserved and that contractual relationships are governed by principles of fairness and justice. This Court must intervene to prevent further erosion of employees' rights and ensure fair and equitable treatment in employment relationships.

C. The Court Should Follow the Analysis in *Rodriguez v. Raymours Furniture Co.*

There can be no doubt that contractual limitations clauses which restrict civil rights claims violate public policy, as the New Jersey Supreme Court found in *Rodriguez v. Raymours Furniture Co., Inc*., 225 NJ 343 (2016). In Rodriguez, the court was asked to address whether "whether the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49 — a law established to fulfill a public-interest purpose — can be contravened by private agreement." 225 NJ at 346. The plaintiff had argued that "LAD was enacted to protect employees, and that allowing private companies to create their own periods of limitation overrides the legislative policy of encouraging discrimination-free workplaces." *Id*. at 352. In finding that employers may not abrogate, by private contract, the statute of limitations of the state's employment discrimination law, the court stated:

> The challenged provision cannot be viewed as a private contractual agreement by which private parties contract to limit private claims by shortening the generally applicable statute of limitations for such actions. The cause of action that plaintiff brings is factually premised on his employment relationship, but it is not a simple private claim. Plaintiff alleges an LAD violation — a law designed for equal parts public and private purposes.
>
> The LAD plays a uniquely important role in fulfilling the public imperative of eradicating discrimination. One searches in vain to

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> find another New Jersey enactment having an equivalently powerful legislative statement of purpose, along with operative provisions that arm individuals and entities with formidable tools to combat discrimination not only through their use but also by the threat of their use. There is a huge incentive for employers to thoroughly investigate and respond effectively to internal complaints in order to limit or avoid liability for workplace discrimination. Responsible employers are partners in the public interest work of eradicating discrimination, but such responsible behavior takes time. A shortened time frame for instituting legal action or losing that ability hampers enforcement of the public interest.
>
> Presently, a dual-enforcement scheme allows litigants to bring direct suit or utilize the resources of the Division on Civil Rights (DCR). Although the LAD has private and administrative remedies, election of either statutorily created course of action furthers the public and private purpose of the LAD — preventing and eliminating discrimination. See *Fuchilla v. Layman*, 109 N.J. 319, 334, 537 A.2d 652 (stating that LAD seeks "nothing less than the eradication of the cancer of discrimination" (quotation marks and citations omitted), cert. denied, 488 U.S. 826, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988)). Restricting the ability of citizens to bring LAD claims is antithetical to that societal aspiration and defeats the public policy goal.
>
> We hold that a private agreement that frustrates the LAD's public purpose imperative by shortening the two-year limitations period for private LAD claims cannot be enforced.

Id. at 346-47. In thoroughly analyzing the policy reasons for enactment of the state's discrimination laws, and concluding that permitting the time period to be shortened by private contract violated public policy, the New Jersey Supreme Court focused on two main issues: (1) that "shortening the time permitted for bringing an LAD action in Superior Court directly impacts and undermines the integrated nature of the statutory avenues of relief and the election of remedies that are substantively available to victims of discrimination under the LAD[]"; and (2) that "a statute of limitations period short of two years effectively eliminates claims. As a practical matter, it takes time for an individual to bring his or her claim to an attorney. The individual may not immediately realize that he or she has been a victim of discrimination[]."[1] *Id*. at 362, 363. Finally, the court took into consideration that a shortened limitations period would impact the employer's

[1] The court further noted that "a shortened statute of limitations might compel an attorney to file a premature LAD action, whereas a thorough investigation might reveal a lack of a meritorious claim.

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ability to "first receive workplace complaints, investigate them, and respond appropriately to limit their liability." *Id*. at 363. The court noted that its decision was "rooted in the unique importance of our LAD and the necessity for its effective enforcement." *Id*. at 365. The court also observed that both the State of Kansas and State of California had already disavowed the practice of allowing statutes of limitations of employment discrimination claims to be shortened by private contract. *Id*. at 365.

The policy reasons set forth in *Rodriguez* are even more present in the present context, where the policy reasons for enactment of the anti-discrimination laws are identical, and the legislature has made clear – unlike in New Jersey –that the appropriate statute of limitations in Michigan is three years. The law in the State of Michigan is that employees have three years to file discrimination claims. Employers should not be able to shorten that time period, particularly where employees have absolutely no bargaining power in the employment context, as argued supra, and the employer has all of the information about the rights that it is taking from its employees.

Moreover, as in many cases, including the plaintiff in *McMillon*, Defendant here did not made Plaintiff aware of an employment agreement limiting her rights until Defendant filed its motion for summary disposition. As stated in *Herweyer*, plaintiffs are entitled to know what statute of limitations applies to their claim. 455 Mich. at 22. No employee should have their employer dictate its own special statute of limitations of its choosing, especially where the legislature has made clear that a plaintiff has three years to file a civil rights lawsuit. Continuing to allow defendants to "get over" on plaintiff-employees defeats the entire purpose of the civil rights statutes and makes it difficult for plaintiffs to seek counsel to assist them in eradicating discrimination in the workplace.

Further, the United States Court of Appeals for the Sixth Circuit in *Logan v. MGM*¸ 939 F.3d 824 (6th Cir. 2019) – which noted this Court's opinions in *Timko v Oakwood Custom Coating, Inc.*, 244 Mich. App. 234 (2001) and *Rory* in footnote 5– refused to permit the shortening of the statute of limitations for Title VII employment discrimination claims. The Sixth Circuit extended this prohibition to disability and age discrimination claims under the ADA and ADEA, respectively, in *Thompson v. Fresh Products, LLC*, 985 F. 3d 509 (6th Cir. 2021). As the plaintiff in *McMillon* argued, Michigan should no longer be the "footnote"; this Court should make clear

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that the laws of this state cannot be circumvented by employers when their current and former employees seek to protect their civil rights.

Under Michigan law, the *Timko* court, citing *Herweyer*, found that "[p]arties may contract for a period of limitation shorter than the applicable statute of limitation provided that the abbreviated period remains reasonable," yet held that six months was reasonable. 244 Mich. App. at 104, 107. However, the *Herweyer* court did not address whether the six-months period was reasonable, finding that the "reasonableness" analysis did not apply in contracts of adhesion, 455 Mich. at 21, and noting that "[a] legal period has already been determined by the Legislature." Id. at 22. In *Rory*, the Supreme Court overruled the reasonableness requirement and concluded that a shortened limitations period should be enforced as written unless it violated law or public policy. 473 Mich. at 470. Thus, because the decisions in both *Timko* and *Rory* violate public policy, in that they do not take into account the one-sided nature of employment related disputes, or any of the public policy considerations that inform anti-discrimination laws, as noted in Rodriguez, supra, and the Sixth Circuit's opinions in *MGM* and *Thompson*, this Court should find that the statute of limitations applicable to civil rights claims cannot be shortened by virtue of an "agreement" with one's employer.

As Justice Welch stated in her concurrence in *McMillon*:

> The validity of contractually shortened limitations periods is an important issue to both employers and employees. Given that this Court never weighed in on the merits of the Court of Appeals decision in Timko, I believe it should do so if presented with the opportunity in the future.

Slip. Op. at 4-5. Plaintiff agrees that it is time for this Court to consider the enforcement of contracts of adhesion specifically related to employment contracts. Plaintiff prays that the Court will rule that employers are not permitted to contractually shorten the statute of limitations applicable to civil rights claims.

CONCLUSION

WHEREFORE, Plaintiff prays that the trial court's ruling granting summary disposition to Defendants be overturned for the reasons set forth herein.

Respectfully submitted,
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Date: July 18, 2024

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CERTIFICATION OF WORD COUNT

A word count of the Brief has been conducted via Microsoft Word, which yielded a total of 3,767 words from the Introduction thorough the Conclusion as required under Adm. File No. 2019-16 and explained in MCR 7.212.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all counsel of record on July 18, 2024 via E-File.

I DECLARE THAT THE STATEMENT ABOVE IS TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.

/s/ Carla D. Aikens