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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
K.F. Kelly, P.J., Jansen and Rick, JJ.

TIMIKA RAYFORD,

Plaintiff/Appellant,

v

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

Defendant/Appellee.

MSC Docket No. 163989

COA No. 355232
Trial Ct Nos. 20-001548-CD

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DEFENDANT/APPELLEE'S RESPONSE BRIEF TO PLAINTIFF/APPELLANT'S "SUPPLEMENTAL BRIEF" DATED JULY 18, 2024

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF APPELLATE JURISDICTION

Defendant/Appellee American House Roseville I, LLC, d/b/a American House East I and American House ("American House") agrees that this Court has jurisdiction to consider Plaintiff/Appellant's Application for Leave to Appeal.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether this Court should affirm the opinion of the Court of Appeals, and not consider the supplemental issues directed by this Court, because Plaintiff has failed to plead legally viable claims.

Defendant/Appellee contends the answer is "Yes."
Plaintiff/Appellant presumably contends the answer is "No."
The Trial Court did not address this issue.
The Court of Appeals did not address this issue.

II. Whether *Clark v DaimlerChrysler Corp*, 268 Mich App 138 (2005), properly extended the Michigan Supreme 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).

Defendant/Appellee contends the answer is "Yes."
Plaintiff/Appellant contends the answer is "No."
The Trial Court did not address this issue.
The Court of Appeals did not address this issue.

III. If the answer to Issue No. 2 is "no," whether the contract at issue in this case is an unconscionable contract of adhesion.

Defendant/Appellee contends the answer is "No."
Plaintiff/Appellant contends the answer is "Yes."
The Trial Court did not address this issue.
The Court of Appeals did not address this issue.

IV. Whether Plaintiff's Position on Appeal Violates Separation of Powers.

Defendant/Appellee contends the answer is "Yes."
Plaintiff/Appellant presumably contends the answer is "No."
The Trial Court did not address this issue.
The Court of Appeals did not address this issue.

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INTRODUCTION

Since 2005, Michigan courts have adhered to the principle that contractual provisions shortening the limitations period for employment-based civil rights claims are enforceable and do not violate Michigan law or public policy. *See Clark v DaimlerChrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005). Since then, Courts have followed *Clark* without division or contestation, including the Trial Court and the Court of Appeals in this case. Moreover, the Legislature has declined to abrogate the principle set forth in these cases despite having numerous opportunities over the course of decades to do so.

Now, Plaintiff asks this Court to overrule *Clark* by usurping the constitutional authority granted exclusively to the Legislature. Not only is Plaintiff's position historically and legally unsupported, but her "argument is directed at the wrong branch of government." *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012). As this Court has long recognized in the face of similar issues:

> 'If it be said, the law is unnecessarily severe, and may sometimes do injustice, without fault in the sufferer under it, our reply is: these are considerations that may very properly be addressed to the legislature, but not to the judiciary' … The responsibility for drawing lines in a society as complex as ours of identifying priorities, weighing the relevant considerations and choosing between competing alternatives is the Legislature's, not the judiciary's."

O'Donnell v State Farm Mut Auto Ins Co, 404 Mich 524, 542; 273 NW2d 829 (1979) (quoting *Sears v Cottrell*, 5 Mich 250, 254 (1858)).

Plaintiff's arguments to the contrary are wholly unsupported. This Court should affirm the decision of the Court of Appeals for the following reasons:

1. Initially, this Court need not reach the supplemental issue directed to the parties because Plaintiff has failed to plead legally viable claims. Plaintiff has not asserted any factual allegations to support a claim that she was discriminated against because of some protected status she held or protected activity she engaged in. Therefore, resolving the supplemental issue is unnecessary given that Plaintiff's claims fail as

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a matter of law.

2. Assuming *arguendo* the Court reaches the first supplemental issue, the Court of Appeals—through *Clark*, 268 Mich App 138—properly applied the holding in *Rory v Continental Ins Co*, 473 Mich 457 (2005) to employment contracts.

3. The contract at issue is neither procedurally nor substantively unconscionable.

4. Our Constitution and this Court's precedent hold that the issues raised in Plaintiff's appeal fall exclusively within the Legislature's authority, and the separation of powers doctrine mandates that this Court abstain from deciding that issue. This is especially true here as the Legislature has already occupied the field by passing legislation barring shortened limitation periods in other contexts.

Accordingly, for these reasons, and as more fully explained below, this Court should affirm the opinion of the Court of Appeals.

COUNTER-STATEMENT OF FACTS

A. Plaintiff's Employment, the Parties' Agreement Regarding Claims Arising Out of Plaintiff's Employment, and Plaintiff's Termination.

American House hired Plaintiff on or about February 14, 2017 (**Ex. 1**, Compl., ¶ 1 (005b)).[1] As consideration for her employment, Plaintiff signed an Employee Handbook Acknowledgement agreement (**Ex. 2**, 02/20/2017 Acknowledgment (019b)).[2] The Acknowledgement Plaintiff signed is a standalone agreement that is independent of the Handbook (**Ex. 4**, Handbook Table of Contents (024b-025b)). This standalone agreement includes an independent provision, whereby Plaintiff agreed to a six-month limitations period for any claims arising out of her employment:

> In consideration of my employment, I agree that any claim or lawsuit arising out of my employment with the Company, or my application for employment with the Company, **must be filed no more than 180 days** after the date of employment action that is the subject of the claim or lawsuit, unless the applicable statute of limitations period is shorter than 180 days in which case I will continue to be bound

[1] Plaintiff erroneously renumbered paragraph 6 of her Complaint under "Statement of Facts" as paragraph 1, and paragraph 60 for Count III as paragraph 36 (*See* Ex. 1, pp. 1-2, 8 (005b, 011b)). To avoid confusion, all subsequent references to Plaintiff's Complaint will refer to the paragraphs as numbered by Plaintiff under the "Statement of Facts" and her claims by count, page number, and paragraph.

[2] Plaintiff's maiden name is Walls and her married name is Rayford (**Ex. 3**, Marriage Certificate (021b)).

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> by that shorter limitations period. While I understand that the statute of limitations for claims arising out of an employment action may be longer than 180 days, I WAIVE ANY STATUTE OF LIMITATIONS TO THE CONTRARY, unless state, federal or local law prohibits such waiver.

(*Id.*) (emphasis in original).

Plaintiff alleges that during her employment (February to July 2017), she became aware that her manager (Mr. Crowell) was having a sexual relationship with a staff member (Ex. 1, ¶ 6 (006b)). Plaintiff does not assert that this relationship was non-consensual, and she does not allege that Mr. Crowell made any unwelcomed or inappropriate sexual advances towards her (*See, id* & PL Application, pp. 8-10). Plaintiff allegedly reported Mr. Crowell's relationship to Human Resources (Ex. 1, ¶ 8 (006b)).

Plaintiff also alleges that she experienced, or was involved in, various confrontations with other employees during her employment (*Id.*, ¶¶ 10-26 (006b-008b)). However, Plaintiff does not assert that any of the issues she alleges concerned or were because of any protected conduct she allegedly engaged in or protected status she held (*See, id.* & PL Application, pp. 8-10).

American House terminated Plaintiff's employment on or about July 7, 2017 (*Id.*, ¶ 33 (008b); **Ex. 5**, 07/07/2017 Termination Notice (027b)).

B. Plaintiff Files Her Untimely Lawsuit, American House Moves for Summary Disposition, and the Trial Court Correctly Dismissed Plaintiff's Claims.

On April 24, 2020 – more than two years and nine months after her allegations occurred and her employment with American House ended – Plaintiff filed this lawsuit in the Macomb County Circuit Court against American House (Ex. 1, Summons (003b)). Plaintiff's Complaint alleged seven (7) claims arising out of her employment with American House (Ex. 1, pp. 5-14 (008b-017b)).[3] In relevant part, Plaintiff asserts claims under the ELCRA for:

[3] As noted below, this Court's Order regarding the briefing on Plaintiff's Application does not concern Plaintiff's dismissed claims for wrongful discharge in violation of public policy (Count V) or malicious

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- Harassment or discrimination based on race (Count I). However, but for stating her race and a single conclusory assertion that she was discriminated against because of her race (*id.*, ¶¶ 39-40 (009b)), Plaintiff alleges no actual facts to support her claim of discrimination (*See* Ex. 1).

- Harassment or discrimination based on gender (Count II). Plaintiff's claim is based solely on the above allegations related to the various employment disagreements she encountered (*Id.*, ¶ 53 (010b)). But, Plaintiff alleges no actual facts that these issues were related to or because of her gender (*See* Ex. 1).

- Hostile work environment (Count III). Again, but for a conclusory allegation that she "was subjected to offensive communication or conduct by Defendant and its agents" (*id.*, ¶ 40 (012b)), Plaintiff does not allege any actual facts to support her claim or that any protected status she held was the cause of the alleged hostile work environment (*See* Ex. 1).

- Retaliation (Count IV). Plaintiff's claim is based solely on her alleged complaints against Mr. Crowell and issues with other employees (*Id.*, ¶ 48 (013b)). But, again, Plaintiff does not allege that any of her complaints were based on conduct that is prohibited by or in violation of the ELCRA (*See* Ex. 1).

American House moved for summary disposition as its initial response to Plaintiff's Complaint asserting *inter alia* that Plaintiff's ELCRA claims should be dismissed pursuant to MCR 2.116(C)(7) because Plaintiff's allegations and claims are based solely on events that arose out of her employment and Plaintiff failed to assert those claims within six months of the events giving rise to the same (**Ex. 6**, AH Motion for Summary Disposition, pp. 4-10 (033b-039b)). Plaintiff filed a response (**Ex. 7**), and American House filed a timely reply (**Ex. 8**).

On August 17, 2020, the Trial Court (via the Honorable Michael E. Servitto) held a hearing on American House's motion and issued a ruling from the bench granting American House's Motion for Summary Disposition in full (*See* **Ex. 9**). The Trial Court agreed with American House that Plaintiff's claims were untimely (*Id.*, pp. 4-7 (061b-064b)). The Trial Court held that the signed Acknowledgment "clearly and unambiguously required plaintiff to file suit within six

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prosecution (Count VI) (which Plaintiff does not challenge on appeal), or her abuse of process claim (Count VII). As such, those claims will not be discussed herein.

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months" of the events giving rise to her claims and that "Plaintiff does not deny this" (*Id.*, pp. 4-5 (061b-062b)). The Trial Court relied on the Court of Appeals' decision in *Clark v DaimlerChrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005), along with its progeny, regarding the enforceability of agreements like the one Plaintiff signed (*Id.*, p. 4 (061b)). The Trial Court found this authority was "exactly on point" and supported the dismissal of Plaintiff's claims (*Id.*).

Accordingly, the Trial Court held that Plaintiff's claims were time barred and granted summary disposition in favor of American House (*Id.*, p. 6 (063b)). On August 17, 2020, the Trial Court entered an Order granting American House's Motion for Summary Disposition for the reasons stated on the record (**Ex. 10**, 08/17/20 Order).

C. The Court of Appeals Affirms Summary Disposition as to Plaintiff's Claims.

Plaintiff filed her Claim of Appeal on October 23, 2020 (**Ex. 11**).[4] On appeal, the only relevant argument Plaintiff made regarding the dismissal of her ELCRA claims is that the parties' agreement was unconscionable (**Ex. 14**, PL Brief, pp. 9-12 (109b-112b)). American House filed its response rebutting Plaintiff's arguments (**Ex. 15**, AH Resp., pp. 11-16 (140b-145b)), and Plaintiff filed a reply (**Ex. 16**).

On December 16, 2021, the Court of Appeals issued its per curiam opinion affirming summary disposition in favor of American House (**Ex. 17**). Turning first to the Acknowledgement's six-month limitations period, the Court of Appeals observed that "Plaintiff does not contest that she entered into a contract under the Acknowledgment agreeing to a six-month limitations period for all claims arising from her employment." (*Id.*, p. 3 (0164b)) (emphasis added). "Rather, plaintiff argues that the Acknowledgment is not enforceable" in relevant part

[4] Following the Trial Court's decision on American House's Motion for Summary Disposition, Plaintiff filed a Motion for Reconsideration solely as to the dismissal of her abuse of process claim (**Ex. 12**). The Trial Court denied that Motion on October 2, 2022 (**Ex. 13**, 10/02/20 Order).

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"because it is unconscionable" (*Id.*). As to the limitations period, the Court of Appeals affirmed that

> Michigan courts have long recognized that parties to a contract are free to agree to a shortened limitations period. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 30; 772 NW2d 801 (2009). 'An unambiguous contractual provision providing for a shortened limitations period is to be enforced as written unless the provision violates the law or public policy or is otherwise unenforceable under traditional contract defenses, including duress, waiver, estoppel, fraud, or unconscionability.' *Id*. These same principles apply in the context of employment contracts. See *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 142; 706 NW2d 471 (2005).

(*Id.*). Based on the undisputed facts regarding the nature and timeliness of her ELCRA claims, and the above authority, the Court of Appeals held Plaintiff's claims were untimely (*Id.*, p. 4 (0165b)). Therefore, summary disposition was affirmed (*Id.*, pp. 1, 7 (162b, 168b)).

D. The Proceedings Before the Michigan Supreme Court.

On January 27, 2022, Plaintiff filed her Application for Leave to Appeal with this Court (*See* 01/27/22 PL Application). Plaintiff's application was nearly identical to her opening brief to the Court of Appeals (including the Questions Presented) in that the Application focused on Plaintiff's arguments that the Acknowledgment is an unconscionable "contract of adhesion"; American House should be estopped under the Employee Right to Know Act; and she allegedly asserted a valid claim for abuse of process (*Compare* Ex. 14, pp. 5-17 (105b-117b) *with* PL App., pp. 7-20).

The only new additions to Plaintiff's Application were two passing references that assert Michigan should join the Sixth Circuit Court of Appeals in precluding contractually shortened limitations periods for civil rights claims (PL App., pp. 4, 14). But for these two fleeting notes, and citing a single case (*Logan v MGM Grand Detroit Casino*, 930 F3d 824 (CA 6 2019)), Plaintiff made no arguments and failed to provide authority supporting her position (PL App., pp. 4-20). Plaintiff's Questions Presented also failed to mention this issue (*Id.*, p. 7).

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On May 3, 2022, this Court issued an Order holding Plaintiff's Application in abeyance pending a decision in *McMillon v City of Kalamazoo*, Case No 162680, -- Mich –; -- NW2d -- (2023) (*See* 05/03/22 Order). On June 23, 2023, this Court issued a second Order directing the Clerk to schedule oral argument on Plaintiff's Application and ordering the parties to file supplemental briefs "addressing whether *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234 (2001), correctly held that contractual limitations clauses which restrict civil rights claims do not violate public policy." (*See* 06/23/23 Order).

Plaintiff filed her Supplemental Brief on August 4, 2023. On August 23, 2023, American House timely filed its supplemental brief in response. Plaintiff filed her Reply to Supplemental Brief on September 2, 2023. Thereafter, on November 8, 2023, this Court heard oral argument on Plaintiff's application for leave to appeal from the December 16, 2021 opinion of the Michigan Court of Appeals. On order of this Court, the Court considered and granted Plaintiff's application. Additionally, the Court ordered the parties to include among the issues to be briefed: (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; and (2) if not, whether the contract at issue in this case is an unconscionable contract of adhesion.

COUNTER-STANDARD OF REVIEW

This Court reviews "de novo a trial court's decision on a motion for summary disposition." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). Likewise, whether a party has properly pled "a cause of action presents a question of law this Court reviews de novo." *Lakin v Rund*, 318 Mich App 127, 132; 896 NW2d 76 (2016).

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LAW & ARGUMENT

A. This Court Should Affirm the Decision of the Court of Appeals, and Decline to Address the Supplemental Issues Briefed in Plaintiff's Second Supplemental Brief, Because Plaintiff Failed to Plead Legally Cognizable Claims.

1. This Court Need Not Address the Supplemental Issues Directed to the Parties.

The issues this Court ordered the parties to supplementally brief concern (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; and (2) if not, whether the contract at issue in this case is an unconscionable contract of adhesion (*See* 05/23/24 Order). This issue presumes, however, that Plaintiff has a viable ELCRA claim to begin with. She does not. As such, this Court need not reach the supplemental issues because Plaintiff failed to plead a legally cognizable claim under the ELCRA.[5]

In a recent comparable case (*McMillon v City of Kalamazoo*), this Court ordered supplemental briefing on several issues, including whether "contractual limitations clauses that restrict civil rights claims violate public policy" (*See McMillon*, No 16260, 01/28/22 Order). But this Court did not ultimately reach that issue because it held a question of fact existed as to whether the plaintiff actually agreed to be bound by the parties' contract. *See McMillon v City of Kalamazoo*, 983 NW2d 79, 81 (2023); *see also, id.* at 80 n 1. That issue not only went to the merits of the case, but it was not a supplemental issue to be briefed as directed by this Court.

Accordingly, like *McMillon*, this Court need not reach the issues regarding supplemental issues identified in this Court's order from May 23, 2024 if another issue regarding the viability

[5] The same is true for Plaintiff's abuse of process claim (count VII). However, as noted in section A.3. of Defendants' Law and Argument section *infra*, Plaintiff has abandoned this issue on appeal.

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of the underlying claims or defense is dispositive. And, as set forth below, Plaintiff has failed to plead a valid claim under the ELCRA.

2. Plaintiff Failed to Properly Plead a Valid Claim Under the ELCRA.

"MCR 2.111(B)(1) requires that a complaint be specific enough to reasonably inform the adverse party of the nature of the claims against him." *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Where a plaintiff "does not refer either specifically or generally to any facts" supporting her allegations, such allegations "cannot be proper under the court rule." *Dacon v Transue*, 441 Mich 315, 330; 490 NW2d 369 (1992).

Moreover, "conclusory statements that are unsupported by allegations of fact on which they may be based will not suffice to state a cause of action." *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014) (footnote omitted); *see also Masrur v. Regents of Univ. of Michigan*, 344 Mich App 102, 110; 999 NW2d 55, 60 (2022), *app den*, 512 Mich 929, 994 NW2d 512 (2023) ("[S]tatements of the pleader's conclusions of law are insufficient to state a cause of action.").

Here, Plaintiff has failed to state a valid cause of action under the ELCRA. Each purported claim and the dispositive deficiencies applicable thereto are addressed in turn.

a. <u>Harassment/Discrimination (Counts I and II)</u>[6]

The ELCRA states that an "employer shall not ... discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of …race" or "sex" MCL § 37.2202(1)(a). The "essence of a sex [or race] discrimination civil

[6] Counts I and II in Plaintiff's Complaint are entitled "Harassment" and make passing allegations to the same (Ex. 1, at 008b-010b). The Court of Appeals previously observed that "[h]arassment based on any of the enumerated classifications in MCL 37.2202(1)(a) is an actionable offense", *Major v Vill of Newberry*, 316 Mich App 527, 549; 892 NW2d 402 (2016), and analyzed such a claim as one for "hostile work environment". *Id.* Accordingly, to the extent Counts I and II allege harassment claims under the ELCRA, such claims fail for the same reasons set forth below as to Count III (hostile work environment).

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rights suit is that similarly situated people have been treated differently because of their sex [or race]." *Radtke v Everett*, 442 Mich 368, 379; 501 NW2d 155 (1993) (alterations added). Thus, the "'ultimate question in an employment discrimination case is whether the plaintiff was the victim of intentional discrimination.'" *Rouch World, LLC v Dep't of CR*, 510 Mich 398, 480; 987 NW2d 501 (2022) (quoting *Hecht v Nat'l Heritage Acads, Inc*, 499 Mich 586; 886 NW2d 135 (2016)).

Here, Plaintiff's Complaint fails to state a valid claim for harassment or discrimination. Plaintiff's race-based claim (Count I) is insufficient as Plaintiff merely states her race and a single conclusory assertion that she was discriminated against because of her race (Ex. 1, ¶¶ 39-40 (009b)). But, she does not allege any actual facts to support her conclusion, nor does the Complaint contain any allegations that Plaintiff was treated differently than another employee outside of her protected class and/or some other form or disparate treatment based on her race (*See* Ex. 1).

The same is true for Plaintiff's sex/gender claim (Count II). Plaintiff merely alleges that she is female and the alleged acts complained of included "incorrect pay, failure to remedy harassment from other employees, address threats from patents, and providing false information to the police prior to terminating her." (Ex. 1, ¶¶ 51, 53 (010b)). Most of these allegations have nothing to do with discrimination or the ELCRA. More importantly, Plaintiff makes no allegations that any of these matters occurred because of her gender or that they were the result of disparate treatment based on her gender (*See* Ex. 1).

Sex discrimination under the ELCRA also "includes sexual harassment". MCL § 37.2103(k). Plaintiff's Complaint does not assert a claim for sexual harassment (*See* Ex. 1). However, to the extent Plaintiff attempts to raise such a claim for the first time on appeal, she has similarly failed to plead a cognizable claim for sexual harassment.

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Sexual harassment under the ELCRA requires, at a minimum, that a plaintiff suffered "unwelcome sexual advances, requests for sexual favors, [or] other verbal or physical conduct or communication of a sexual nature" MCL § 37.2103(k) (alteration added). The "plaintiff must not only show that the employee was discriminated against because of sex, she must also show that the employee was 'subjected to unwelcome sexual conduct or communication.'" *Haynie v State*, 468 Mich 302, 309; 664 NW2d 129 (2003) (quoting *Radtke*, at 382). "'The threshold for determining that conduct is unwelcome is 'that the employee did not solicit or incite it, and the employee regarded the conduct as undesirable or offensive.'" *Radtke*, at 384 (citations omitted).

Here, while Plaintiff alleges that it was known "that in order to advance or receive better treatment, sexual acts needed to be exchanged" (Ex. 1, ¶ 7 (006b)), and she refused to participate in such acts (*id.*, ¶ 52 (010b)), Plaintiff does not allege that she was actually confronted with that solicitation or otherwise propositioned to engage in such acts (*See* Ex. 1). In fact, Plaintiff's Complaint makes no allegation that she was the subject of unwelcomed sexual advances, requests for sexual favors, or any other conduct or communication of a sexual nature (*See, id.*).

Accordingly, Counts I and II of Plaintiff's Complaint fail to assert a legally viable claim under the ELCRA for discrimination on the basis of race or gender.

b. Hostile Work Environment (Count III)

Count III of Plaintiff's Complaint asserts a claim for hostile work environment, but does not specify what protected classification is the basis for that claim (Ex. 1, at 011b-012b). So, assuming *arguendo* Count III is based on gender or race (as those are the only two classifications Plaintiff notes in her Complaint), Count III still fails to assert a valid claim.

To establish a claim for hostile work environment, Plaintiff "must prove" *inter alia* that she "was subjected to communication or conduct on the basis of a protected status" and that she

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"was subjected to unwelcome conduct or communication on the basis of the protected status" *Major v Vill of Newberry*, 316 Mich App 527, 550; 892 NW2d 402 (2016); *see also Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000) (recognizing the same elements).[7] "The essence of a hostile work environment action is that 'one or more supervisors or co-workers create an atmosphere so infused with hostility toward members of one sex [or race] that they alter the conditions of employment for them.'" *Radtke*, 442 Mich at 385 (alteration added).

Plaintiff's claim is legally deficient. Plaintiff asserts a single, conclusory allegation that she "was subjected to offensive communication or conduct by Defendant and its agents" (Ex. 1, ¶ 40 (012b)). However, Plaintiff does not allege any actual facts regarding who subjected her to the alleged communication or conduct; when this allegedly took place; or the substance of the alleged communication or conduct (*See* Ex. 1). Plaintiff also does not allege any facts to support that any protected status she held was the cause of the alleged hostile work environment (*See, id.*).

Accordingly, Count III of Plaintiff's Complaint fails to assert a legally viable claim under the ELCRA for hostile work environment.

c. <u>Retaliation (Count IV)</u>

An ELCRA retaliation claim requires that a plaintiff show that she "engaged in a protected activity". *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 161; 934 NW2d 665 (2019); *Barrett v Kirtland Cmty Coll*, 245 Mich App 306, 318; 628 NW2d 63 (2001) ("Plaintiff cannot prevail on a claim of retaliation in violation of the CRA without establishing that he engaged in activity protected under the act."). MCL § 37.2701(a) "specifically defines the type of activity protected under the CRA." *Barrett*, at 318. An employee engages in protected activity if they

[7] The *Major* Court assumed "that a hostile environment claim may be maintained on the basis of conduct involving" any of the enumerated classifications protected under the ELCRA. *Id.*, at 549 n 3.

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"opposed a violation of this act," they "made a charge, filed a complaint," or they testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL § 37.2701(a).

Plaintiff's retaliation claim is based solely on her alleged complaint to Human Resources regarding Mr. Crowell's relationship and the issues with other employees (Ex. 1, ¶ 48 (013b)). Again, however, Plaintiff does not allege that any of her complaints were based on conduct that is prohibited by or in violation of the ELCRA (*See* Ex. 1). The Court of Appeals in *Barrett* faced similar allegations. *Barrett*, at 319-320. There, like here, the plaintiff "never complained that he was subjected to any physical or verbal conduct" based on his protected status, nor "did plaintiff complain that he was treated differently because of" that protected status. *Id.*, at 319. As such,

> an objective employer could not conclude that plaintiff was raising the specter of a claim pursuant to the CRA. Rather, the evidence merely established that plaintiff was asserting generic, non-sex [or race]-based complaints regarding his working conditions and that those complaints were not based on sex [or race].

Id., at 319-320 (alterations added). As such, Count IV of Plaintiff's Complaint failed to assert a legally viable claim under the ELCRA for retaliation.

Accordingly, for the reasons set forth above, Plaintiff failed to plead a claim under the ELCRA. Therefore, this Court need not address the supplemental issue directed to the parties and the Court should affirm the Court of Appeals.

3. Plaintiff Failed to Properly Plead a Valid Abuse of Process Claim.

American House notes that in Plaintiff's application for leave to appeal to this Court, Plaintiff contended that she properly pled a claim for abuse of process. (*See* 01/27/22 PL Application at pp. 16-19.) However, Plaintiff failed to raise any such argument in the brief she filed following the entry of this Court's order granting Plaintiff leave to appeal to this Court. (*See generally,* Pl.'s second supplemental brief dated 7/18/2024.) Accordingly, Plaintiff has abandoned any such issue and, thus, should be precluded from maintaining any appeal as to her abuse of

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process claim. *See Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264, 268 (2000) (recognizing that an issue is abandoned if it is not raised in the statement of the questions presented); MCR 7.212(C)(5) (statement of questions involved must be included in brief).

Nonetheless, even if this Court considered the issue, Plaintiff's arguments are without merit and the Court of Appeals' decision should be affirmed. First and foremost, Plaintiff's abuse of process claim is subject to the contractual six-month limitations period that precludes her ELCRA claims. Indeed, the six-month contractual limitations provision is not limited solely to employment claims, but covers "any claim or lawsuit arising out of my employment" with American House (Ex. 2) (emphasis added). Plaintiff admits the basis for her abuse of process claim stems from American House's alleged actions that resulted in Plaintiff being cited for allegedly making a false report on July 3, 2017, or while she was still employed with American House (Pl.'s application for leave, p. 16). Further, American House's alleged actions culminated with Plaintiff being terminated on or about July 7, 2017 (*Id.*). Meaning, Plaintiff's claim stems from alleged actions taken by American House during and up to the termination of her employment. Thus, these actions arise out of her employment and are within the scope of the contractual limitation period. Therefore, the Trial Court correctly dismissed this and all of Plaintiff's claims as untimely.

But, even if that was not the case, Plaintiff's claim was still properly dismissed because it is legally deficient. "Abuse of process is the wrongful use of the process of a court." *Lawrence v Burdi*, 314 Mich App 203, 211; 886 NW2d 748 (2016). "In a case alleging abuse of process, the pleadings must allege with specificity an act committed in the use of process 'that is improper in the regular prosecution of the proceeding.'" *Dalley v Dykema Gossett*, 287 Mich App 296, 322; 788 NW2d 679 (2010) (quoting *Early Detection Ctr, PC v New York Life Ins Co,* 157 Mich App

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618, 629; 403 NW2d 830 (1986)). "A claim asserting nothing more than an improper motive in properly obtaining process does not successfully plead an abuse of process." *Id.*

Instead, the "gravamen of the misconduct" for such a claim "'is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish.'" *Friedman v Dozorc*, 412 Mich 1, 30 n 18; 312 NW2d 585 (1981). In other words, an "action for the abuse of process lies for the improper use of process ***after*** it has been issued, not for maliciously causing it to issue." *Lawrence*, at 211 (emphasis added). As this Court recently noted, this point "is what distinguishes abuse of process from malicious prosecution, i.e., 'abuse of process is concerned with the wrongful use of process after it has been issued, while the tort of malicious prosecution is concerned with the wrongful issuance of process.'" *Reffitt v Mantese*, No. 346471, 2019 WL 5204542, at *5 (Mich App Oct 15, 2019) (quoting 54 CJS, Malicious Prosecution, § 4, p 738).[8]

Plaintiff "does not dispute" that the foregoing law governs her claim (Brief, p. 14). She asserts, however, that her abuse of process claim is proper because: "the criminal 'process' was initiated" when Plaintiff was cited for making a false larceny report on July 3, 2017, and then American House allegedly used that pending process to justify Plaintiff's termination (Brief, p. 14). In other words, Plaintiff asserts that the <u>termination of her employment</u> was the improper act at issue (*Id.*, p. 15).

The fatal flaw with Plaintiff's position is that the termination of her employment was <u>not</u> the "use of the process of a court", *Lawrence*, at 211, or otherwise "'improper in the regular

[8] *See also Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998) (noting the elements of a claim for malicious prosecution).

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prosecution'" of a court proceeding. *Dalley*, at 322. Simply put, the termination of Plaintiff's employment occurred outside of any legal process that was allegedly ongoing at that time, and it was not an act of process of any court. Instead, it was a business decision made by a private employer committed wholly independent of our judicial system. Thus, Plaintiff's allegations do not state a claim for abuse of process.

Additionally, Plaintiff's attempt to liken her allegations to those in *Three Lakes Ass'n v Whiting*, 75 Mich App 564; 255 NW2d 686 (1977), is also incorrect. In *Three Lakes*, the defendants initiated a civil lawsuit against the plaintiff ("Action 926"), and then used that lawsuit for the "collateral purpose of coercing plaintiff to end all opposition to defendants' condominium project." *Id.*, at 569, 574. The linchpin act alleged by plaintiff was "that defendants offered to dismiss Action 926 in return for an end to all opposition by plaintiff to their condominium project". *Id.*, at 574. As a result, this Court held there was a question of fact regarding defendants' "use of Action 926 as a club to obtain a purpose collateral to its proper purpose." *Id.*

The dispositive difference between *Three Lakes* and Plaintiff's allegations is that the former included the defendants improperly using the actual process of a court after it was initiated (i.e., settlement and dismissal of claims) to achieve a collateral objective (ending the plaintiff's opposition to the condominium project). Here, however, American House did nothing of the like and it did not improperly use any court process after Plaintiff was cited by the police to achieve a collateral purpose. Therefore, as the Trial Court correctly held, *Three Lakes* is distinguishable and does not support Plaintiff's argument.

At its core, Plaintiff erroneously believes initiating a judicial process to justify an extra-judicial act outside of that process is sufficient to state a claim for abuse of process. Michigan's jurisprudence holds otherwise. Without more, all Plaintiff asserts is an alleged "improper motive"

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by American House employees for calling the police and having Plaintiff cited for larceny, but such allegations do "not successfully plead an abuse of process." *Dalley*, at 322.

Therefore, Plaintiff's claim for abuse of process is legally deficient and was properly dismissed by the Trial Court on this alternative ground. For the same reasons, the Trial Court correctly denied Plaintiff's Motion for Reconsideration. Thus, the Court of Appeals' decision that Plaintiff failed to plead a viable abuse of process claim should be affirmed.

4. Plaintiff Should Not Be Allowed to Amend Her Complaint as to Her Abuse of Process Claim Because She Waived Her Request and Any Amendment Would Be Futile.

In Plaintiff's application for leave to appeal to this Court, Plaintiff contended that she should be allowed to amend her Complaint because she alleges "there are sufficient facts to support such a claim". (*See* 01/27/22 PL Application at pp. 20.) However, Plaintiff failed to raise any such argument in the brief she filed following the entry of this Court's order granting Plaintiff leave to appeal to this Court. (*See generally,* Pl.'s second supplemental brief dated 7/18/2024.) Accordingly, Plaintiff has abandoned any such issue. *See Caldwell*, 240 Mich App at 132; MCR 7.212(C)(5) (statement of questions involved must be included in brief).

Nonetheless, even if this Court considered this issue, Plaintiff's request should be denied because she waived this argument below and any amendment would be futile.

An argument "is not properly preserved" for appellate review when the asserting party "raised it for the first time in its motion for rehearing or reconsideration." *Farmers Ins. Exch v Farm Bureau Ins Co*, 272 Mich App 106, 117-18; 724 NW2d 485 (2006). *See also Dep't of Env't Quality v Morley*, 314 Mich App 306, 316; 885 NW2d 892 (2015) (same).

American House asserted in its Motion for Summary Disposition – as an alternative argument to those asserted under MCR 2.116(C)(8) – that Plaintiff should not be allowed to amended her Complaint because doing so would be futile (Ex. 6, (038b-39b). Plaintiff failed to

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address this argument in her response (Ex. 7 (41b-50b)). Plaintiff did not address this issue at oral argument, and the Trial Court did not rule upon the same (*see generally*, Ex. 9; Ex. 10). Plaintiff then improperly raised her request for the first time in her Motion for Reconsideration (Ex. 12 (078b)). The Trial Court did not address her request (Ex. 13).

Plaintiff waived her request to amend her Complaint because she failed to address this issue in response to American House's Motion for Summary Disposition, she did not address it during oral argument, and she raised it for the first time in her Motion for Reconsideration. Accordingly, Plaintiff's request is not properly preserved for appeal and should be denied. But, even if Plaintiff's request was proper, any amendment would be futile.[9]

Where summary disposition is warranted under MCR 2.116(C)(8), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). Such justification exists where "the record indicates that any amendment would [be] futile." *Allegheny Ludlum Corp v Dep't of Treasury*, 207 Mich App 604, 605; 525 NW2d 512 (1994). Futility is also a basis to deny a traditional request for leave to amend a pleading. *See Bennett v Russell*, 322 Mich App 638, 647; 913 NW2d 364 (2018).

Plaintiff should not be allowed to amend her Complaint because doing so would be futile. Plaintiff's lengthy Complaint sets forth detailed allegations to support her claims. Plaintiff's abuse of process claim does not fail for lack of specificity, but simply because Plaintiff's allegations are

[9] The fact the Trial Court did not address American House's argument is understandable considering the Trial Court's ruling that Plaintiff's abuse of process claim failed as a matter of law was in the alternative and Plaintiff failed to address this issue in her response brief or during oral argument. Nevertheless, American House's argument is sufficiently preserved if this Court reaches this issue because American House properly asserted the same: "So long as issues are brought to the trial court's attention, they are preserved for our review irrespective of whether the trial court rules on, or even recognizes, them." *West v Dep't of Nat Res*, No. 348452, -- Mich App --, *available at* 2020 WL 4555034, at *1 (Mich App Aug 6, 2020) (citing *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994)).

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squarely precluded by binding Michigan law. Suffice it to say, if allegations existed that could sustain her claim, Plaintiff would have pled them originally.

Instead, just like in her Motion for Reconsideration, Plaintiff alleges on appeal that unspecified and unpled allegations exist that would allow her claim to legally pass muster (*See* Pl.'s Application for leave, p. 16). However, Plaintiff has failed to articulate what these allegations are or explain how these unknown allegations would properly state a claim for abuse of process. Plaintiff's failure to fill in the blanks is also fatal to her claim because "[t]his Court will not search the record for factual support for a party's claim." *McRoberts v Ferguson*, 322 Mich App 125, 137; 910 NW2d 721 (2017).

Therefore, Plaintiff's improper and futile request to amend her Complaint should be denied.

B. Even Assuming, *Arguendo*, That This Court Reaches the Supplemental Issues (Which It Need Not Do), The Michigan Court of Appeals—Through *Clark v. DaimlerChrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005)—Properly Applied the Holding in *Rory v Continental Ins Co*, 473 Mich 457 (2005) to Employment Contracts.

Assuming *arguendo* this Court reaches the supplemental issue directed to the parties, principles of Michigan law leave no doubt that the Michigan Court of Appeals in *Clark v. DaimlerChrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005) properly applied the holding in *Rory v Continental Ins Co*, 473 Mich 457 (2005) when deciding *Clark*. However, as set forth below in section B.2 of this Law & Argument section of Appellees' brief, the notion that the Michigan Court Appeals "extended" the holding of *Rory* is a misnomer. Rather, principles of stare decisis required the Michigan Court of Appeals to follow the holding of *Rory* when deciding *Clark*. As such, unless this Court seeks to overrule *Rory* (which it should not do), the analysis that *Clark* applied in assessing whether the six-month contractual limitations period in the employment contract derives from the holding of *Rory*, which requires Michigan courts to enforce unambiguous

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contractual provisions providing for a shortened period of limitations as written, unless the provision would violate law or public policy.

1. Overview of the Legal Principles Germane to this Court's Analysis.

Given that Michigan Courts have held that a sixth-month contractually shortened limitations period is reasonable and enforceable both before and after this Court's decision in *Roy*, it is important to clarify the scope of the applicable precedent that is to be considered.

In *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234; 625 NW2d 101 (2001), the primary issue before the Court of Appeals was whether "the 180-day period of limitation" contained in the plaintiff's employment application was "unreasonable". *Id.*, at 238.[10] The *Timko* Court resolved that issue based on this Court's then-existing precedent as set forth in *Herweyer v Clark Highway Servs, Inc*, 455 Mich 14; 564 NW2d 857 (1997), and *Camelot Excavating Co v St Paul Fire & Marine Ins Co*, 410 Mich 118; 301 NW2d 275 (1981). *See Timko*, at 238-240. Ultimately, the *Timko* Court held that "the 180–day period of limitation does not constitute an inherently unreasonable amount of time" to bring a claim and, therefore, "we conclude that the 180–day period qualifies as reasonable." *Id.*, at 243-344 (citing *Camelot*, at 127 and *Myers v Western–Southern Life Ins Co,* 849 F2d 259, 262 (CA 6 1988)). *Timko's* focus – pursuant to *Herweyer* and *Camelot* – was on the reasonableness of a six-month limitations period and the form of the agreement between the parties (an employment application), not the public policy associated with the claims at issue. *See, id.*

Four years after *Timko*, this Court overruled *Herweyer* and *Camelot*. In *Rory v Cont'l Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), this Court reiterated *inter alia* that:

[10] *Timko* also addressed and rejected the plaintiff's argument that the application could not be enforced based on mutuality of obligation and that it was allegedly an adhesion contact. *Timko*, at 244-245.

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> A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*. Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that the general rule of contracts is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.

Id. at 468 (footnotes, citations, internal quotations, and internal brackets omitted) (emphasis in original). Moreover, the Court held that a "mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions." *Id.*, at 470 (footnote omitted). As a result, the reasonableness rule no longer applied and *Camelot* and its progeny were overruled. *Id.*

Additionally, as is applicable here and in that case, *Rory* held "that an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy." *Id.*, at 470. This Court then considered "whether the contractually shortened period of limitations violates law or public policy." *Id.* The answer for both was "No". *Id.*, at 471-476; *see also, infra* (*Rory*'s observations on public policy).

Dispelling any doubt as to whether the *Rory's* holding decision applied solely to insurance contracts or contracts generally, the Court concluded its decision by holding that *all* unambiguous contracts—and not just insurance contracts—must be enforced as written, unless a contractual provision violated law or public policy:

> Consistent with our prior jurisprudence, unambiguous contracts, *including* insurance policies, are to be enforced as written unless a contractual provision violates law or public policy. Judicial determinations of "reasonableness" are an invalid basis upon which to refuse to enforce unambiguous contractual provisions. Traditional defenses to enforcement of the contract at issue, such as waiver, fraud, or unconscionability, have neither been pled nor proven.

Id. at 491 (emphasis added).

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Two months after the Michigan Supreme Court decided *Rory*, the Court of Appeals decided *Clark v DaimlerChrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005). In *Clark*, the plaintiff brought a claim for age discrimination under the ELCRA, which was dismissed by the trial court as time-barred by a "shortened six-month period of limitations" in the plaintiff's employment application. *Id.*, at 140-141. Finding the contract provision unambiguous, the *Clark* Court noted that "under *Rory*, we are compelled to enforce it as written unless it is contrary to law or public policy" *Id.* at 142. The *Clark* Court then followed this Court's instructions in *Rory* point-by-point and held:

> Because there are no statutes explicitly prohibiting the contractual modification of limitations periods in the employment context, the contract provision is not contrary to law. … Furthermore, the Court in *Rory* clarified that public policy must be clearly rooted in the law. ... Hence, this Court '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.' ... Michigan has no general policy or statutory enactment prohibiting the contractual modification of the periods of limitations provided by statute. ... Likewise, even before *Rory,* provisions within an employment contract providing for a shortened period of limitations were held to be reasonable and, therefore, valid and enforceable. See *Timko v. Oakwood Custom Coating, Inc.,* 244 Mich. App. 234, 240–244, 625 N.W.2d 101 (2001).

Id. (citing *Rory*, at 471-472) (internal citations omitted). "Consequently, we are unable to conclude that the limitations period provided in the contract violates public policy." *Id.*

As discussed in detail below, *Clark* was correctly decided. As detailed above, the Michigan Court of Appeals, in *Clark*, dutifully followed *Rory* by carefully analyzing whether the two exceptions to enforcing the plain language of a contract—whether a contractually shortened period of limitations in an employment agreement violates law or public policy—precluded a valid and enforceable contact. The *Clark* court answered both questions in the negative and, thus, properly concluded that that a sixth-month limitations period in an employment contact is valid and enforceable.

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2. *The Michigan Court of Appeals, in Clark, Did Not "Extend" Rory to Employment Contracts; Rather, it Applied Rory as Required Under the Rule of Stare Decisis.*

The Michigan Court of Appeals is bound by stare decisis to follow the decisions of the Michigan Supreme Court. *Duncan v State*, 300 Mich App 176, 193; 832 NW2d 761 (2013). A published opinion of this Court has precedential effect under the rule of stare decisis, thus binding lower courts and tribunals. MCR 7.215(C)(2); *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 23; 678 NW2d 619 (2004). Only the Supreme Court may overrule its prior decisions. *People v Crockran*, 292 Mich App 253, 256; 808 NW2d 499 (2011).

Application of stare decisis does not require factual identity between cases, *Hoffman v Burkhead*, 353 Mich 47, 54; 90 NW2d 498 (1958), but it does require that the question presented be essentially the same, *Sizemore v Smock*, 430 Mich 283, 291 n 15; 422 NW2d 666 (1988). The identity of the question presented is determined by the facts and issues. *Topps-Toeller, Inc v City of Lansing*, 47 Mich App 720, 729; 209 NW2d 843, lv den 390 Mich 788 (1973). The focus is on the consistent application of principles of law. *See In re Sprenger's Estate*, 337 Mich 514, 523; 60 NW2d 436 (1953).

The question presented in *Rory* was essentially the same as that set forth in *Clark*; namely: whether a Court should enforce the plain language of a contractually shortened limitations period where there the provision in question did not violate law or public policy. Thus, under the rule of stare decisis, the *Clark* panel properly applied (as opposed to "extended") binding Michigan Supreme Court precedent in deciding *Rory*. Thus, unless this Court intends to overrule or otherwise abrogate *Rory*'s holding (which it should not do), there is no legal basis to disturb the holding of *Clark*.

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3. The Michigan Court of Appeals, in Clark, Properly Concluded That Rory's First Exception to Enforcing the Plain Language of a Contract—Whether the Contract Provision Violates Michigan Law—Does Not Preclude Enforcement of a Contractually Shortened Limitations Period in an Employment Contract.

As it was true when the Michigan Court of Appeals decided no statutes explicitly prohibiting the contractual modification of limitations periods in the employment context, the contract provision is not contrary to law. Plaintiff herself makes no contention that the provision is contrary to law. Thus, this exception to enforcing the plain language of a contract as set forth in *Rory* is inapplicable.

4. The Michigan Court of Appeals, in Clark, Properly Concluded That Rory's Second Exception to Enforcing the Plain Language of a Contract—Whether the Contract Provision Violates Michigan Public Policy—Does Not Preclude Enforcement of a Contractually Shortened Limitations Period in an Employment Contract.

The second exception to enforcing the plain language of a contract—whether the contract violates Michigan public policy—does not prohibit enforcement of a sixth-month limitations period in an employment contact. As set forth below, Michigan public policy supports the holding of *Clark*.

a. Guiding Principles for Determining Public Policy.

To determine if a contractual provision "runs afoul of the public policy of the state, it is first necessary to discuss how a court ascertains the public policy of the state." *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002). Public policy "in this context is a legal term of art that refers to policies that are 'clearly rooted in the law.'" *Soaring Pine Cap Real Est & Debt Fund II, LLC v Park St Grp Realty Servs, LLC*, No 163320, -- Mich --, *slip op.*, at 8 (2023) (quoting *Terrien*, at 67). "Relatedly, there must be 'definite indications in the law of the sovereign to justify the invalidation of a contract as contrary to [public] policy.'" *Id.* (quoting *Terrien*, at 68) (brackets in original). As such, "this Court looks to 'the policies that have been adopted by the public through

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our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.'" *Soaring Pine*, at 9 (quoting *Terrien*, at 66-67) (cleaned up).

These are the only sources to be considered as there "is no other proper means of ascertaining what constitutes our public policy." *Terrien*, at 67. Public policy

> must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is,* and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges.

Id. at 66 (emphasis in original).[11]

As to the instant subject matter, the "'principle that contracts in contravention of public policy are not enforceable should be applied with caution'" *Skutt v City of Grand Rapids*, 275 Mich 258, 264; 266 NW 344 (1936) (quoting *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353; 51 S Ct 476, 477 (1931)) (emphasis added). Also, the bases to invalidate a contract on public policy grounds are "narrow." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 372; 817 NW2d 504 (2012).

Such narrow grounds do not include "the personal predilections of the majority of the deciding tribunal about what is reasonable or fair" *DeFrain*, at 373, nor the "general considerations of supposed public interests." *Terrien*, at 68. Public policy is also "not to be determined by what a majority of this Court deems desirable or appropriate at a given time" *Smitter v Thornapple Twp*, 494 Mich 121, 140; 833 NW2d 875 (2013), or what this Court believes "would be most fair or just or best public policy." *Lash v City of Traverse City*, 479 Mich 180, 197; 735 NW2d 628 (2007) (citing *Hanson v Mecosta Co Rd Comm'rs,* 465 Mich 492, 504; 638 NW2d 396 (2002)).

[11] This Court has rejected definitions of "public policy" that were based on "common sense and common conscience", as well as other vague pros of right and wrong. *Terrien*, at 68 n 13. Such a "nebulous definition" was rejected "because it would effectively allow individual judges discretion to substitute their own personal preferences for those of the public expressed through the regular process of the law." *Id.*

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Similarly, as this Court recently affirmed, considerations of what is fair or "equitable" have no place in this discussion as "'the focus of the judiciary must ultimately be upon the policies that, *in fact*, have been adopted by the public through our various legal processes'" *Soaring Pine*, at 20 (quoting *Terrien*, at 66-67) (emphasis in original). Meaning, unless the policy is "clearly rooted in the law", "explicit", "well defined", and "dominant", *Terrien*, at 67-68, then the policy is not "truly a 'public' policy as opposed to merely a judge's own preferred policy." *Id.*, at 78.

Against that backdrop, the next focus is examining the "objective sources" of public policy as it relates to the ELCRA and, specifically, the limitations period for claims under that statute.

b. <u>Public Policy Sources Relevant to the Limitations Period for Civil Rights Claims</u>.

Initially, our Constitution does not prohibit private parties from contractually agreeing to shorten the statute of limitations for any claims. *See generally* Cont. 1963.

As for the common law, this Court recognizes that "Michigan has 'no general policy … which would prohibit private parties from contracting for shorter limitations periods than those specified by general statutes.'" *Rory v Cont'l Ins Co*, 473 Mich 457, 471; 703 NW2d 23 (2005) (quoting *Camelot Excavating Co v St Paul Fire & Marine Ins Co*, 410 Mich 118, 139; 301 NW2d 275 (1981)). There is also no relevant case law supporting same. *See, id.*

The common law is also silent about employment-based civil rights claims. The reason why is that before passage of the ELCRA and its predecessor, "Michigan did not provide a common-law remedy for workplace discrimination." *McClements v Ford Motor Co*, 473 Mich 373, 382; 702 NW2d 166 (2005) (citing *Pompey v Gen Motors Corp,* 385 Mich 537, 552; 189 NW2d 243 (1971)). Protections against discrimination "in the workplace are wholly creatures of statute." *Id.* Therefore, there are no common-law public policy interests against limiting the time to bring civil rights claim related to employment.

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As for the ELCRA, that statute protects individuals from discrimination and retaliation with respect to their employment based on protected characteristics or activity. *See* MCL §§ 37.2202(1)(a), 37.2701(a). Passed in 1976, the ELCRA provides a "comprehensive scheme" to remedy "discrimination in employment" *Eide v Kelsey-Hayes Co*, 431 Mich 26, 31; 427 NW2d 488 (1988), and is "an extensive expansion of the preexisting substantive provisions of civil rights legislation." *Matras v Amoco Oil Co*, 424 Mich 675, 696-697; 385 NW2d 586 (1986).

Notwithstanding the ELCRA's noble purpose and breadth, what is noticeably absent from that statute is any language related to the limitations period for bringing a claim provided therein. *See generally* MCL § 37.2100 *et seq*. That is significant for several reasons.

First, no public policy considerations related to the issue before this Court can be drawn from the ELCRA due to the Act's silence on an applicable limitations period. As this Court holds, when it comes to public policy issues related to statutory matters, such policy is best "understood in terms of <u>its actual provisions</u> than in terms of a judicial effort to identify some overarching public policy" *Titan Ins Co v Hyten*, 491 Mich 547, 565; 817 NW2d 562 (2012) (emphasis added).

Second, the ELCRA's silence as to a limitations period is also considerable because its predecessor <u>did</u> specify a statutory limitations period. The Michigan Fair Employment Practices Act ("FEPA"), MCL § 423.301 *et seq*., "was enacted in 1955" and prohibited employment-based discrimination. *Walker v Wolverine Fabricating & Mfg Co*, 425 Mich 586, 604 n 6; 391 NW2d 296 (1986). The FEPA stated that an individual "aggrieved by an alleged unlawful employment practice may, by himself or his agent, make, sign and file with the board, within 90 days after the alleged act of discrimination, a verified complaint in writing" *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 551; 398 NW2d 368 (1986) (quoting MCL § 423.307(b)). The "Legislature repealed the FEPA" and replaced it with the ELCRA. *Walker*, at 604 n 6; *Eide*, 431 Mich at 31.

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The Legislature's actions in replacing the FEPA with the ELCRA, and eliminating a statutory limitations period in the process, illustrates the Legislature's intent to not classify the limitations period for ELCRA claims as a substantive right (*See, infra*). That, combined with the fact that the Legislature enumerated no conditions or restrictions on modifying the limitations period, persuasively shows the Legislature placed little to no value on the limitation period for civil rights claims. Stated otherwise: if the Legislature believed the limitations period was a right or had any import to civil rights in Michigan, it would have codified that right or placed restrictions on what (if any) modifications could be made to the limitations period.

That's critical here because the Legislature has demonstrated instances in which it believed such protection *was* necessary. For example, the Legislature has for other employment statutes expressly adopted a limitations period in the actual statute. *See, e.g.*, M.C.L. § 423.216(a) ("No complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the commission"); MCL § 15.363(1) (under the Whistleblowers' Protection Act, a person "may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.").

Likewise, the Legislature has also spoken on prohibiting the modification of the limitations period for certain claims. While the Legislature has only done so in apparently "one specific context: life insurance policies" *see Rory v Cont'l Ins Co*, 473 Mich 457, 472; 703 NW2d 23 (2005) (citing MCL § 500.4046(2)), the fact it has done so evidences the unavoidable intent of the Legislature to prohibit such modification when it deems it necessary.

Taken together, the ELCRA's silence on both the applicable limitations period for its claims and a prohibition as to modifying that time period – when the Legislature has affirmatively acted on both in other contexts – is dispositive. As this Court recently acknowledged, the ELCRA's

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"silence" on both issues "is particularly meaningful here." *Ottgen v Katranji*, No 163216, -- Mich --, *slip op.*, at 7 (2023). "That is because the Legislature has shown it 'knows how to tweak'" or regulate the limitations period for civil claims, "but it did not do so for" claims under the ELCRA. *Id.* (citing *Castro v Goulet*, 501 Mich 884, 887; 901 NW2d 614 (2017)) (Viviano, J., concurring).

Accordingly, if the Legislature believed the public policy of this state should prohibit the modification of the limitations period for civil rights claims it would have done so. The "best source of public policy is the Legislature." *Gavrilides Mgmt Co, LLC v Michigan Ins Co*, 340 Mich App 306, 316; 985 NW2d 919 (2022), *appeal denied*, 981 NW2d 725 (2022) (citing *Woodman v Kera LLC*, 486 Mich 228, 245-246; 785 NW2d 1 (2010)). Thus, the absence of Legislative action on the issue before the Court is dispositive.

Third, the ELCRA's silence as to a limitations period means the applicable time to bring a civil rights claim is governed by the Revised Judicature Act ("RJA") and, specifically, MCL § 600.5805(2). *See Garg v Macomb Cnty Cmty Mental Health Servs*, 472 Mich 263, 284; 696 NW2d 646 (2005). This further emphasizes the lack of importance (and the Legislature's lack of concern) for the limitations period governing civil rights claims.

As this Court has long observed, the "R.J.A. is legislation that affects procedural rights", *not* substantive rights. *Sam v Balardo*, 411 Mich 405, 424; 308 NW2d 142 (1981). To wit: "The purpose of the act was to effect procedural improvements, not advance social, industrial or commercial policy in substantive areas." *Id*. (quoting *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 151; 200 NW2d 70 (1972)) (emphasis added).

Further, MCL § 600.5805, "commonly known as the general tort statute of limitations", includes "14 subsections, 12 of which clearly refer to various types of tort suits." *Miller-Davis Co v Ahrens Const, Inc*, 489 Mich 355, 363; 802 NW2d 33 (2011). What is now § 5805(2) (formerly

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subsection 10), is "known as the residual tort statute" and applies to "'all other actions to recover damages for the death of a person, or for injury to a person or property.'" *Id.*, at 363 n 11.

Meaning, the Legislature specifically chose to highlight a statute of limitations for certain claims, yet excluded civil rights claims from any form of explicit codification. Instead, civil rights claims fall within the general "residual" subsection along with other general civil claims such as negligence, *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995), breach of fiduciary duty, *Wayne Cnty Ret Sys v Wayne Cnty*, 301 Mich App 1, 67 n 37; 836 NW2d 279 (2013), and nuisance, *Marilyn Froling Revocable Living Tr v Bloomfield Hills Country Club*, 283 Mich App 264, 290; 769 NW2d 234 (2009), just to name a few. Thus, civil rights claims are on equal legal footing as these other civil claims and garner no preferential treatment under Michigan law.

Fourth, the principles set forth in *Clark* have been the law in Michigan since 2005. In that time, the ELCRA has been amended, including twice just this year. *See* P.A. 2023, No. 0006 (amending the ELCRA to add "sexual orientation" and "gender identity or expression" as protected characteristics); P.A. 2023, No. 0045 (amending the ELCRA to define "race" as including "hair texture and protective hairstyles" (i.e., the CROWN Act)). Yet, the Legislature – all the while knowing the principles set forth in *Clark* governed civil rights claims in Michigan – consciously chose not to statutory abrogate these cases by amending the ELCRA to preclude any waiver of the limitations period. *See, e.g.*, *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439-440; 716 NW2d 247 (2006) (affirming "'that the Legislature is presumed to be aware of judicial interpretations of existing law when passing legislation."); *Bartenwerfer v Buckley*, 143 S Ct 665, 674-675 (2023) ("'This Court generally assumes that, when Congress enacts statutes, it is aware of this Court's relevant precedents.").

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In sum: the Legislature eliminated a statutory limitations period for civil rights claims upon enacting the ELCRA, but codified such a period for other employment statutes. The Legislature also declined to specify a limitations period for civil rights claims upon enacting and amending the RJA, but did so for various other civil claims. The Legislature has also expressed no prohibition against shortening the limitations period for civil rights claims, although it has had ample opportunity to do so, yet specifically prohibited such a practice for at least one type of claim.

Taken together, the public policy math for the issue before the Court yields a single answer: Michigan public policy does not protect the limitations period for civil rights claims or prohibit parties from contractually agreeing to shorten that time period. There is no authority to the contrary and, therefore, there is no basis to hold that the public policy of this state prohibits parties from contractually shortening the limitations period for civil rights claims.

c. Public Policy Sources Supporting *Clark*.

Unlike the ELCRA, the public policy considerations supporting *Clark* are substantial and historically engrained in Michigan law. In addition to what *Rory* observed as noted above, *see supra*, the following sources of public policy dispositively show *Clark* was correctly decided.

As for the freedom to contract, "'the general rule of contracts is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.'" *Bronner v City of Detroit*, 507 Mich 158, 166; 968 NW2d 310 (2021) (quoting *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002)) (cleaned up).

This Court recognizes that the "notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52; 664 NW2d 776 (2003) (emphasis added); *see also Macomb Cnty v AFSCME Council 25*, 494 Mich 65, 80 n

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41; 833 NW2d 225 (2013) (affirming the same). This is "a 'bedrock principle of American contract law" *Wilkie*, at 51, and "the freedom to contract" is "deeply entrenched in the common law of Michigan." *Terrien*, at 72 n 19 (citing *McMillan v Mich S & N I R Co,* 16 Mich 79 (1867)). This "ancient and irrefutable" principle protecting the freedom to contract

> draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art. I, § 10, cl. 1. Our own state constitutions over the years of statehood have similarly echoed this limitation on government power.

Wilkie, at 52 (citing Const. 1963, art. 1, § 10). This principle "is, in short, an unmistakable and ineradicable part of the legal fabric of our society", *id.*, and remains "one of the firmest axioms in the whole fabric of the social philosophy of our culture" *Rory v Cont'l Ins Co*, 473 Mich 457, 479; 703 NW 2d 23 (2005).

Accordingly, unlike the limitations period for civil rights claims, a party's freedom to contract has historically been recognized and continues to be protected by the United States Constitution, Michigan's Constitution, our common law, and this Court's long-standing precedent.

Next, "[s]tatutes of limitation are procedural devices intended to promote judicial economy and the rights of defendants." *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995). Meaning, not only are limitation periods *procedural* in nature, not substantive rights, but they are intended to protected defendants, not plaintiffs.

Moreover, this Court has "long recognized the value of a statute of limitations" *Mair v Consumers Power Co*, 419 Mich 74, 80; 348 NW2d 256 (1984) (citing *Shadock v Alpine Plank-road Co,* 79 Mich 7, 13; 44 NW 158 (1889)), and also "recognized that the statute of limitations is not a disfavored plea but a perfectly righteous defense, a meritorious defense." *Bigelow v Walraven*, 392 Mich 566, 570; 221 NW2d 328 (1974). Moreover, the "policy goals underlying statutes of limitation are well establish" and, again, exist to protect defendants:

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> Statutes of limitation 'encourage the prompt recovery of damages; they penalize plaintiffs who have not been industrious in pursuing their claims; they afford security against stale demands when the circumstances would be unfavorable to a just examination and decision; they relieve defendants of the prolonged fear of litigation; they prevent fraudulent claims from being asserted; and they remedy the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert.'

Lemmerman v Fealk, 449 Mich 56, 65; 534 NW2d 695 (1995) (quoting *Lothian v Detroit,* 414 Mich 160, 166-167; 324 NW2d 9 (1982)) (cleaned up).

Furthermore, this Court holds that the noble purposes underlying the ELCRA is of no greater significance than the purposes served by a limitations period:

> While it can scarcely be gainsaid that the purpose of the Civil Rights Act is 'to root out discrimination and make injured parties somewhat whole,' … that purpose must be understood in the context of a competing 'purpose' to ensure that relief under the act be subject to a statute of limitations.

Garg v Macomb Cnty Cmty Mental Health Servs, 472 Mich 263, 285 n 11; 696 NW2d 646 (2005) (internal citation omitted).

Last, and certainly not least, *Rory* (and by the same token, *Clark*) reaffirmed more than 100 plus years of case law penned by this Court enforcing shortened limitations periods. *See Rory v Cont'l Ins Co*, 473 Mich 457, 466 n 15; 703 NW2d 23 (2005) (collecting cases from 1883 to 1975); *see also Tom Thomas Org, Inc v Reliance Ins Co*, 396 Mich 588, 592; 242 NW2d 396 (1976) (collecting and recognizing the same).

Taken together: the *Clark's* holding has overwhelming support under Michigan's Constitution, common law, and case law—including *Rory*. Moreover, nothing in *Clark* is contradicted or prohibited by the laws and authorities of this state, and the indicia of legislative intent set forth above shows the Legislature can and has had ample opportunity to disagree, but as affirmatively chosen not to. Therefore, the public policy interests of this state support the holding in *Clark*. The case was correctly decided.

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5. The Doctrine of Stare Decisis Dictates that Clark Should Not Be Overruled.

The foregoing overwhelmingly shows that *Clark* was correctly decided given that contractual provisions shortening the limitations period for civil rights claims do not violate public policy. However, even if this Court disagrees, *Clark* is still precedent, *see* MCR 7.215(C)(2), and the mere fact a majority of today's Court may believe this precedent was wrongfully decided "by itself, does not necessarily mean that overruling it is appropriate." *Coldwater v Consumers Energy Co*, 500 Mich 158, 172; 895 NW2d 154 (2017) (citing *Robinson v Detroit*, 462 Mich 439, 465; 613 NW2d 307 (2000)).

"Overruling precedent must, of course, be undertaken with caution and must only be done after careful consideration of the effect of stare decisis." *Haynie v State*, 468 Mich 302, 314; 664 NW2d 129 (2003). This "Court should respect precedent and not overrule or modify it unless there is substantial justification for doing so." *People v Feezel*, 486 Mich 184, 212; 783 NW2d 67 (2010). Such a justification "is *not* a mere belief that a precedential case was wrongly decided or that the Court, as currently composed, would have decided the case differently." *Petersen v Magna Corp*, 484 Mich 300, 320; 773 NW2d 564 (2009) (emphasis in original). Rather, "the Court should consider several evaluative criteria, none of which, standing alone, is dispositive." *Id.*

Those criteria are set forth in "a three-part test to determine whether the doctrine of stare decisis nonetheless supports upholding the previously decided case." *Feezel*, at 212. That test is: "(1) whether the decision defies practical workability, (2) whether reliance interests would work an undue hardship if the decision were overturned, and (3) whether changes in the law or facts no longer justify the decision." *Id.*, at 212-213;

First, a decision "defies practical workability if it has proved difficult to apply or implement." *In re Ferranti*, 504 Mich 1, 25; 934 NW2d 610 (2019). "Considerations that are

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relevant to this analysis include whether the decision has been met with criticism" and "whether its application been contested or difficult" *Ottgen v Katranji*, No 163216, -- Mich --, *slip op.*, at 13 (2023) (collecting cases). Stated differently, a "decision defies practical workability when it generates confusion among courts trying to apply it and sows division." *Kandil-Elsayed v F & E Oil, Inc*, No 162907, -- Mich --, *slip op*., at 36 (2023).

Clark does not defy practical workability. The principle set forth in those cases – that a six-month limitations period in the employment context is enforceable – is straightforward. This principle has apparently not been contested since these cases were decided; it has yielded no confusion from Michigan courts; and there has been no published criticism from the Court of Appeals or this Court. To the contrary, as the Court of Appeals recently affirmed:

> Undaunted, plaintiff asks the Court to conclude that a limitations provision in an employment contract that shortens the time to file a claim under the ELCRA violates public policy as a matter of law. However, this issue has already been decided against plaintiff's position and this Court is bound by the Michigan Supreme Court's decision in *Rory* and by our own decision in *Clark*. … Those cases stand for the proposition that such limitations periods are valid and enforceable and do not violate public policy.

French v MidMichigan Med Ctr-Gladwin, unpublished per curiam opinion of the Court of Appeals, issued Mar 23, 2023 (No 360230), pp. 2-4 (**Ex. 18**, at 171b-173b).

As for the dissent in *Clark*, it is unpersuasive. Judge Neff's dissenting opinion was also based in part on the allegedly adhesive nature of the agreement in that case, see *Clark*, 268 Mich App at 148-153 (Neff, J., dissenting), which *Rory* holds has no applicability, see discussion *infra* Part C of Law and Argument section. As for Judge Neff's public policy comments, *see id.*, at 154-156, while some may be valid in theory, these comments merely presented a partial view to one side of a policy debate that is within the exclusive realm of the Legislature. But, again, as this Court holds:

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> making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: 'The responsibility for drawing lines in a society as complex as ours—of identifying priorities, weighing the relevant considerations and choosing between competing alternatives—is the Legislature's, not the judiciary's.'

Terrien v Zwit, 467 Mich 56, 67; 648 NW2d 602 (2002) (quoting *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999)). *See also In re Mardigian Est*, 502 Mich 154, 170; 917 NW2d 325 (2018) (affirming the same); *People v Betts*, 507 Mich 527, 565-566; 968 NW2d 497 (2021) (same and collecting sources). Accordingly, Judge Neff's dissent is still unavailing.

Additionally, unlike other decisions this Court has recently overruled: the principle set forth in *Clark* does not open the door to "arbitrary and discriminatory enforcement", *Feezel*, at 213; there have been no exceptions carved out of the rule set forth in *Clark*, *see Ferranti*, at 26; there has been no disagreement ("frequently" or otherwise) "over how to apply" the principle in question, *see Kandil-Elsayed*, *slip op.*, at 37; and there has been no repeated questioning by courts or challenges to *Clark's* principles. *See Ottgen*, *slip op.*, at 14. Thus, this factor weighs heavily in favor of not overruling *Clark*.

Second, for reliance interest, the "Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Coldwater v Consumers Energy Co*, 500 Mich 158, 173; 895 NW2d 154 (2017) (citing *Robinson*, 462 Mich at 466).

Clark has been precedent in Michigan for 19 years. As such, it is not a decision of a recent vintage that this Court has previously opined had yet to achieve reliance status. *See Feezel*, 486 Mich at 216 (four years "was recently decided"); *Coldwater*, 500 Mich at 173 (six years means "any reliance … has thus been relatively brief."). While this Court recently overruled a decision from 2001 (*Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2001)), *Lugo* was marred by

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"two decades of uncertainty … where parties and lower courts have had to navigate an unclear standard and varying application." *Kandil-Elsayed v F & E Oil, Inc*, No 162907, -- Mich --, *slip op*., at 38-39 (2023). That is not the case here.

As noted above, there is no noteworthy division, contestation, or confusion over the principle set forth in *Clark*. Moreover, since *Clark* was decided nearly two decades ago, employers and employees alike have relied on *Clark* to guide their conduct. This is not only evident from the instant case – as the appliable provision at issue was agreed upon in 2017 – but is still being followed to this day by state and federal courts alike. *See, e.g.*, *French v MidMichigan Med Ctr-Gladwin*, pp. 2-4 (Ex. 18, at 171b-173b); *Rockymore v Cont'l Mgmt*, 2021 WL 5042993, at *4 (ED Mich Sept 22, 2021) (Ex. 18, at 193b); *Murphy v Magna Seating of Am, Inc*, 2020 WL 1862676, at *5 (ED Mich Apr 13, 2020) (collecting like cases applying the same) (Ex. 18, at 178b); *Posselius v Springer Pub Co*, unpublished per curiam opinion of the Court of Appeals, issued Apr 17, 2014 (No. 306318), pp. 3-6 (Ex. 18, at 184b-187b). Thus, unlike other cases that have been recently overturned, there has not been "scant application" of *Clark* to undermine its reliance within Michigan's jurisprudence. *See In re Ferranti*, 504 Mich 1, 27; 934 NW2d 610 (2019). Therefore, the reliance interest also strongly favors not overruling *Clark*.

Finally, there have been no relevant changes in the law or facts, so this factor is inapplicable. *See Coldwater*, 500 Mich at 174; *Kandil-Elsayed*, -- Mich --, *slip op*., at 39.

Therefore, taking the foregoing as a whole, all of the relevant factors hold that *Clark* should not be overruled based on *stare decisis*.

6. Plaintiff's Supplemental Arguments Have No Merit.

Remarkably, Plaintiff contends that prospective employees who are negotiating the terms and conditions of their employment with prospective employers have *less* bargaining power than

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prospective insureds who are negotiating the terms of their insurance policies. (*See* Pl.'s 07/18/2024 Supp. Brief, pp. 6-7.) As noted by Judge Shapiro of the Michigan Court of Appeals, it is difficult to imagine a context where there is less bargaining power than that present in an insured/insurer negotiation over a proposed insurance policy:

> One party, typically an individual, is presented with a preprinted policy and told to "take it or leave it." On the other side is typically an insurance entity with billions of dollars in assets and multiple employees dedicated to drafting contract language that will favor the entity in every way possible under the law or in what the entity hopes it can reshape the law to be. If the individual, assuming he or she is able to understand the policy language, declines to accept every word as written, they will not be permitted to purchase a policy. No revisions are even entertained. Moreover, if this individual then seeks coverage from a competitor insurer, they are all but certain to face the same or similar situation."

Jawad A Shah, MD, PC v. State Farm Mut Auto Ins Co, 324 Mich App 182, 217 n1; 920 NW2d 148, 168 (2018) (Shapiro, J., concurring in part, dissenting in part). Nonetheless, under *Rory*, reviewing courts are nonetheless required to enforce the plain language absent a provision that is contrary to law or public policy.

Plaintiff's arguments regarding the decisions of other Courts analyzing different laws—none of which arise out of Michigan statute or common law—are without merit. First, authoritative sources outside of Michigan have no relevance to determining the public policy of this state:

> The public policy <u>of this state</u> is to be found in the declarations and deeds of <u>its people</u>. These find concrete expression in the Constitution adopted by the people, the laws enacted by the Legislature, the acts of the Governor, the Attorney General, others exercising executive power, the decisions of our courts, and the vote of the people.

People v Bricker, 389 Mich 524, 529; 208 NW2d 172 (1973); *see also Terrien v Zwit*, 467 Mich 56, 67-68, 78; 648 NW2d 602 (2002) (same). As this Court just affirmed, "there must be 'definite indications <u>in the law of the sovereign</u> to justify the invalidation of a contract as contrary to [public] policy.'" *Soaring Pine Cap Real Est & Debt Fund II, LLC v Park St Grp Realty Servs, LLC*, No

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163320, -- Mich --, *slip op.*, at 8 (2023) (quoting *Terrien*, at 68) (emphasis added). Moreover, while other state and "federal precedent may often be useful as guidance in this Court's interpretation" of analogous laws, "such precedent cannot be allowed to rewrite Michigan law." *Garg v Macomb Cnty Cmty Mental Health Servs*, 472 Mich 263, 283; 696 NW2d 646 (2005).

Therefore, what other state and federal courts have said on the topic before this Court are irrelevant and cannot be considered when deciding the issue at hand. But, even if that were not the case, and we ignore this Court's long-standing precedent noted above, the state and federal cases Plaintiff cites are distinguishable and inapplicable.

In one of the two cases that Plaintiff cites, *Logan v MGM Grand Detroit Casino*, 939 F3d 824 (CA 6 2019), the Sixth Circuit became the first (and, to date, only) federal circuit court to hold "that a contractual provision that purports to shorten the limitation period for bringing suit under Title VII is unenforceable." *Id.*, at 831. That holding is founded on the Supreme Court's position for purposes of federal law "that where statutes that create rights and remedies contain their own limitation periods, the limitation period should be treated as a substantive right", which is "not waivable" *Id.*, at 829. Moreover, in sharp contrast to ELCRA, Title VII contains a *mandatory* administrative exhaustion requirement that *requires* aggrieved employees to exhaust their administrative remedies with the Equal Employment Opportunity Commission before filing suit against an employer. As the Sixth Circuit stated in great detail:

> Title VII enforcement relies on a combination of public and private action and mandates that the EEOC, the federal agency tasked with enforcing Title VII, must afford non-compliant employers the chance to voluntarily cure their violations before Title VII litigation may be brought against them. [citations omitted] . . . . Consequently, a protected individual may not simply sue a recalcitrant employer under Title VII without having first brought the dispute before the EEOC for resolution.

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Logan, 939 F3d at 827 (CA 6 2019) (internal citations omitted).[12]

Based on the existence of this statutory scheme, which was the product of Congressional action, the Court concluded that "Title VII contains its own limitation period." *Id.* at 829. As a result, the *Logan* Court held that "the 300-day limitation period to sue under Title VII is a substantive, rather than procedural, rule" and, therefore, "the limitation period of this statute is not prospectively waivable as it pertains to litigation." *Id.*[13]

The reasoning relied that Plaintiff's relies upon from *Logan* does not apply here. As discussed above, the ELCRA does not contain its own limitations period, so the applicable limitations period is not a substantive right. Instead, the limitations period is proscribed by the general catchall provision of the RJA, which means it is a mere procedural device. In such instances, as *Logan* affirmed, federal courts "have allowed the limitation period to be contractually altered." *Logan*, 939 F3d at 831 (emphasis added). Thus, the reasoning of *Logan* actually supports American House's position—not Plaintiff's position. According, the limitations period for Michigan civil rights claims are not substantive rights and Plaintiff's reliance on *Logan* is misplaced.[14]

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[12] The Sixth Circuit's opinion in *Logan* provides a comprehensive summary of Title VII's exhaustion requirement, which American House has not included in this brief due to its length. *See id.* at 827-829.

[13] The Sixth Circuit applied that same reasoning to hold that contractually shortened limitations periods for claims under the ADA and ADEA are similarly unenforceable. *See Thompson v Fresh Prod, LLC*, 985 F3d 509, 520-521 (CA 6 2021).

[14] American House notes that Justice Welch, in her concurrence in *McMillon*, 983 N.W.2d 79 observed, "other states have recently found that contractual agreements to shorten the period to bring discrimination lawsuits are invalid." One of the three cases, cited by Justice Welch, *Rodriguez v Raymours Furniture Co, Inc*, 225 NJ 343; 138 A3d 528 (2016), is cited by Plaintiff in her second supplemental brief. American House addresses *Rodriguez* below. Regarding the second of the three cited cases, *Ellis v US Sec Assocs*, 169 Cal Rptr 3d 752, 757-761 (Cal App 2014), the state of California—like the federal government—has a mandatory administrative exhaustion requirement that expressly provides employees with a period of one year to file an administrative claim before filing suit. *See generally*, *Ellis*, 169 Cal Rptr 3d 752. Similarly, in *Croghan v Norton Healthcare, Inc*, 613 S.W.3d 37, 42-43 (Ky App, 2020), the Kentucky Court of Appeals held that a sixth-month contractual limitations claim to bring certain claims under the Kentucky Civil Rights Act was contrary to a Kentucky statute that prohibited contracts that reduce the statute of

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As for *Rodriguez v Raymours Furniture Co*, 138 A3d 528 (NJ 2016), that opinion holds no persuasive value. But for discussing broad, generalized pros regarding the nobility of civil rights claims in New Jersey, the *Rodriguez* Court never actually cites to any "objective sources" under its Constitution, common law, statutes, or case law to support its public-policy reasoning. *See, id.* In fact, *Rodriguez* broke rank with decades of precedent that upheld and enforced contractually shortened limitations periods in various contexts. *See Rodriguez v Raymours Furniture Co*, 93 A3d 760, 768 (NJ App 2014), *rev'd*, 138 A3d 528 (2016) (collecting cases).

The *Rodriguez* court invaded the province of the New Jersey Legislature by judicially legislating. The New Jersey Court of Appeals correctly declined that same request:

> Plaintiff refines his argument on this point, urging us to judicially impose a prohibition on agreements shortening limitation periods specifically in employment contracts. … This argument asks us to intrude upon the prerogative of the Legislature. None of these enactments impose a ban on contractually reducing a limitation period. The Legislature is presumably aware of the long-established case law allowing contractual reductions that are reasonable and not contrary to public policy, where not statutorily prohibited. Yet, it has not acted.
> …
> The judicial role involves such functions as interpretation of which statutory limitation provision applies in cases of ambiguity, the development and application of principles and doctrines to avoid injustices, such as equitable tolling, the discovery rule, estoppel, and the continuing violation doctrine, as well as a determination of whether any contractual modification is reasonable and not contrary to public policy.
> We therefore decline plaintiff's invitation to impose a judicial ban on the shortening of limitation periods for claims by workers against their employers. Plaintiff's arguments in this regard are better directed to the Legislature, which could consider, with input from all stakeholders and affected parties, the advisability of such legislation, and which could consider alternatives, such as specifying certain types of actions in which to impose a ban or partial ban on modifications of the statutory time frames, the procedures required to effectuate any such contractual modifications, and other related issues.

Rodriguez, 93 A3d 760, 769 (App Div 2014) (internal citations omitted).

limitations by more than 50%. Thus, the reasoning behind *Logan*'s is highly similar to reasoning of the California Court of Appeals and Kentucky Court of Appeals.

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The New Jersey Supreme Court ignored the foregoing and judicially amended New Jersey law. While the actions of that court may be permissible in New Jersey, it is not in Michigan. *See, e.g.*, *Perez v Keeler Brass Co*, 461 Mich 602, 611 n 8; 608 NW2d 45 (2000) ("Even if we agreed with defendant as a matter of policy, there is no basis for such a provision in the statute, and we are not free to craft a 'judicial amendment.'"); *People v Schaefer*, 473 Mich 418, 430; 703 NW2d 774 (2005) ("It is the role of the judiciary to interpret, not write, the law.").

Simply put, the *Rodriguez* opinion does not pass muster under Michigan law. Therefore, *Rodriguez*, like the other cases noted above, are inapplicable and hold no authoritative value under Michigan law regarding the issue before the Court.

C. The Contract at Issue in This Case is Not an Unconscionable Contract of Adhesion.

As noted above, this Court in *Rory* dispositively rejected further application of the adhesion contract doctrine and outlined in great detail the untenable basis for that doctrine as a whole. *See Rory*, 473 Mich at 476-490. In doing so, *Rory* not only overruled *Herweyer* but also outlined that the "adhesion contract doctrine" was untenable to begin with as it "existed in Michigan solely in dicta", was "implicitly adopted" by *Herweyer* "without substantive analysis", and was "in contravention of more than one hundred years of contrary case law from this Court." *Id.* at 477-478.

Because *Clark* did not "extend" but instead properly applied *Rory* in concluding that a sixth-month contractual limitations period in an employment contract is enforceable under the holding of *Rory*, it is wholly unnecessary for this Court to address whether the contract at issue in this case is an unconscionable adhesion contract. However, even if this Court disagrees, an adhesion contract must be enforced according to its plain terms unless one of the traditional contract defenses applies. *See Rory, supra* at 477 ("An 'adhesion contract' is simply that: a

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contract. It must be enforced according to its plain terms unless one of the traditional contract defenses applies.") (emphasis in original). In the instant case, both the Trial Court and Michigan Court of Appeals rejected Plaintiff's argument that the signed agreement is unconscionable. (*See* **Ex. 9** at p. 4 (062b); **Ex 17** at pp. 4-5 (165b-166b)). This Court should do the same.

Under Michigan law, unconscionability must be both procedural and substantive. *Liparoto Const, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 30; 772 NW2d 801, 805 (2009). "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term." *Id.* (internal citation omitted). "Substantive unconscionability exists where the challenged term is not substantively reasonable." *Id.* (internal citation omitted). "However, a contract or contract provision is not substantively unconscionable simply because it is foolish for one party or very advantageous to the other." *Id.* (internal citation omitted). "Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience." *Id.* (internal citation omitted).

Additionally, a trial court may only find a contract unconscionable if the procedural and substantive elements existed at the time the contract was made, and the trial court is given great discretion in making that determination:

> Under Michigan law, unconscionability is a question of law for the court to decide. *Citizens Ins. Co. of Amer. v. Proctor & Schwartz,* 802 F.Supp. 133, 143 (W.D.Mich.1992) (citing *Northwest Acceptance Corp. v. Almont Gravel,Inc.,* 162 Mich.App. 294, 412 N.W.2d 719, 722 (Mich.Ct.App.198 7) (in turn quoting the Practice Commentary by Professor Roy L. Steinheimer, Jr., to Mich. Comp. Laws § 440.2302)). **The issue is determined based on the facts and circumstances that existed when the contract was made, not those extant at the time of the suit.** *Id.* at 143, 144; Mich. Comp. Laws Ann. § 440.2302(1). **A reviewing court will uphold the trial court's unconscionability determination unless it is clearly erroneous.** *Northwest Acceptance Corp.,* 412 N.W.2d at 720, 724.

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Andersons, Inc. v. Horton Farms, Inc., 166 F.3d 308, 323 (6th Cir. 1998).[15]

Here, Plaintiff failed to establish the necessary prerequisite of procedural unconscionability. In generalized terms, Plaintiff argues, "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." (Pl.'s 7/18/2024 Supp. Brief at p. 8.) Putting aside the fact that there are no allegations in the Complaint or record evidence supporting this assertion, a mere disparity in bargaining power is insufficient to establish procedural unconscionability; rather, Plaintiff must show that she had no had no realistic alternative to acceptance of the term. *See Rembert v. Ryan's Family Steak Houses, Inc.*, 235 Mich. App. 118, 157 n 28, 596 NW2d 208 (1999) ("If the prospective employee (applicant) would be able to obtain work elsewhere, the contract is not one of adhesion because the applicant has a meaningful choice in accepting the offer of employment."). Indeed, if this Court were to hold that mere inequality of bargaining power, standing alone, established procedural unconscionability, this would effectively invalidate virtually all employment contracts of any kind—as well as motor vehicle purchase agreements, insurance policies, and numerous others. This is untenable.

Plaintiff's argument regarding substantive unconscionability likewise misses the mark. She argues, "[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." (Pl.'s 7/18/2024 Supp. Brief at p. 8.) This

[15] See also *Silverman v. Spitzer*, 2014 WL 7157419, at *11 (Mich. Ct. App. Dec. 16, 2014) ("[W]hether an agreement is substantively unconscionable must be determined from the facts as they existed at the time of the agreement.") (**Defendants' Exhibit 24**), citing *Northwest Acceptance Corp, supra,* 162 Mich. App at 300.

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argument is directly contrary to the plain language of the Acknowledgement. Indeed, not only does the Acknowledgment state that Plaintiff agreed to the contractually-shortened limitations period in "consideration of my employment" (see Ex. 2), but the "continuation of employment" is sufficient consideration for a contact. *QIS, Inc v Industrial Quality Control, Inc*, 262 Mich App 592, 594; 686 NW2d 788 (2004). Thus, as the Trial Court and Michigan Court of Appeals correctly held, there was a corresponding benefit and bargained-for-exchange of legal detriments (i.e., consideration).

Further, there is nothing in a contractual shortened limitations period of six months that "shocks the conscience" as necessary to establish substantive unconscionability. Indeed, the Legislature itself has established a statutory limitations period of a mere 90 days for claims brought under Michigan's Whistleblowers' Protection Act ("WPA"). *See* MCL § 15.363(1) (under the WPA, a person "may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.").

Accordingly, Plaintiff's unconscionability argument fails. The Michigan Court of Appeals correctly affirmed the Trial Court on this issue. Therefore, the Court of Appeals' ruling should be affirmed.

D. Plaintiff's Position on Appeal Violates Separation of Powers.

Plaintiff's position is not only unsupported by Michigan law (public policy or otherwise), but what she is asking this Court to do is an unconstitutional invasion of separation of powers.

"The people of the state of Michigan have divided the powers of their government 'into three branches: legislative, executive and judicial.'" *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 98; 754 NW2d 259 (2008) (quoting Cont. 1963, art. 3, § 2). "'The

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legislative power of the State of Michigan is vested in a senate and a house of representatives.'" *Id.* (quoting Cont. 1963, art. 4, § 1). And, "legislative power is the power to make laws." *Id.*

As for the law on contractually modifying the limitations period for civil claims, the Legislature has specifically spoken on that subject and exercised its power to prohibit such agreements. *See Rory v Cont'l Ins Co*, 473 Mich 457, 472; 703 NW2d 23 (2005) (citing MCL § 500.4046(2)). By codifying the prohibition in MCL § 500.4046(2), the Legislature not only demonstrated that enacting such prohibitions lies within its legislative power, but that the Legislature has already occupied the field with respect to that issue. And, as this Court recognizes, with "the Legislature's occupation of the field" on a subject such as this, "the judiciary is not the proper entity to create new rights or extend theories to reach new situations" on the same subject. *Van v Zahorik*, 460 Mich 320, 330; 597 NW2d 15 (1999). Instead, the "creation and extension of rights" on that subject "is clearly the province of the Legislature, not the judiciary." *Id.*

Moreover, as this Court has said time and again, policy determinations and the lawmaking process is solely ascribed and constitutionally limited to the Legislature. *See, e.g.*, *Longnecker v Noordyk Mooney, Inc*, 394 Mich 696, 699; 232 NW2d 654 (1975); *Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602 (2002); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589; 702 NW2d 539 (2005); *People v Betts*, 507 Mich 527, 565-566; 968 NW2d 497 (2021). And, as such, courts cannot write the laws or judicially amend statutes. *See, e.g.*, *Robinson v City of Detroit*, 462 Mich 439, 467; 613 NW2d 307 (2000); *Paige v City of Sterling Heights*, 476 Mich 495, 518; 720 NW2d 219 (2006); *Younkin v Zimmer*, 497 Mich 7, 11; 857 NW2d 244 (2014). In fact, *Clark* spoke to this exact issue, opining that any restrictions on contractually shortening the limitations period for civil rights claims "ought to be imposed by the Legislature, not the judiciary." *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 142 n 2; 706 NW2d 471 (2005).

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Accordingly, Plaintiff's position has no legal support and her request for this Court to change the law is unconstitutional. Therefore, Plaintiff's request should be rejected and this Court should affirm the decision of the Court of Appeals.

CONCLUSION

WHEREFORE, for the reasons set forth above, Defendant/Appellee American House Roseville I, LLC, d/b/a American House East I and American House respectfully requests that this Honorable Court **AFFIRM** the opinion of the Court of Appeals.

Respectfully submitted:

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WORD LIMIT VERIFICATION

Pursuant to MCR 7.312(A)(1) and 7.212(B)(3), and in reliance of the word count functions of the word-processing system being used, the undersigned verified that Defendant/Appellee's Response Brief to Plaintiff/Appellant's "Supplemental Brief" dated July 18, 2024 is 15,969 words, which is within the maximum amount permitted pursuant to MCR 7.212(B)(1).

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