STATE OF MICHIGAN
IN THE SUPREME COURT

LAKISHA McMILLON,

Appellant,

v

CITY OF KALAMAZOO,

Appellee.

Supreme Court No. 162680

Court of Appeals No. 351645

Kalamazoo County Circuit Court
Case No. 2019-0252-CD

AMICUS CURIAE BRIEF OF THE LABOR AND EMPLOYMENT LAW SECTION OF THE STATE BAR OF MICHIGAN[1]

James F. Hermon (P53765)
DYKEMA GOSSETT PLLC
400 Renaissance Center
Detroit, MI 48243-1668
(313) 568-6540
jhermon@dykema.com

Robin Wagner (P79408)
Pitt McGehee Palmer Bonanni & Rivers PC
117 W. 4th Street, Suite 200
Royal Oak, MI 48067-3848
(248) 398-9800
rwagner@pittlawpc.com

Attorneys for Labor and Employment Law Section of the
State Bar of Michigan

Dated: September 15, 2022

[1] Pursuant to MCR 7.312(H)(4), counsel for the Labor and Employment Law Section of the State Bar of Michigan attest that they authored the brief in whole and that no counsel or parties made a monetary contribution intended to fund the preparation or submission of the brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

JURISDICTIONAL STATEMENT AND AUTHORITY FOR FILING AMICUS BRIEF

The Labor and Employment Law Section of the State Bar of Michigan ("LELS" or "Amicus") agrees that Appellant timely filed her Application for Leave to Appeal with this Court, pursuant to MCR 7.305. The LELS respectfully requests that this Court accept this amicus brief pursuant to MCR 7.312(H).

STATEMENT OF QUESTIONS PRESENTED

I. Should this Court grant the pending application for leave to appeal to consider whether the Appellant is bound by the terms of a document that states, "I understand that this application is not a contract of employment," given the previous holdings of this Court in *Heurtebise v Reliable Business Computers, Inc.*, 452 Mich 405 (1996)?

Appellant answers: Yes.

Appellee answers: No.

Amici LELS answers: No.

This Court should answer: No.

II. Whether Appellant properly preserved the issue presented above during the lower court's proceedings in this matter.

Appellant answers: Yes

Appellee answer: No

Amici LELS answers: No

This Court should answer: No.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Labor and Employment Law Section of the State Bar of Michigan (the "LELS") is comprised of over 2,000 members of the Bar who represent both public and private employees, labor unions, and employers. Those members are geographically dispersed throughout the state and work in practices ranging in size from solo practices to the largest law firms in Michigan. However, as diverse as the interests of the membership are, all members share an interest in the law that governs the relationship between employees and their employers.

This case, therefore, is of interest to the LELS because its outcome could affect the legal landscape for all employers in the state. While the LELS membership has disparate opinions on whether all of the issues described in this Court's January 28, 2022, Order should be addressed by the Court, there is agreement that the Court's *Heurtebise* jurisprudence should not be disturbed, given employees and employers' reliance on the well-established principles set forth in that case and its progeny. Furthermore, there is agreement that the Court should not find that the issues raised by this appeal were properly preserved.

The LELS is therefore submitting this brief as amicus curiae to encourage the Court to decline review of the second issue described in the Court's January 28, 2022, Order, both because the Court should not disturb existing precedent surrounding *Heurtebise* and because that issue was not properly preserved below.

INTRODUCTION

Following the original briefing on the Application for Leave to Appeal on this matter, the Court issued an Order on January 28, 2022 directing the Clerk to schedule oral argument on the application and ordering the parties to submit supplemental briefing on four issues: whether

> 1. *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234 (2001), correctly held that the limitations clauses in employment applications are part of the binding employment contract;
>
> 2. the appellant is bound by the terms of a document that state "this…is not a contract of employment," *see Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405 (1996);
>
> 3. contractual limitations clauses that restrict civil rights claims violate public policy, *see, e.g., Rodriguez v Raymours Furniture Co, Inc*, 225 NJ 343 (2016); and
>
> 4. these issues are preserved. *See Michigan Gun Owners, Inc v Ann Arbor Public Schools*, 502 Mich 695, 708-09 (2018).

In that same Order, the Court invited a number of groups, including the LELS, to file briefs as amicus curiae.

Upon reviewing the invitation, the LELS Council considered whether it was possible to submit an amicus brief on all four of the issues identified by the Court's January 28, 2022 Order and concluded it could not. Some of the issues on which the Court is seeking briefing are the subject of considerable debate among members of the LELS and, therefore, the Council concluded that it would not be appropriate to take a position on behalf of the membership either in favor of or in opposition to the leave application as to issues 1 and 3.

As to issues 2 and 4, however, the Council concluded that there was sufficient uniformity of interest among members of the LELS that submission of an amicus brief was warranted. The law regarding the formation of contracts through statements in job applications or employee handbooks is fairly well established in Michigan and has been for decades. Changes in that law

would undermine a relatively clear body of law that is understood and relied upon by both employees and employers when determining their obligations to one another. Accordingly, the LELS opposes a grant of leave of appeal on this matter to the extent that such a grant could be the gateway to a change in this well established area of the law.

Similarly, the standards applicable to preservation of issues on appeal are firmly established by prior decisions of this Court and the Michigan Court of Appeals. The LELS therefore opposes the grant of a leave of appeal that would result in a change to those standards, given the interests of the bar in consistent rules of decision.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Statement of Facts contained in the parties' existing pleadings to this Court appear to accurately recite the relevant facts and proceedings in this matter. The LELS does not restate the facts involved in this appeal but offers the following relevant background information about the LELS for this Court's consideration.

The Labor and Employment Law Section of the State Bar of Michigan (the "LELS") is comprised of over 2,000 members of the Bar who represent both public and private employees, labor unions, and employers. Those members are geographically dispersed throughout the state and work in practices ranging in size from solo practices to the largest law firms in Michigan. However, as diverse as the interests of the membership are, all members share an interest in the law that governs the relationship between employees and their employers.

ARGUMENT

I. THIS COURT SHOULD NOT GRANT LEAVE TO RECONSIDER THE STANDARDS APPLICABLE TO CONTRACT FORMATION ARTICULATED UNDER *HEURTEBISE* AND ITS PROGENY.

Over twenty-five years ago, this Court set forth a clear rule to be followed by employers and employees in determining whether an enforceable contract existed regarding non-discharge terms of employment. In *Heurtebise v Reliable Bus Computers*, 452 Mich 405, 407-14 (1996), the Court considered whether an arbitration provision in an employee handbook containing a statement that "the Policies specified herein do not create an employment or personal contract, express or implied…" could create an enforceable contract of arbitration. Applying traditional principles of contract formation, this Court held that the handbook at issue failed to satisfy all elements needed to create an enforceable contract. *See id.* at 413-14. In doing so, the Court focused on the handbook's phrases disclaiming formation of any binding contract, finding that those phrases "demonstrate[d] that the [employer] did not intend to be bound to any provision contained in the handbook." *Id.* at 414. Simply put, this Court found that a contract cannot exist where the drafter disclaims that alleged contract's very existence.

A significant body of Michigan caselaw has arisen in the wake of the *Heurtebise* decision. For instance, in *Stewart v Fairlane Community Mental Health Centre*, the Court of Appeals considered a similar arbitration provision in an employee policy manual. *See* 225 Mich App 410 (1997). There, the policy manual contained a disclaimer that "the Personnel Policies Manual is neither an 'employment agreement,' nor a 'contract of employment.'" *Id.* at 413. The *Stewart* court, following this Court's reasoning in *Heurtebise,* concluded that no binding contract was created when that contract's existence was explicitly disclaimed. *See id*. at 423; *see also Ventura v Oakwood Hosp Corp*, 1999 Mich App. LEXIS 2041, 1999 WL 33454001 *2-3 (Mich Ct App Feb. 19, 1999) ("We find that the general disclaimer of any creation of a contract in the hospital's

employee handbook is virtually identical, in substance, to the disclaimer provision the Supreme Court relied on in *Heurtebise* to find that the handbook in that case had not created an enforceable arbitration agreement. It is also similar to the disclaimer provision relied on by this Court in *Stewart* to find that the handbook in that case had not created an enforceable arbitration agreement. The disclaimer in the instant case clearly indicates that the content of the handbook is not intended to create terms or conditions of either an expressed or implied employment contract, as did the disclaimers in *Heurtebise* and *Stewart*. Accordingly, the trial court erroneously ordered the parties to submit to arbitration.").[2]

Michigan Courts also have relied upon *Heurtebise* and its progeny to find that an employer and employee have entered into an enforceable contract where the elements of contract formation were satisfied and not disclaimed. *See e.g. Pellow v Daimler Chrysler Servs N Am, LLC*, 2006 U S Dist LEXIS 62056, *22-23 (ED Mich Aug 31, 2006) (finding an arbitration provision in an employment application binding where "[u]nlike the employee handbook at issue in *Heurtebise*, the documents at issue here do not disclaim contract status"); *Waller v Daimler Chrysler Corp*, 391 F Supp 2d 594, 602 (ED Mich 2005) (holding the same where, "[u]nlike the policy manual in *Stewart,* nowhere in the application for employment… does Defendant express a desire not to be bound by [its] terms"); *Posselius v Springer Pub. Co.*, 2014 Mich App LEXIS 693, 2014 WL 1514633 *7-9 (Mich Ct App April 17, 2014) (distinguishing *Heurtebise* and *Stewart* because "there is nothing to indicate that [the defendant] did not intend to be bound by that agreement").

[2] The continued vitality of the *Heurtebise* doctrine is not in doubt. Earlier this summer, the Michigan Court of Appeals has applied this principle to policy manuals and handbooks containing such disclaimers. *See Chambers v Cath Charities of Shiawassee & Genesee Cntys*, 2022 Mich App LEXIS 3701, *7 (Mich Ct App June 23, 2022) (concluding that "the disclaimer in this case was a manifestation of defendants' intent not to be bound by the arbitration agreements").

Nor has the *Heurtebise* rule been limited to alleged contracts to arbitrate employer-employee disputes. Subsequent rulings of Michigan Courts have applied the same standard to other contracts between an employer and employee that are alleged to have arisen, finding that, unless the contract is alleged to limit the reasons an employer can terminate an employee,[3] the normal requirements of contract formation must be satisfied before either an employer or employee will be bound. For example, in *Mohamed v Brenner Oil Co*, 2019 Mich App LEXIS 1094, 2019 WL 845852 (Mich Ct App, February 21, 2019), the Court was charged with determining whether a plaintiff had agreed to shortened 180-day statute of limitations period contained within a Form Acknowledgement to an employee handbook that expressly stated that policies contained within the handbook were not binding and could be changed at any time. Relying extensively upon *Heurtebise* and *Stewart*, the Court of Appeals determined that the clear language of the Form Acknowledgement prevented any contract from being formed, as there was no mutuality of obligation in the face of the handbook's disclaimer. Accordingly, the Court of Appeals held that the limitations period had not been shortened by contract and reversed and remanded to the trial court for further proceedings.

Employers have come to understand the *Heurtebise* rule and have incorporated it into applications, handbooks, and policy pronouncements. Where an employer wishes to enter into a contract on some issue, such as in the case of an arbitration agreement or an agreement to shorten

[3] In the context of wrongful termination, this Court recognized the "legitimate expectations" doctrine in *Touissant v Blue Cross & Blue Shield of Mich,* 408 Mich 579 (1980) based on a public policy theory. This Court has expressly refused to extend the legitimate expectations doctrine beyond wrongful discharge cases, instead following traditional contract formation elements regarding terms of employment other than discharge. *See Dumas v Auto Club Ins Ass'n*, 437 Mich 521 (1991). The Court of Appeals examined these two diverging theories in detail recently in *Bodnar v St John Providence, Inc*, 327 Mich App 703 (2019) in the course of rejecting a plaintiff's attempt to enforce an employer policy providing severance pay as a contract.

the statute of limitations, it can create such a contract through a clear statement to an employee binding both sides to the terms of that agreement. Where an employer wishes to simply articulate policy but retain the flexibility to change that policy in the future according to the needs of the business, it can do so by incorporating a disclaimer similar to the one described in *Heurtebise* into that policy. The rule is relatively simple and has been relied upon by employers for decades as they implement policies in the workplace.

Disturbing that well defined rule would likely have unintended consequences upon both employers and employees. Were the Court to find that a contract can be formed even where a clear disclaimer is in place, both employers and employees could suddenly find themselves bound to contracts that they had no intention of entering into. Employers could be found to breach "contracts" in handbooks by failing to give annual reviews, or by varying from progressive discipline policies. Employees could breach "contracts" by failing to appear at work as scheduled, or by failing to arbitrate cases even where the only arbitration agreement was contained within a handbook found to be inadequate under the *Heurtebise* standards. Such a result would upend the stability that both parties to the employment relationship have come to rely upon, and would open a new era of claims by employers and employees based on "agreements" that no one ever made. Such a result clearly would be undesirable for all parties concerned. Accordingly, the LELS would encourage the Court to decline the opportunity to reform the standards of contract formation established by *Heurtebise* and its progeny.[4]

[4] The LELS takes no position on whether those standards were satisfied by the employment application at issue here. Rather, it writes this amicus brief only to encourage the Court to apply only the existing rules instead of articulating new rules of law in this area.

II. THIS COURT SHOULD FIND THAT THE ISSUES RAISED BY THE APPELLANT IN HER SUPPLEMENTAL BRIEF WERE NOT PROPERLY PRESERVED.

The appellee aptly remarked in concluding their supplemental response brief that:

> The issues identified by this Court have potentially enormous implications for Michigan employees and employers… The issues deserve a fuller elucidation in a case where (1) the lower courts and the parties have had an opportunity to fully consider the issues, and (2) a resolution of the issues may actually make a material difference to the parties before it. This is not that case.

Appellee City of Kalamazoo, Supplemental Response Brief, page 39. The appellee is correct that this Court's ruling on the supplemental issues in its January 2022 Order would have a significant impact on the state of employment law in Michigan. Addressing the *Heurtebise* issue alone would potentially require employers to re-structure how they adopt, amend, and evolve their employment policies.

Further, appellant did not raise these issues in the courts below. Appellee properly cites considerable authority establishing that appellant's failure to raise these issues at the trial level bars this Court from reviewing them *sua sponte* on appeal. This Court summarized its views on issue preservation in *Walters v. Nadell*, stating:

> Michigan generally follows the "raise or waive" rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a failure to timely raise an issue waives review of that issue on appeal.

481 Mich 377, 387 (2008) (internal citations and quotations omitted). These principles "require litigants to raise and frame their arguments at a time when their opponents may respond to them *factually*." *Id.* at 388.

Appellant had the burden and the opportunity to raise these issues at the trial court upon penalty of waiver. *See Walters*, 481 Mich at 387. She failed to do so at the trial level, and

compounded that error by failing to raise them in her appeals to the Court of Appeals and her initial application for leave to appeal to this Court. Appellant "may not remain silent in the trial court only to prevail on [issues not] called to the trail court's attention." Permitting Appellant to do so would provide her with the proverbial "appellate parachute," that Michigan courts repeatedly have rejected. *See Dresselhouse v Chrysler Corp.*, 177 Mich App 470, 477 (1989); *see also Booth Newspapers, Inc v Univ of Mich Bd Of Regents*, 444 Mich 211, 234 n.23 (1993) ("This Court has repeatedly declined to consider arguments not presented at a lower level… We have only deviated from that rule in the face of exceptional circumstances.")

In this case, this Court is in the same position as it was in *Michigan Gun Owners, Inc v Ann Arbor Public Schools*. There, Justice McCormack explained in the majority opinion that:

> The concurrence/dissent wants to have it both ways: we should grant leave because these cases "present an important set of legal issues" while purporting to "take rules regarding issue preservation very seriously…" If *ever* we want to "take rules regarding issue preservation and abandonment very seriously," it should be here. Granting leave to appeal under the circumstances presented would send a message that we should and do decline to send: Abandon an issue in your application for leave to appeal? And definitively distance yourself from that legal theory at oral argument? Worry not! The Court will revive the theory for you and give you free rein to try again after hearing oral argument on that application.

502 Mich 695, 710 n.9 (2018).

The January 2022 Order presents issues of law and fact that clearly were not developed, or even discussed, below. The Court should decline the opportunity to hand appellant the proverbial "appellate parachute" by reviewing these issues on this record, and instead decline leave to appeal.

CONCLUSION

For the foregoing reasons, the Court should decline appellant's application for leave to appeal in the above matter.

Respectfully Submitted,

By:/s/ *James F. Hermon*
James F. Hermon (P53765)
DYKEMA GOSSETT PLLC
Attorneys for the Labor and Employment Law Section of the State Bar of Michigan
400 Renaissance Center
Detroit, MI 48243-1668
(313) 568-6540
jhermon@dykema.com

By:/s/ *Robin Wagner*
Robin Wagner (P79408)
PITT MCGEHEE PALMER BONANNI & RIVERS PC
Attorneys for the Labor and Employment Law Section of the State Bar of Michigan
117 W. 4th Street, Suite 200
Royal Oak, MI 48067-9800
(248) 398-9800
rwagner@pittlawpc.com

Dated: September 15, 2022

STATEMENT REGARDING WORD COUNT IN BRIEF

Pursuant to MCR 7.212(B), undersigned counsel certifies that the above Amicus Curiae Brief of the Labor and Employment Law Section of the State Bar Of Michigan contains a total of 2,630 words in the portions of that brief required to be counted pursuant to MCR 7.212(B)(2).

By:/s/ *James F. Hermon*
James F. Hermon (P53765)
DYKEMA GOSSETT PLLC
Attorneys for the Labor and Employment Law Section of the State Bar of Michigan
400 Renaissance Center
Detroit, MI 48243-1668
(313) 568-6540
jhermon@dykema.com