RECEIVED by MSC 10/12/2024 11:59:15 PM

In The Supreme Court for the State of Michigan

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

PLAINTIFF-APPELLANT'S REPLY IN SUPPORT OF HER SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

Dated: October 12, 2024

Respectfully Submitted,

CARLA D. AIKENS, P.L.C.

/s/ Carla D. Aikens

Carla D. Aikens (P69530)
615 Griswold St., Ste. 709
Detroit, MI 48226
Tel: (844) 835-2993
Fax: (877) 454-1680
carla@aikenslawfirm.com
Attorneys for Plaintiff-Appellant

RECEIVED by MSC 10/12/2024 11:59:15 PM

TABLE OF CONTENTS

LAW AND ARGUMENT 4

A. Defendant's New Argument Regarding the Sufficiency of Plaintiff's ELCRA Claim Was Not Raise in the Trial Court. 4

B. Plaintiff-Appellant's ELCRA Claim is Sufficiently Pled 6

C. The Court in *Clark v. DaimlerChrysler Corp*., 268 Mich. App. 138 (2005) Should Not Have Applied the Holding in *Rory v. Continental Ins. Co*., 473 Mich. 457 (2005) to Employment Contracts. 7

D. The Contract at Issue in This Case is Unquestionably An Unconscionable Contract of Adhesion 9

E. Defendant-Appellant's Imposition of Contractual Limitations Undermines Legislative Protections for Employees. 11

CONCLUSION 13

RECEIVED by MSC 10/12/2024 11:59:15 PM

TABLE OF AUTHORITIES

Cases

Ben P Fyke & Sons v Gunter Co., 390 Mich. 649 (1973)..... 6
Clark v. DaimlerChrysler Corp., 268 Mich. App. 138 (2005)..... 7
Croghan v Norton Healthcare, Inc., 613 SW3d 37 (Ky. App. 2020)..... 5
Dalley v Dykema Gosett, 287 Mich. App. 296 (2010)..... 6
Duray Dev, LLC v Perrin, 288 Mich. App. 143 (2010)..... 4
Ellis v US Security Associates, 224 Cal App 4th 1213, 1226, 169 Cal Rptr 3d 752 (2014)..... 5
In re Complaint of Rovas Against SBC Michigan, 482 Mich. 90 (2008)..... 11
In Re Forfeiture of Certain Personal Property, 441 Mich. 77 (1992),..... 4
Liparoto Const, Inc v. Gen Shale Brick, Inc..... 10
Robinson v. City of Detroit, 462 Mich. 439 (2000)..... 7
Rodriguez v Raymours Furniture Co., 225 NJ 343, 138 A3d 528 (2016)..... 5
Timko v. Oakwood Custom Coating, Inc., 244 Mich. App. 234 (2001)..... 5
Topps-Toeller, Inc. v. City of Lansing, 47 Mich. App. 720 (1973)..... 8
Walters v Nadell, 481 Mich. 377 (2008)..... 4

RECEIVED by MSC 10/12/2024 11:59:15 PM

LAW AND ARGUMENT

A. Defendant's New Argument Regarding the Sufficiency of Plaintiff's ELCRA Claim Was Not Raise in the Trial Court.

Plaintiff submits that Defendant's argument regarding the sufficiency of Plaintiff's ELCRA claim is improper for consideration by this Court, as it was neither raised in the trial court nor addressed by the Court of Appeals. In the trial court, Defendant-Appellee filed a motion for summary disposition in which the only issue raised regarding Plaintiff's ELCRA claim was that it was time-barred pursuant to the six-month contractual limitation period. Defendant did not argue that Plaintiff's ELCRA claim was otherwise legally insufficient, and it is not appropriate to raise that issue for the first time in the Supreme Court. As the Michigan Supreme Court explained in *Walters v Nadell*, 481 Mich. 377, 386 (2008), "[u]nder our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court," and a "failure to timely raise an issue waives review of that issue on appeal." Similarly, in *In Re Forfeiture of Certain Personal Property*, 441 Mich. 77, 84 (1992), the Court held that issues and arguments raised for the first time on appeal are not subject to review. This principle was further emphasized in *Duray Dev, LLC v Perrin*, 288 Mich. App. 143, 149 (2010)), where the Court of Appeals explained that to preserve an issue for appeal, a party must specifically raise it before the trial court.

Moreover, Defendant's reliance on *McMillon v City of Kalamazoo* is misplaced, as the central issue in *McMillon* was whether the plaintiff had agreed to be bound by a contractual limitations clause, a factual question that the Court found dispositive. While *McMillon* left open important questions about contractual limitations clauses in civil rights cases, it does not support Defendant's attempt to introduce new arguments at this stage.

RECEIVED by MSC 10/12/2024 11:59:15 PM

Further, Justice Welch's concurrence in *McMillon* acknowledged that while this Honorable Court's resolution of the case left unanswered certain factual questions, it also left open broader legal issues—specifically, whether employment agreements may shorten the statutory period for filing civil rights claims and whether the *Timko v. Oakwood Custom Coating, Inc*., 244 Mich. App. 234 (2001), decision remains good law. Justice Welch highlighted that *Timko*, which upheld a six-month limitation period, was never reviewed by this Court, leaving an important question unresolved.

As Plaintiff has previously noted and this Court is aware, other states have found that such contractual limitations clauses are against public policy. In *Ellis v US Security Associates*, 224 Cal App 4th 1213, 1226, 169 Cal Rptr 3d 752 (2014), the California court held that a shortened limitations period for civil rights claims violated public policy. The New Jersey Supreme Court reached a similar conclusion in *Rodriguez v Raymours Furniture Co*., 225 NJ 343, 138 A3d 528 (2016), ruling that contractual agreements to shorten the statutory period for discrimination claims were invalid. Kentucky courts have also rejected such limitations in *Croghan v Norton Healthcare, Inc*., 613 SW3d 37, 43 (Ky. App. 2020), where a contractual six-month limitation period was found to violate statutory protections and place undue burdens on claimants. Justice Welch's concurrence underscores the significance of this issue for both employers and employees. Given that this Court never reviewed the merits of *Timko*, Justice Welch's concurrence in *McMillon* emphasized that the Court should take the opportunity to address these critical questions, if presented.

Therefore, Plaintiff respectfully asserts that this Court should address the supplemental issues it ordered to be briefed on May 23, 2024. These issues, which have been thoroughly briefed by Plaintiff, have a serious impact on the civil rights of the citizens of this state –and

RECEIVED by MSC 10/12/2024 11:59:15 PM

should be decided by this Court. Defendant's attempt to introduce new arguments regarding the sufficiency of the ELCRA claim at this stage is improper and should be rejected in favor of addressing the critical issues that this Court asked the parties to address.

B. Plaintiff-Appellant's ELCRA Claim is Sufficiently Pled

However, if the Court chooses to review whether Plaintiff-Appellant sufficiently pled her ELCRA claim, Plaintiff-Appellant contends that she did. While the Court should not address this issue that Defendant never raised in its motion for summary disposition, Plaintiff asserts that her Complaint provided sufficient facts to reasonably inform Defendant of the nature of the claim, in accordance with *Dalley v Dykema Gosett*, 287 Mich. App. 296, 305 (2010). In *Dalley*, the Court of Appeals emphasized that a complaint need only provide "sufficient facts to reasonably inform the opposing party of the nature of the claim." Here, Plaintiff's Complaint, supported by a detailed factual narrative, easily met this pleading standard by providing Defendant with sufficient notice of her ELCRA claims, including the factual basis for the allegations of discrimination and retaliation.

Moreover, if the trial court had found the ELCRA claim insufficient in any way, Plaintiff would have respectfully requested an opportunity to amend the Complaint before dismissal. Under Michigan law, leave to amend a complaint "shall be freely given when justice so requires" (MCR 2.118[A][2]). The Michigan Supreme Court has long held that amendments should be allowed to facilitate the resolution of cases on their merits, as reflected in *Ben P Fyke & Sons v Gunter Co.*, 390 Mich. 649, 659 (1973). Thus, if the initial pleading had been found to be insufficient, the proper course would have been to allow amendment to correct any defects, not dismissal.

RECEIVED by MSC 10/12/2024 11:59:15 PM

For these reasons, even if the Court were to review this issue, Plaintiff contends that her ELCRA claim was validly pled, and any perceived deficiencies could have been remedied through amendment, if necessary, had the issue been raised in the trial court. Consequently, this issue should not prevent the Court from addressing the substantive questions on fundamental rights presented in the supplemental briefing.

C. The Court in *Clark v. DaimlerChrysler Corp*., 268 Mich. App. 138 (2005) Should Not Have Applied the Holding in *Rory v. Continental Ins. Co*., 473 Mich. 457 (2005) to Employment Contracts.

Defendant contends that the Michigan Court of Appeals in *Clark v. DaimlerChrysler Corp*. correctly applied the precedent from *Rory v. Continental Ins. Co*. because it was bound to do so under the principle of *stare decisis*. However, Plaintiff argues that *stare decisis* is not as inflexible as Defendant suggests. Looking to *Robinson v. City of Detroit*, 462 Mich. 439 (2000), it is important to highlight the multifactor test that courts apply before overruling precedent. The first factor in this test asks whether the earlier decision was wrongly decided, but even if that is true, it does not automatically require the court to overrule the precedent. Courts must also consider whether the decision is "practically workable," whether reliance interests would create undue hardship, and whether changes in law or facts justify departing from the earlier ruling.

Applying a contractually shortened statute of limitations in employment contracts, as was done in *Clark*, is unworkable in practice, especially for Michigan workers. Allowing such limitations deprives employees of their rights and disproportionately favors employers. No reasonable employee walks into a job believing that they will one day have to one day sue their employer, but employers hire employees, armed with sophisticated legal counsel whose function is to make sure that the employer is as protected as possible while the unsuspecting employee is defenseless. In the employment context, shortening the statute of limitations imposes an undue

RECEIVED by MSC 10/12/2024 11:59:15 PM

burden on potential plaintiffs by forcing them to rush through a process over which they often have little to no control –investigation of claims by the Michigan Department of Civil Rights, securing legal representation, and filing lawsuits—all while navigating the pressures of having lost their job, in the instance of a wrongful termination. This places workers in a precarious position, giving them insufficient time to seek justice, thus making the ruling impractical and unjust in this setting – which is exactly as the employer intends it to be. The employee receives absolutely no benefit from a purported agreement to shorten the statute of limitations.

Furthermore, *stare decisis* is not applicable here, because the cases of *Clark* and *Rory* are not substantially similar. The principle of *stare decisis* requires courts to follow precedent when the facts and issues presented in a new case are essentially the same as those in a prior decision. According to *Topps-Toeller, Inc. v. City of Lansing*, 47 Mich. App. 720, 729 (1973) *stare decisis* mandates that "courts should reach the same result when presented with the same or substantially similar issues in another case with different parties." However, the contexts of *Clark* (an employment contract) and *Rory* (an insurance contract) differ significantly. While both cases involve contract law, the specific legal frameworks, standards, and policy considerations are distinct.

In insurance contracts, such as in *Rory*, individuals typically enter agreements where they pay premiums in exchange for the promise of coverage in the event of a loss. Consumers have the opportunity to shop around for better terms, and even if not always successful, the sheer number of insurance providers gives consumers options from which to choose. This allows some negotiation or at least flexibility in choosing coverage that suits their needs. Employment contracts, however, do not afford employees the same luxury. These contracts outline the terms of employment, including duties, compensation, and termination conditions, but typically never

RECEIVED by MSC 10/12/2024 11:59:15 PM

offer the ability to negotiate the terms. Again, no reasonable employee would decline employment on the basis of an obscure term they have no reason to think would ever apply to them, even if it were understood. Rejecting these terms can result in unemployment while they search for other opportunities. This stark difference in bargaining power underscores why the application of *Rory* to employment contracts in *Clark* was inappropriate.

Accordingly, the rule of *stare decisis* from *Topps-Toeller* does not apply in this instance, because the issues in *Clark* and *Rory* are not substantially similar. As noted above, *Clark* improperly extended the reasoning of Rory to a fundamentally different type of contract without recognizing the critical distinctions between insurance and employment contexts. Additionally, the consequences of allowing contractually shortened limitation periods in employment relationships are severe, depriving workers of adequate time to seek justice while imposing undue hardship.

In light of these considerations, Plaintiff urges the court to reconsider the holding in *Clark*. The doctrine of *stare decisis* should not bind the court to an unworkable decision that undermines the rights of all workers in the State of Michigan. The practical differences between insurance and employment contracts, along with the unequal bargaining power, make this case unsuitable for application of the *Rory* precedent. Therefore, this Court should reevaluate *Clark* and restore fairness in the employment context, especially in protecting workers' ability to bring claims without being restricted by unfairly shortened limitation periods.

D. <u>The Contract at Issue in This Case is Unquestionably An Unconscionable Contract of Adhesion</u>

Defendant's argument that the contract at issue is not an unconscionable contract of adhesion fails to address the profound disparity in bargaining power between employers and

RECEIVED by MSC 10/12/2024 11:59:15 PM

employees, particularly in the context of employment contracts. Under Michigan law, unconscionability requires both procedural and substantive elements. Procedural unconscionability exists when the weaker party has no realistic alternative but to accept the terms of the contract. *Liparoto Const, Inc v. Gen Shale Brick, Inc*., 284 Mich App 25, 30; 772 NW2d 801, 805 (2009). In the context of employment contracts, this principle is crucial.

Procedural unconscionability is clearly present here. Potential employees, when seeking employment, are driven by the basic necessity to secure income for sustenance—paying bills, providing for their families, and meeting responsibilities. This necessity puts employees in a vulnerable position where they have little to no leverage to negotiate the terms of employment, particularly provisions such as shortened statutes of limitations, which they likely do not even understand. To wit, even attorneys who do not practice employment law are often unaware of the applicable statutes of limitations for civil rights claims. Many job seekers have no realistic alternative but to accept the terms as written, since rejecting the contract would likely result in unemployment. Employers hold all of the advantages—resources, legal expertise, and negotiating power. Employees are forced to accept whatever is offered to secure employment.

Furthermore, Plaintiff's argument regarding substantive unconscionability is equally meritorious. Substantive unconscionability exists where the terms of the contract are so one-sided that they "shock the conscience" *Liparoto*, 284 Mich App at 30. The provision at issue—shortening the statute of limitations in an employment contract—does precisely that. It strips employees of their statutory rights to pursue claims, such as wrongful termination or discrimination, without offering any corresponding benefit or exchange. The employer gives up nothing in return, but gains the advantage of limiting liability. This type of clause is profoundly inequitable, as it places the burden entirely on the employee to meet an unreasonably shortened

RECEIVED by MSC 10/12/2024 11:59:15 PM

deadline, often within a context where the employee may still be processing the emotional and practical fallout of their termination or other employment issue, and they may have no idea that they even have a claim to pursue.

The fact that Michigan employers frequently include shortened statutes of limitations in their employment contracts only exacerbates the issue. It is unreasonable to suggest that employees who do not agree with such terms can simply "find another job" when the practice is so widespread. This systemic imbalance further underscores the inequity of the provision, making it extremely difficult for employees to escape these oppressive terms. Employment, unlike insurance or other commercial contracts, is not undertaken for enjoyment but out of necessity. Forcing employees to accept such detrimental terms is unjust and unconscionable.

Additionally, this provision is substantively unconscionable because it deprives employees of their ability to seek redress for a right without any compensatory benefit. This skewed balance of rights is extreme and unduly harsh, particularly given the reality of the modern employment landscape, where employees face significant pressures and limited choices when entering into contracts. Therefore, the provision should be deemed unconscionable under Michigan law.

E. Defendant-Appellant's Imposition of Contractual Limitations Undermines Legislative Protections for Employees.

Defendant-Appellee's argument that enforcing a shortened statute of limitations is supported by Michigan law and separation of powers principles is fundamentally flawed. While it is true that the separation of powers divides legislative, executive, and judicial functions as cited in *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 98 (2008), this case is not about the judiciary overstepping into legislative functions. Rather, it concerns the judiciary's role in upholding the rights established by the legislature for the protection of employees and

RECEIVED by MSC 10/12/2024 11:59:15 PM

ensuring that those rights are not undermined by contracts that unfairly strip individuals of their statutory entitlements.

The courts permitting employers to contractually alter statutory limitations, which are designed to protect employees, creates an inequity that runs counter to both public policy and fundamental fairness. When the legislature enacts laws to protect employee rights—such as providing reasonable time limits within which employees can bring claims—those protections should not be undermined by employers inserting contractual terms that strip employees of the very rights the legislature sought to protect. Allowing such contractual modifications effectively lets employers rewrite the law, which, ironically, undermines the legislative power Defendant invokes.

This Court should view this as an unconstitutional practice by employers, not a permissible one. Permitting employers to shorten statutory limitations periods through contracts of adhesion unfairly shifts the balance of power to the employer. In *Clark v DaimlerChrysler*, the court acknowledged that restrictions on contractually shortening the limitations period for civil rights claims should be imposed by the legislature, not the judiciary. However, this misses the central issue—employers should not be able to circumvent statutory protections in the first place. The judiciary has a critical role in ensuring that statutory rights are upheld and that powerful employers do not abuse contract provisions to strip employees of their ability to seek legal redress.

This practice of allowing employers to reshape statutory protections also creates serious issues of public policy. Employees, who are often in a far weaker bargaining position, have no real choice but to accept these unfair contractual terms. The legislature, in enacting employee protection laws, sought to address this disparity. If the judiciary continues to allow employers to

RECEIVED by MSC 10/12/2024 11:59:15 PM

circumvent these protections through contract, it would effectively render those legislative protections meaningless. Therefore, it is this Court's duty to prevent such overreach by employers and ensure that the legislative intent behind employee protections is preserved. This is not a question of judicial overreach but rather one of ensuring that legislative protections are upheld in practice, not just in theory.

This Court should strike down these unconscionable contractual provisions, which effectively allow employers to rewrite statutory protections and undermine the rights provided by the legislature to the people. Allowing employers to impose such limitations through contracts of adhesion should be regarded as the real constitutional violation, as it erodes the very protections the legislature sought to provide for employees.

CONCLUSION

WHEREFORE, Plaintiff prays that this Court finds that employment contracts that seek to shorten the statute of limitations to bring a civil rights claim violates public policy.

Respectfully submitted,
CARLA D. AIKENS, P.L.C.

Date: October 12, 2024

By: /s/ Carla D. Aikens
Carla D. Aikens (P69530)
Attorneys for Plaintiff
615 Griswold Street, Suite 709
Detroit, MI 48226
Tel: (844) 835-2993
Fax: (877) 454-1680
carla@aikenslawfirm.com

RECEIVED by MSC 10/12/2024 11:59:15 PM

CERTIFICATION OF WORD COUNT

A word count of the Brief has been conducted via Microsoft Word, which yielded a total of 2,842 words from the Introduction thorough the Conclusion as required under Adm. File No. 2019-16 and explained in MCR 7.212.

RECEIVED by MSC 10/12/2024 11:59:15 PM

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all counsel of record on October 12, 2024 via E-File.

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

/s/ Carla D. Aikens