STATE OF MICHIGAN

IN THE MICHIGAN COURT OF APPEALS

RAYNARD CANN,

Plaintiff-Appellant,

DOCKET NO 353694

LOWER COURT CASE NO 2020-000175-CL

VS

ELITE PLASTIC PRODUCTS, INC.,

Defendant-Appellee.

_____/

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PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

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STATEMENT OF JURISDICTION

The Court has jurisdiction to hear this appeal of right under Const 1963, art vi, sec 10; MCL 600.308(a); and MCR 7.203(A).

QUESTION PRESENTED

WHETHER, IN DISMISSING THIS CASE UNDER MCR 2.116(C)(7) BASED ON THE EMPLOYMENT CONTRACT'S SIX-MONTH LIMITATION PERIOD PROVISION, THE LOWER COURT COMMITTED REVERSIBLE ERROR.

Plaintiff-Appellant responds: "Yes."

Defendant-Appellee responds: "No."

The Lower Court, If Not For Present Controlling Law, Would Probably Respond: "Yes."

INTRODUCTION

This case arises from an employment situation arising from shortened contractual limitations period that Plaintiff-Appellant Raynard Cann **[PLAINTIFF CANN OR PLAINTIFF EMPLOYEE]** "agreed to" without counsel, information or knowledge. This case is a Michigan Workers' Disability Compensation Act case arising from Defendant-Appellee Elite Plastic Products, Inc.'s **[DEFENDANT ELITE'S OR DEFENDANT EMPLOYER'S]** retaliation against Plaintiff Cann for exercising his Act rights. In his appeal, Plaintiff Cann challenges the Michigan Supreme Court's *Rory* decision and its prevailing contract law.

STATEMENT OF FACTS

On August 8, 2016, Plaintiff Cann applied for a position with Defendant Elite. (1/16/20 Complaint **[Complaint]**, para 9; Complaint Exhibit 1, 8/8/16 Plaintiff Cann Employment Application) **In small print, the Employment Application included the following six-month contractual statute of limitations provision:**

> "I agree that any claim of lawsuit relating to my service with the company must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary."
>
> Complaint Exhibit 1, 8/8/16 Plaintiff Cann Employment Application)

On August 26, 2016, Defendant Elite hired Plaintiff Cann as a utility person. (Complaint, para 10; Complaint Exhibit 2, 8/26/16 Defendant Elite Hiring Documents) Except for his first employment month, Plaintiff Cann worked on the first shift. (Complaint, para 11)
During his first month, Plaintiff Cann worked as a machine operator. (Complaint, para 12)
During his second month, Defendant Elite changed his duties to general cleaning, cleaning of machines, assisting with the flow of materials to the production line, and transporting parts from the production floor to the warehousing space. (Complaint, para 13)

On January 20, 2017, about 7:00 AM, Plaintiff Cann began working his shift. He was emptying the grinders behind the machines and sweeping up, when the water started shooting out from a machine through a hose. The water was hot, about 200 degrees. The water was hitting him. He could not move out of the way. (Complaint, para 14; Complaint Exhibit 3, 1/17 Plaintiff Cann Summary) A machine technician was working on the machine. That employee was responsible for the water problem. He apologized to Plaintiff Cann. (Complaint, para 15) Plaintiff Cann was in shock and confused about what was happening. (Complaint, para 16; Complaint Exhibit 3, 1/17 Plaintiff Cann Summary)

Other employees took him to the rest room and put ice, freezing water, and other items on him. They asked him if he wanted to go to the clinic. They said that he did not have any burns, and that he was fine. But they gave him burn cream. (Complaint, para 17; Complaint Exhibit 3, 1/17 Plaintiff Cann Summary) After he had applied burn cream, they told him to wrap his legs up. He did so. (Complaint, para 18; Complaint Exhibit 3, 1/17 Plaintiff Cann Summary) When they asked him how he was feeling, he responded that he felt burning up hislegs, aching up his legs. He was in burning pain. They told him it would go away. Complaint, para 19; Complaint Exhibit 3, 1/17 Plaintiff Cann Summary)

When Plaintiff Cann went back out on the floor, he was looking for the staff (general manager, all supervisors, and his supervisor). But he found that the staff had gone into a staff meeting. He was still in burning pain. When his supervisor, Joe E_____, came out of the meeting, he approached Joe E_____ and told him that he was in pain, that he could not work, and that he wanted to leave. Joe E_____ approved his leaving. (Complaint, para 20; Complaint Exhibit 3, 1/17 Plaintiff Cann Summary) So, Plaintiff Cann left the building and walked up 23 Mile Road towards Wal-Mart to catch the bus. But he called his friend, Xavier Steward **[Steward]**, to pick him up. Steward picked him up from Wal-Mart and took him to DMC Detroit Receiving Hospital **[Detroit Receiving]** in Downtown Detroit. Detroit Receiving Hospital treated and released him. (Complaint, para 21; Complaint Exhibit 3, 1/17 Plaintiff Cann Summary; Complaint Exhibit 4,1/20/17 DMC Detroit Receiving Hospital Discharge Instructions)

On January 23, 2017, Detroit Receiving recommended to Plaintiff Cann that he file a workers' compensation claim. (Complaint, para 22) On January 23, 2017, Plaintiff Cann called Sarah Noble **[Noble]**, Defendant Elite's Human Resources representative, and told her that he had gone to Detroit Receiving Hospital, and that Detroit Receiving had told him that he had second degree burns. (Complaint, para 23) **Plaintiff Cann told her about Detroit Receiving's recommendation to file a workers' compensation claim.** (Complaint, para 24) Two hours later, Noble called back and told Plaintiff Cann to go to Urgent Care for medical treatment. So, on that day, he went to Urgent Care and obtained further medical treatment. (Complaint, para 25; Complaint Exhibit 5, 1/23/17 Urgent Care Medical and Work Status Report) **On January 23, January 25, and February 1, 2017, Plaintiff Cann went to Urgent Care in Shelby Township, Michigan, where they diagnosed his injury as right thigh second degree burn**

and treated him. They restricted his duty from January 23, 2017 through February 15, 2017. (Complaint, para 26; Complaint Exhibit 5, 1/23/17, 1/25/17, & 2/1/17 Urgent Care Medical and Work Status Reports, 1/23/17 Henry Ford Health System Shelby Mall Urgent Care Medical Records)

On January 30, 2017, Plaintiff Cann returned to the hospital for follow-up treatment. The doctor gave him a note saying that he could not work from January 26, 2017 to February 5, 2017, but that he could return to work on February 6, 2017. (Complaint, para 27; Complaint Exhibit 6, 1/30/17 DMC Detroit Receiving Hospital Note) Since Urgent Care said that Plaintiff Cann could work with restrictions, he went back to work on January 24, 25, and 26, 2017. But he was in too much pain to work. He took the prescribed pain medication. But it did not work. (Complaint, para 28) On or about February 3, 2017, Noble called him and told him that the company had discharged him ostensibly for violating the attendance policy. (Complaint, para 29; Complaint Exhibit 7, 2/3/17 (later altered to 1/31/17 Defendant Elite Employee Separation Record & 1/30/17 Notice of Attendance Record)) As proximate results of Defendant Elite's wrongful discharge, Plaintiff Cann has suffered substantial damages. (Complaint, para 30)

RELEVANT PROCEDURAL HISTORY

1. On January 16, 2020, Plaintiff Cann sued Defendant Elite in the Macomb County Circuit Court for wrongful discharge based on Defendant Elite's retaliatory discharge of him for exercising his state statutory workers' compensation rights. (5/30/20 Macomb County Circuit Court Case Number 2020-000175-CL Case Docket Sheet **[Lower Court Docket Sheet]** on file; 1/16/20 Complaint **[Complaint]**)

2. On March 13, 2020, Defendant Elite moved for dismissal under MCR 2.116(C)(7)

based on the Employment Application's above small print six-month contractual statute of limitations provision. (Lower Court Docket Sheet on file; 3/13/20 Defendant Elite Plastic Products, Inc.'s Motion to Dismiss Pursuant to MCR 2.116(C)(7) **[Motion to Dismiss]**)

3. On April 3, 2020, Plaintiff Cann responded to the motion and urged the lower court to deny the motion based on the Employment Application's above small print six-month contractual statute of limitations provision's involuntariness and unconscionability. (Lower Court Docket Sheet on file; 4/3/20 Plaintiff's Response to Defendant's Motion to Dismiss **[Response to Motion to Dismiss]**)

4. On May 11, 2020, the lower court, Judge Carl Marlinga, reluctantly granted the motion and dismissed the case with prejudice. (Lower Court Docket Sheet on file; 5/11/20 Order Granting Defendant's Motion To Dismiss And Dismissing The Case With Prejudice)

LOWER COURT DECISION

Though reluctantly, the lower court granted Defendant's Motion to Dismiss and dismissed the case with prejudice.

ARGUMENT

I.THIS COURT SHOULD ENDORSE REVERSAL OF THE LOWER COURT'S SUMMARY DISPOSITION ORDER, BECAUSE THE 6-MONTH CONTRACTUAL LIMITATIONS PERIOD PROVISION AT ISSUE IS UNCONSCIONABLE AND INVOLUNTARY.

A. APPLICABLE PROCEDURAL LAW.

When considering an MCR 2.116(C)(7) motion, the Court evaluates the pleadings, affidavits, depositions, admissions, and documents that the parties present with their motion and response. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998), *Holmes v Michigan Capital Center*, 242 Mich App 703, 706; 619 NW2d 319 (2000), *lv den* 465 Mich 899; 636 NW2d 144 (2001). The Court accepts all well-pleaded complaint allegations as true and

construes them in the plaintiff's favor, unless the parties' presented documentary evidence contradicts them. *Shay v Aldrich,* 487 Mich 648, 656; 790 NW2d 629 (2009), *Kuzmar v Raksha Corp,* 481 Mich 169, 175-176; 750 NW2d 121 (2008). **"`The Court must consider the documentary evidence in a light most favorable to the nonmoving party.'"** *Zwiers v Growney,* 286 Mich App 38, 42; 778 NW2d 81 (2009), *lv den* 486 Mich 1058; 783 NW2d 514 (2010), quoting *RDM Holdings, Ltd v Continental Plastics Co,* 281 Mich App 678, 687; 762 NW2d 529 (2008) (our emphasis). If the parties do not dispute any facts, and if reasonable minds cannot differ on their legal effect, whether the plaintiff's claim is barred is a question of law for the court. *Zwiers,* 286 Mich App 38, 42, *RDM Holdings,* 281 Mich App 678, 687. But if the parties dispute any material fact, and if factual development can provide a basis for recovery, summary disposition is unjustified. *Zwiers,* 286 Mich App 38, 42, *RDM Holdings,* 281 Mich App 678, 687.

B. APPLICABLE SUBSTANTIVE LAW—THE MICHIGAN LAW CONFLICT BETWEEN ALMOST UNRESTRICTED FREEDOM OF CONTRACT AND REASONABLENESS-RESTRICTED FREEDOM OF CONTRACT

C. *RORY V CONTINENTAL INSURANCE CO:* ADOPTION OF ALMOST UNDRESTRICTED FREEDOM OF CONTRACT AND REJECTION OF REASONABLENESS RESTRICTION.

This case focuses on an employment contract's contractual limitations period provision. In *Rory v Continental Insurance Co,* 473 Mich 457; 703 NW2d 23 (2005), the Court's Majority adopted almost unrestricted freedom of contract: "`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….`the general rule [of contracts] is that competent persons shall have the utmost liberty of

contracting[,] and that agreements voluntarily and fairly made shall be held valid and enforce[able].'" *Id* at 468 (*Rory* Majority's emphasis), quoting *Terrien v Zwit,* 467 Mich 56, 71; 648 NW2d 602 (2002), quoting *Twin City Pipe Line Co v Harding Glass Co,* 283 US 353, 356; 51 S Ct 476; 75 L Ed 1112 (1931). The *Rory* Majority asserted that "[w]hen a court abrogates unambiguous contract provisions based on its own independent assessment of `reasonableness,' the court undermines the parties' freedom of contract." *Rory,* 473 Mich 457, 468-469.

The *Rory* Majority further asserted that a court's abrogation of such contract provisions based on the court's unreasonableness conclusion contradicted "`the bedrock principle that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent…a contract in violation of law or public policy.'" *Id* at 469 (citation omitted). "`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. It 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 its citizens[.]'" *Id,* quoting *Terrien,* 467 Mich 56,71 & citing US Const art I, sec 10, cl 1 (prohibiting federal government impairment of contracts). Imperative for freedom of contract is government enforcement of contracts. *Rory,* 473 Mich 457, 469-470, citing 15 A Corbin, *Contracts* (Interim ed), Sec 1376 & *Wilkie v Auto-Owners Insurance Co,* 469 Mich 41, 51-52; 664 NW2d 776 (2003) (further citations and footnotes omitted). Next, the *Rory* Majority contended that until recently, Michigan courts had upheld shortened insurance policy contractual limitations provisions and had held them inapplicable "only where the insured could establish [insurer] waiver…or estoppel." *Rory,* 473 Mich 457, 467 FN15 (collecting cases)

Based on its above almost unrestricted freedom of contact principle, the *Rory* Majority held that Michigan courts must enforce contractual limitations periods according to their terms, unless given periods violate Michigan public policy, or unless a traditional contract defense applies. *Id* at 470. "Examples of traditional defenses include duress, waiver, estoppel, fraud, or unconscionability." *Id* FN 23, citing *Gilliam v Michigan Mortgage-Investment Corp,* 224 Mich 405; 194 NW 981 (1923) (unconscionability) (further citations on other such defenses omitted). So, the *Rory* Majority rejected any reasonableness restriction on its enforce-contractual-provisions-as-written principle. Finally, the *Rory* Majority overruled the line of cases recognizing this reasonableness restriction. *See infra*, pp 16-17 for case references.

D. *RORY* DISSENTS AND UNDERLYING DECISIONS: REJECTION OF OVEREXPANDED FREEDOM OF CONTRACT AND RECOGNITION OF THE REASONABLENESS RESTRICTION.

In the above decisions and dissents, Justices recognized the reasonableness principle: **"The limitation period must be reasonable."** *Herweyer v Clark Highway Services, Inc,,* 455 Mich 14, 20; 564 NW2d 857 (1997) (our emphasis). *Accord, Camelot Excavating Co, Inc v St Paul Fire & Marine Insurance Co,* 410 Mich 118, 126; 301 NW2d 275 (1981). **Court review of contractual limitations provisions for "reasonableness" is "a legitimate exercise[.]"** *Rory,* 473 Mich 457, 492 (Kelly, J, dissenting) (our emphasis). *Accord, id* at 513-514 (Cavanagh, J, dissenting), *Herweyer,* 455 Mich 14, 20, *Camelot Excavating,* 410 Mich 118, 141 (Levin, J, concurring), *Tom Thomas Organization, Inc v Reliance Insurance Co,* 396 Mich 588, 592; 242 NW2d 396 (1976). "`It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought[,] and a statute that fails to do this cannot possibly be sustained as a law of limitations.'" *Rory,* 473 Mich 457, 493 (Kelly, J, dissenting), quoting *Price v Hopkin,* 13 Mich 318, 324-325 (1865). **"The essential reasoning behind this rule is that an**

unreasonable limitations period offers an aggrieved party no recourse to the courts [and]…unfairly divests that party of a right that it supposedly provided.'" *Rory,* 473 Mich 457, 493 (Kelly, J, dissenting) (our emphasis), quoting 54 CJS, *Limitation of Actions,* Sec 5. Contract parties can "`provide another and different period of limitation from the provided statute, and…such limitation, if reasonable, will be binding and obligatory upon the parties.'" *Id,* quoting 1 H G Wood, *Limitation of Actions* (4th ed Matthew Bender & Co 1916), Sec 42. *Accord, Rory,* 473 Mich 457, 513 (Cavanagh, J, dissenting).

"[C]ourts throughout the country recognized the reasonableness rule." *Rory,* 473 Mich 457, 493-494 (Kelly, J, dissenting) (collecting cases) (our emphasis). Justice Kelly asserted that in recognizing the reasonableness rule, recent Michigan courts had not created new law but adopted old law. *Id* at 493-494 (Kelly, J, dissenting), citing *Express Co v Caldwell,* 88 US (21 Wall) 264, 267; 22 L Ed 556 (18(1875), *Price,* 13 Mich 318, 324-325, *Longhurst v Star Insurance Co,* 19 Iowa 364, 370-371 (1865), 54 CJS, *Limitation of Actions,* Sec 5, Wood, *supra,* Sec 5 (further citations omitted).

The *Herweyer* Court and the *Rory* Dissents have recognized the following evaluation factors in determining whether a contractual limitations provision is reasonable:

1. Whether "the claimant has sufficient opportunity to investigate and file an action[.]
2. Whether "the time is…so short as to [practically abrogate] the right of action[.]
3. Whether 'the action is not barred before the loss or damage can be ascertained."

Herweyer, 455 Mich 14, 20. *Accord, Camelot Excavating,* 410 Mich 118, 127, *Rory,* 473 Mich 457, 505 (Kelly, J, dissenting).

E. ADHESION CONTRACTS.

An adhesion contract is "`a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a `take it or leave it' basis[.]'" *Rory,* 457 Mich 473, 480, quoting *Zurich Insurance Co v Rombaugh*, 384 Mich 228, 233; 180 NW2d 775 (1970) (further citation omitted). *See also, Rory,* 473 Mich 457, 484-485, quoting *Morris v Metriyakool,* 418 Mich 423, 440; 344 NW2d 736 (1984) (plurality opin) (Adhesion contracts "`are characterized by standard forms prepared by one party which are offered for rejection or acceptance without opportunity for bargaining and under the circumstances that the second party cannot obtain the desired [item] or service except by acquiescing in the form agreement."), *Rory,* 473 Mich 457, 485, quoting *Morris,* 418 Mich 423, 471 (Ryan & Brickley, JJ, concurring) ("`A contract of adhesion is a contract which has some or all of the following characteristics: the [contract] parties…were of unequal bargaining strength; the contract is expressed in standardized language prepared by the stronger party to meet his needs; and the contract is offered by the stronger party to the weaker party on a `take it or leave it basis.'") **"`Therefore, the essence of [an adhesion contract] is a nonconsensual agreement forced upon a party against his will.'"** *Rory,* 473 Mich 457, 485, quoting *Morris,* 418 Mich 423, 471, quoting *Rombaugh,* 384 Mich 228, 233 (our emphasis).

The *Rory* Majority did not recognize the adhesion contract as a separate kind of contract: "An `adhesion contract' is simply that: a contract. It must be enforced according to its plain terms unless one of the traditional contract defenses applies." *Rory,* 473 Mich 457, 477. Until *Herweyer,* Michigan courts recognized the "`adhesion contract doctrine'" only in dicta. In adopting it, the *Herweyer* Court did not do any "substantive analysis[.]" In adopting it, the *Herweyer* Court contradicted over 100 years of contrary Michigan Supreme Court decisions.

Rory, 473 Mich 457, 477. The *Rory* Majority outlined its version "of how the notion of an `adhesive' contract arose[.]" In 1919, Professor Edwin W. Patterson introduced the term adhesion contract "to describe a life insurance policy term requiring `delivery of the policy to the applicant' before the policy became effective. FN37" He recognized that "`life insurance contracts are contracts of `adhesion.'" The insurer and the insured draft the contract. But the insured "merely `adheres' to it, has little choice as to its terms. FN38" *Id,* quoting Edwin Patterson, *The delivery of a life-insurance policy,* 33 Harv L R 1, 221, 222 (1919). Most courts enforced these terms. The *Rory* Majority characterized an "adhesion contract['s]" original designation as a kind of contract but not as a bar to a contract's or a contract provision's enforcement. *Id.*

In 1943, Professor Friedrich Kessler urged courts to "refuse to enforce unfair…adhesion contracts" and contract provisions. He recognized standard forms contracts' benefits. But he also recognized that "enterprises with` strong bargaining power' used adhesion contracts, and that weaker parties "could not `shop around for better terms'" for two reasons: First, the standard contract drafting party "[had] `a monopoly[.]'" Second, all competitors used the same provisions. FN41 "Kessler expressed concern that `powerful industrial and commercial overlords' would `impose a new feudal order of their own making upon a host of vassals.'" *Id* at 479, quoting Friedrich Kessler, *Contracts of adhesion--some thoughts about freedom of contract,* 43 Colum L Rev 629, 632, 640 (1943).

The *Rory* Majority stated: "`As with any contract,'" an adhesive contract's provisions define the contract parties' "`rights and duties.'" Only by establishing a traditional contract defense, like "fraud, duress, unconscionability, or waiver," *Id* at 489, quoting & citing *Wilkie,* 469 Mich 41, 62 & FN23, can a party overcome an adhesion contract's provisions. Thus, the

Rory Majority concluded that whether a contract is adhesive is irrelevant, and that adhesive and non-adhesive contracts are enforceable in accordance with their "plain language." *Rory,* 457 Mich 473, 489.

The *Rory* dissents recognized adhesion contracts as a separate kind of contract. Before recognizing adhesion contracts, courts "`developed a whole series of semi-covert techniques for somewhat balancing these [form-contract bargains. A court can `construe' language into patently not meaning what the language is patently trying to say. It can find inconsistencies between clauses and throw out the troublesome one. It can even reject a clause as counter to the whole purpose of the transaction. It can reject enforcement for want of `mutuality.'" *Id* at 506 (Kelly, J, dissenting), quoting Professor Karl Llewellyn in Book Review, *The standardization of commercial contracts in English and Continental Law, by O. Prausnitz*, 52 Harv L R 1, 702 (1939) & citing M. Meyerson, *The reunification of contract law: The objective theory of consumer form contracts*, 47 U Miami L Rev 1263 (May 1993). Then, in the early 20th century, leading authorities saw this approach's drawbacks and called for uniformity. This call led to modern adhesive contract theory. *Id* at 507 (Kelly, J, dissenting), citing Meyerson, *supra,* pp 1277-1278. The dissenters pointed out that **"the idea of balancing the inequities of form contracts (or…`adhesion contracts') has long been recognized. And there is good reason for this long-standing recognition….the bargained-for exchange fundamental to traditional contracts does not exist in adhesion contracts."** *Id* at 507 (Kelly, J, dissenting) (our emphasis). Individuals do not bargain over adhesion contract terms. The stronger party imposes them. *Id* at 507-508 (Kelly, J, dissenting), citing *Brakeman v Potomac Insurance Co,* 472 Pa 66, 72; 371 A2d 193 (1977). "The majority contends that it bases its decision on the `freedom of contract and the liberty of each person to order his or her own affairs by agreement.'….It also states that

contracts `voluntarily and fairly made' should be enforced….**In making these statements, the majority either ignores or intentionally obfuscates the fact that adhesion contracts are not fairly made or bargained for by individuals managing their own affairs."** *Id* at 510 (Kelly, J, dissenting) (our emphasis). The *Rory* Majority thus created a rule permitting dominant contracting parties "to bargain unfairly so that they can maximize their financial profit….the average individual [having] little, if any, bargaining power[,]" carries an unjust burden. **Therefore, the *Rory* Majority returns "the state back into the era when courts either used covert means of interpreting contracts or ignored equity altogether."** *Id* at 510 (Kelly, J, dissenting) (our emphasis).

"`No longer do individuals bargain for this or that [contract] provision." The dominant party's legal advisor drafts the standard form contract. "[I]t is henceforth futile for an individual to attempt any modification, and incorrect for the economist and lawyer to classify or judge such arrangements as standing on an equal footing with individual agreements.'FN2" Meyerson, *supra,* p 1264.

The *Camelot Excavating* Concurrence and *Herweyer* recognized adhesion contracts, the latter in the employment contract context. "`The rationale of the rule allowing parties to contractually shorten statutory periods of limitation is that the shortened period is a bargained-for term of the contract. Allowing such bargained-for terms may in some cases be a useful and proper means of allowing parties to structure their business dealings. **In the case of an adhesion contract, however, where the party ostensibly agreeing to the shortened period has no real alternative, this rationale is inapplicable.'"** *Herweyer,* 355 Mich 14, 20-21, quoting *Camelot Excavating,* 410 Mich 118, 141 (Levin, J, concurring) (our emphasis).

"We share Justice Levin's concerns. **Employment contracts differ from bond contracts. An employer and employee often do not deal at arms length when negotiating contract terms. An employee in the position of plaintiff has only two options: (1) sign the employment contract as drafted by the employer or (2) lose the job.** Therefore, unlike in *Camelot* where two businesses negotiated the contract's terms essentially on equal footing, here plaintiff had little or no negotiating leverage. Where one party has less bargaining power than another, the contract agreed upon might be, but is not necessarily, one of adhesion, and at the least deserves close judicial scrutiny." *Herweyer,* 355 Mich 14, 21 (our emphasis).

F. PRESUMPTION OF READING AND UNDERSTANDING THE CONTRACT.

The *Rory* Majority reaffirmed the conclusive presumption that before agreeing to contracts, contracting parties have read and understood the contract provisions, whether they have done so or not. *Rory,* 473 Mich 457, 489 FN82 (also collecting cases). *Accord, Galea v FCA US LLC,* 323 Mich App 360, 369; 917 NW2d 694 (2018), *Clark v Daimler Chrysler Corp,* 268 Mich App 138, 145; 706 NW2d 471 (2005), *lv den* 475 Mich 875; 713 NW2d 779 (2006). The *Rory* Majority also reaffirmed the prevailing principle that failure to read an agreement is not a defense to an action to enforce its provisions. *Rory,* 473 Mich 457, 489 FN82 (also collecting cases). *Accord, Galea,* 323 Mich App 360, 369, *Watts v Polaczyk,* 242 Mich App 600, 604; 619 NW2d 714 (2000).

The *Rory* Dissent challenged the above presumption and principle:

"If the consumer does not read and comprehend the individual clauses of the contract, there can be no agreement on the particular terms in them. There can be no meeting of the minds. Moreover, when one side presents a contract on a take-it-or-leave-it basis and is in a place of considerable power over the other, there can be no bargained-for

exchange. Hence, an outdated strict construction policy of construing these agreements is utterly unworkable. FN12" *Rory,* 473 Mich 457, 508 (Kelly, J, dissenting) (our emphasis).

"The majority contends that consumers should be assumed to know all the contents of their insurance policies. But it notes that without a meeting of the minds no contract exists." *Id,* (Kelly, J, dissenting). *See also, id* at 490 FN84 (if there is no meeting of the mind, there is no contract, citing *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 372; 666 NW2d 251 (2003)). **"The purpose of modern judicial review of adhesion contracts is to balance the inequity that they present.** Instead of either forcing a consumer to abide by a term that he never knew of or rejecting the entire contract, the court balances the inequities of the contract to enforce its overriding intent. Therefore, what was fairly bargained for is enforced and what the parties minds truly met on remains. But the majority, instead of continuing to balance these inequities, returns to the generally unworkable strict construction approach. In doing so, it ignores the true nature of adhesion contracts." *Rory,* 473 Mich 457, 508 FN12 (Kelly, J, dissenting) (our emphasis).

"This classical theory has no basis in either reality or justice. FN56 **Courts had to create a `conclusive' presumption that the signing party understood the terms because such a presumption was so counter-factual. The drafters of the contracts knew the signing party had not read the terms.** There could be no problem of unfair surprise, since the objective understanding of the contract drafter mirrored the subjective reality of the non-drafter." Meyerson, *supra,* pp 1272-1273 (our emphasis)

"The common law of contracts…has strayed from the path or logical progression. FN41 The wrong turn occurred when the perfectly logical assumption that a merchant's signature implied assent to negotiated terms was mistakenly applied to consumer form contracts. The

courts abandoned the objective theory in search of a seductive consistency…."The classical legal view of standard form contracts defies logic and invites great injustice. Essentially, **under the twin banners of `freedom of contract' FN42 and `duty to read,' FN43 the law has given drafters of form contracts the power to impose their will on unsuspecting and vulnerable individuals."** Meyerson, *supra,* pp 1271-1272. (our emphasis)

Finally: "The [disadvantaged person's] lack of access to courts and counsel has particular significance in the law of contracts. Obtaining housing, health care, employment and consumer purchases are all contractual transactions. **An inability to negotiate, understand, or enforce contract rights in these areas can affect a person's life in fundamental ways."** Teri J Dobbins, *The Hidden Costs Of Contracting: Barriers To Justice In The Law Of Contracts,* 7 J L Soc'y 116 (Fall 2005) (our emphasis). **As a rule, the disadvantaged person lacks the money to hire an attorney to negotiate a contract for him or her. As a rule, the disadvantaged person lacks the money to hire an attorney to sue and if necessary to appeal a contract case.** So, "the development of the common law of contracts is based disproportionately on cases involving large dollar amounts and relatively wealthy parties. This is particularly important when issues of public policy are at stake." Dobbins, *supra,* p 117. "Economically disadvantaged persons face many obstacles to contracting long before any dispute over performance or enforcement arises….people may be most vulnerable, and the most harm may occur, during the contract negotiation and formation stage." Dobbins, *supra,* p 122. "Economically disadvantaged persons may accept unfavorable [contract] terms…because they lack access to information that would help inform their choices. Wealthier persons have access to newspapers, television, magazines, and the internet; all of these allow them to shop around for prices or make more informed decisions….Without easy access to these sources, a person may accept whatever terms are

offered simply because they are unaware that other, better options exist. FN40" Dobbins, *supra*, pp 122-123.

II. THE MICHIGAN SUPREME COURT SHOULD OVERRULE *RORY* AND ADOPT OR READOPT THE *RORY DISSENTS', HERWEYER'S, CAMELOT EXCAVATING'S,* AND *TOM THOMAS'* REASONABLENESS RESTRICTION ON *RORY'S* OVEREXPANDED FREEDOM OF CONTRACT RULE.

Overruling *Rory's* overexpanded freedom of contract and rejection of any reasonableness evaluation of contract provisions is essential and warranted. ***Rory* permits numerous oppressive, one-sided employment, insurance, computer services, cable TV, and other oppressive, one-sided contracts to stand. *Rory* rests on the assumption that in most contracting situations, two parties, both with some contracting power and thus at least nearly equal, are negotiating most contracts. But that assumption is wrong. In most contracting situations, one contracting party has far more power than the other. *Rory* rests on the assumption that in most cases, contracting parties negotiate contract provisions. But in most cases, they do not. In most situations, standard form "take-it-or-leave it" contracts and contract provisions are the rule. *Rory* rests on the assumption that the parties reach a meeting of the minds on these provisions. But in most cases, they do not. *Rory* rests on the assumption that both parties have meaningful alternatives to assenting to the mostly adhesive, standard form contracts. But in most cases, the weaker party does not have such alternatives. He/she/it must assent or suffer heavy negative impacts.** The stronger party has every reason and incentive to use and enforce mostly adhesive, standard form "take-or-leave-it" contracts, because doing so is more efficient, cost-effective, and effortless. Thus, *Rory* permits numerous oppressive contracts. While benefitting the few, this oppression damages the many.

Furthermore, fair and objective reasonableness evaluation factors are available. **The *Herweyer* Court adopted objective and workable reasonableness evaluation factors.** The

Rory Majority's criticism of the reasonableness standard as subjective overlooks these factors and possible development of other objective and workable factors, whether for all or most contracts or for specific area contracts (employment, computer services, cable TV, etc.). So, the *Herweyer* alternative is just as workable as the *Rory* alternative. Based on the above analysis, this Court should endorse the Michigan Supreme Court's overruling of *Rory*.

III. IN THIS CONTEXT, THE EMPLOYMENT CONTRACT'S SIX-MONTH LIMITATIONS PROVISION IS UNREASONABLE.

Since Plaintiff Cann was a laborer needing employment to survive, the employment contract's six-month limitations provision was not reasonable. **Defendant's position was all-powerful and dominant. His position was powerless and perilous. If he did not sign the employment contract, he risked discharge from his employment. So, there could be no real bargaining, meeting of the minds, or true Plaintiff Cann assent.** The events here occurred before the coronavirus pandemic. So, the present extended and increased unemployment benefits were not available. Also, the Unemployment Agency was contesting and even rejecting many unemployment claims due to alleged fraud, thus delaying unemployment benefits to thousands of unemployed people. *See* Paul Egan, *Michigan residents falsely accused of jobless fraud can sue, [Michigan] Supreme Court says*, Detroit Free Press (April 5, 2019). Furthermore, given his disadvantaged economic and social status, he was going to have, and did have, a much harder time finding a lawyer to handle his case. In this context, he did not have sufficient opportunity to investigate and sue Defendant. In this context, the six-month period was so short that it practically eliminated his right and ability to sue Defendant. Therefore, the six-month limitations provision and period are not reasonable.

IV. IN THIS CONTEXT, THE EMPLOYMENT CONTRACT'S SIX-MONTH LIMITATION PROVISION IS UNCONSCIONABLE.

Rory reaffirmed recognition of traditional contract defenses, like duress, fraud, mistake, and unconscionability. *Id* at 470 & FN23, *Allard v Allard,* 308 Mich App 536, 553; 867 NW2d 866 (2014), *vacated on other grounds* 499 Mich 932; 878 NW2d 888 (2016) (unconscionability), This case involves unconscionability.

A. UNCONSCIONABILITY SUBSTANTIVE LAW.

To show that a contract provision is unconscionable, the plaintiff must show its procedural and substantive unconscionability. *Clark,* 268 Mich App 138, 143, *Id* at 147 (Neff, J, dissenting), *Hubscher & Son, Inc v Storey,* 228 Mich App 478, 481; 578 NW2d 701 (1998), *Northwest Acceptance Corp v Almont Gravel, Inc,* 162 Mich App 294, 302; 412 NW2d 719 (1987). "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term." *Clark,* 268 Mich App 138, 144, citing *Allen v Michigan Bell Telephone Co,* 18 Mich App 632, 637; 171 NW2d 689 (1969), *lv den* 383 Mich 804 (1970). "If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability." *Clark,* 268 Mich App 138, 144, citing *Allen,* 18 Mich App 632, 637. "Substantive unconscionability exists where the challenged term is not substantively reasonable." *Clark,* 268 Mich App 138, 144, citing *Allen,* 18 Mich App 632, 637-638. "[A] term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience." *Clark,* 268 Mich App 138, 144, citing *Allen,* 18 Mich App 632, 637-638. In determining whether a contract provision is unconscionable, Michigan courts have adopted a two-part test:

1. What is the parties' relative bargaining power, economic strength, their alternative supply sources, "in a word, what are their options?"

2. Whether the provision at issue is substantively reasonable.

Hubscher & Son, 228 Mich App 478, 481, *Northwest Acceptance Corp,* 162 Mich App

294, 302; 412 NW2d 719 (1987), *Clark*, 268 Mich App 138, 147 (Neff, J, dissenting). "Reasonableness is the primary consideration." *Hubscher & Son*, 228 Mich App 478, 481, *Clark*, 268 Mich App 138, 147 (Neff, J, dissenting).

A six-month contractual limitations period for an employment claim standing alone is substantively reasonable. *Eg*, *Clark*, 268 Mich App 138, 141, 145, *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 242; 625 NW2d 101 (2001), *Minevich v Spectrum Health-Meier Heart Center*,1 F Supp 2d 790, 799-800 (WD Mich 2014).

Courts have applied unconscionability to employment and similar contracts. *See Meehan v New England School of Law*, 522 F Supp 484, 494 (D Mass 1981), *aff'ds* 705 F2d 439 (CA 1, 1983) (the Court applied the unconscionability doctrine to a law professor's wrongful discharge case), *Scheele v Mobil Oil Co*, 510 F Supp 633, 637 (D Mass 1981) (the court applied the unconscionability doctrine to a franchise agreement, including its termination provision).

B. UNDERLYING POLICY ENVIRONMENT: GROSSLY UNEQUAL EMPLOYER-EMPLOYEE BARGAINING POWER- PART I.

This case involves an employer-employee relationship. **Employer-employee relationships feature tremendous employer power over the employee and thus grossly unequal employer-employee bargaining power. Employer-employee relationships also feature tremendous relative employer economic strength and relative employee weakness. In this kind of power relationship, the employee's contractual or other agreement to a shortened contractual limitations period cannot be voluntary. Rather, any such agreement is inherently involuntary. Furthermore, the shortened contractual limitations period provision is procedurally unconscionable, because Plaintiff had no realistic alternative but to accept the above provision or else lose the employment opportunity and remain**

unemployed. Therefore, any alleged Plaintiff "freedom" to accept or reject the above provision is not only illusionary but also nonexistent.

The above conclusions are based on the actual employment environment for employees like Plaintiff: First, despite certain common law and statutory restrictions, most American employees are at-will employees. National Conference of State Legislatures, *At-Will Employment-Overview* (April 15, 2008), available at www.ncsl.research/labor-and-employment/at-will-employment-overview, Betterteam, *At-Will Employment: Complete Information With State Information And Definition* (July 29, 2019), available at www.betterteam.com, Drew DeSilver, *10 Facts About American Workers*, Pew Research Center (August 29, 2019), available at www.pewresearch.org/fact-tank/2019/08/29/facts-about-american-workers. Thus, their employers can fire them for any reason or no reason, good reason bad reason, or no reason, and with or without notice. Michael Z. Green, *Opposing Excessive Use Of Employer Bargaining Power In Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 Tex Wesleyan L Rev 77 (2003) (the second),

Even Adam Smith, whom many see as the main theoretician of modern capitalism, recognized this inherently unequal bargaining power:

"Prima facie, it seems obvious that the distribution of power is biased towards capital owners, an assessment that can be traced back as far as Adam Smith who comments on the division of bargaining power as follows:

"`It is not, however, difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into a compliance with their terms. [...] In all such disputes the masters can hold out much longer. A landlord, a farmer, a master manufacturer, a merchant, though they did not employ a single workman, could generally live a year or two upon the stocks which they have already acquired. Many workmen could not subsist a week [...] without employment. In the long run the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate.'"

"There is no reason to believe that this assessment is no longer valid. Although the situation of workers has improved remarkably since the times of Adam Smith – primarily through the creation of the welfare state – **the basic pattern remains unchanged….workers usually depend exclusively on labour income from one particular job and thus severely restricting their scope of action. As a result, the pressure to accept a job offer at a given wage rate is far more urgent than the pressure to hire someone at the demanded wage rate."**

"The fact that unemployment is a realistic and imminent possibility creates competition between potential employees so that employers can always rely on applicants who are willing to work for the offered wage rate. If supply exceeds demand, workers compete more keenly among themselves than companies compete for them. The very existence of unemployment therefore secures that bargaining power is shifted towards capital."

Vincent Victor, *The Role of Bargaining Power: How Unions Affect Income Distribution,* Potsdam Economic Papers 6, Master's Thesis, University of Potsdam (Potsdam University Press 2019), available at publishup-uni-postdam.de/files/pep06.pdf, quoting Adam Smith, *The Wealth of Nations* (2007 Ed Orig Pub 1776), pp 56-57 (our emphasis). Also, compared to employees, employers have more and better access to information. Victor*, supra.*

> "It is commonplace that employers and employees are not on equal footing. The inequality between them is multi-dimensional. Employers have more wealth. Employers have more bargaining power. Owners and managers are usually of higher social status."

Aditi Bagchi, *The Myth of Equality in the Employment Relation,* 2009 Mich St L Rev 579, 580 (2009). *Accord,* Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (CA 9, 2002) (finding employer had "considerably more bargaining power than . . . its employees").

In the 1935 National Labor Relations Act, Congress recognized unequal employer-employee bargaining power:

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."

National Labor Relations Act, 29 USC Secs 151-169, Findings and Policies. *Accord, Brooklyn Savings Bank v O'Neil,* 324 US 697, 706-707; 65 S Ct 895; 89 L Ed 1296 (1945) (recognizing and referring "to the unequal bargaining power as between employers and employees").

C. UNDERLYING POLICY ENVIRONMENT: GROSSLY UNEQUAL EMPLOYER-EMPLOYEE BARGAINING POWER- PART II.

"**What this report finds:** Labor markets in capitalist economies are fundamentally tilted against individual workers' ability to bargain effectively with employers. Policy does not have to be rigged *for* employers to give them particular clout in labor markets; instead, the very nature of these labor markets gives them clout. In the past, when economic growth was broadly shared across the population, it was because policymakers understood this basic asymmetry and used policy levers to bolster the leverage and bargaining power of workers. Conversely, recent decades' rise of inequality and anemic wage growth has resulted from a stripping away of these policy bulwarks to workers' labor market power."

"Introduction

"Since 1979, the bottom 90 percent of the American workforce has seen their pay shrink radically as a share of total income. **Figure A** shows total labor compensation for the bottom 90 percent as a share of all market-based income in the American economy. In 1979, this share was 58 percent, but as of 2015 it had shrunk to just under 47 percent. The amount of money this loss represents is staggering; had the 1979 share held constant, the bottom 90 percent of the American workforce would have had roughly $1.35 trillion in additional labor income in 2015, or about $10,800 per household."

The biggest *change* in relative power between typical workers and their employers in recent decades has been a collapse of workers' power. There is some evidence of increasing absolute employer power (e.g., through increased market concentration), but our view is that the bigger change remains the collapse of workers' power.

> **This collapse of worker power has been overwhelmingly driven by conscious policy decisions** that have intentionally undercut institutions and standards that previously bolstered the economic leverage and bargaining power of typical workers; it was not driven simply by apolitical market forces.

Josh Bivens & Heidi Shierholz, *What labor market changes have generated inequality and wage suppression*, Economic Policy Institute (December 12, 2018), (authors' emphasis), available at www.ep1.org/publication/what-labor-market-changes-have-generated-inequality-and-wage-suppression.

In contrast, employers' bargaining power has grown:

> "Growing concentration is, of course, just one possible manifestation of growing employer power**.** Other forms are highlighted in the "dynamic monopsony" framework best elucidated by Manning (2003). In this framework, labor market frictions (e.g., workers lacking complete information about employment alternatives, spatial mismatches, and the need for flexible schedules) give employers some measure of wage-setting power over workers. For example, there may be plenty of fast-food restaurants employing workers within a few miles of a given low-wage worker's house, but only one of those restaurants is on a direct bus route that makes the commute manageable. Or only one allows for an efficient pairing of commuting and dropping kids off at school. Such frictions accumulate and grant employer-side power in the labor market."

Bivens & Shierholz, *supra.* The key factors behind declining employee bargaining power and growing employer bargaining power include:

> "The evidence clearly shows that erosion of worker-side power is the dominant factor in the power imbalance in the labor market.
>
> "Likely the most important factor behind the collapse in workers' bargaining power has been the erosion in the share of workers in a union, which fell from 24 percent in 1973 to 10.7 percent in 2017. Research demonstrates that this erosion has had a substantial impact on middle-wage workers, including both union and nonunion workers (Rosenfeld, Denice, and Laird 2016).
>
> "Another post-1979 development that has undercut the bargaining position of low and moderate-wage workers is the rise in the average level of unemployment. Between 1949

> and 1979 the unemployment rate averaged 5.2 percent; between 1979 and 2017 it averaged 6.3 percent. This is not just a result of the Great Recession—between 1979 and 2007 unemployment averaged 6.1 percent. Research has demonstrated clearly that low- and middle-wage workers' pay is much more responsive to unemployment than the pay of highly paid workers. The post-1979 increase in average unemployment hence has predictably contributed to rising inequality and slow pay growth for the bottom 80 percent.
>
> "Finally, economic theory and evidence clearly indicates that growing trade with low-wage countries should boost wage inequality in the United States and lower wages for workers without a four-year college degree. This type of trade grew significantly since the 1970s. Imports from low-wage countries were equal to 0.7 percent of U.S. GDP in 1973, but 6.3 percent in 2016."

Bivens & Shierholz, *supra.*

Globalization has also strengthened employers' bargaining power and weakened employees' bargaining power:

> "Finally, the rise of globalization that has pressured American workers' wages is often presented as inevitable—simply driven by technology and other countries' decisions to join the global trading system. There is some truth to the latter, and these developments were likely always going to be hard on American workers' wages. But this trade-induced redistribution has been amplified by policy decisions. Trade agreements in recent decades have sought to maximize labor market competition between workers in the U.S. and abroad while simultaneously boosting protections for corporate profits."

Bivens & Shierholz, *supra.*

Another globalization-related action leading to the above outcome include overvaluing the dollar, leading to "trade deficits and manufacturing job losses." Bivens & Shierholz, *supra.*

> "Further, employers have pursued an aggressive host of practices meant to limit workers' bargaining position, and policymakers have not, for the most part, taken the actions necessary to curb these practices through strengthened standards or enforcement. These aggressive employer practices include (among other things) requiring workers to sign mandatory arbitration agreements with class and collective action waivers as a condition of employment, misclassifying workers as independent contractors, and not providing workers with predictable schedules."

Bivens & Shierholz, *supra.*

"Employers, as a whole, have the balance of bargaining power in their favor when dealing with employees." Green, *supra,* p 95 (our emphasis). *Accord,* Bivens & Shierholz, *supra,* Aida Farmand & Teresa Ghilarducci, *Why American Older Workers Have Lost Bargaining Power,* Schwartz Center for Economic Policy Analysis and Department of Economics, The New School for Social Research, Working Paper Series 2019-2 (May 2019), available at www.economicpolicyresearch.org/research/retirement_security_b.....

D. UNDERLYING POLICY ENVIRONMENT: GROSSLY UNEQUAL EMPLOYER-EMPLOYEE BARGAINING POWER- PART III.

Labor and employment authorities have used the term "monopsony power" to describe a growing part of the labor market situation. Monopsony power refers to a situation, where one buyer or a few buyers are the sole or nearly sole buyers of goods or services, such as labor services. Nick Bunker, *Monopsony and market power in the labor market,* Washington Center for Equitable Growth (April 24, 2015), available at www.equitablegrowth.org/monopsony-market-power-labor-market. *Accord,* Marshall Steinbaum, *Evidence And Analysis Of Monopsony Power, Including But Not Limited To In Labor Markets* (Public Comment to the Federal Trade Commission), August 2018, available at www.ftc.gov/documents/2018/08/ftc-2018-0054-d-0006-151013.pdf, Jeanna Smialek, *What's Monopsony? It May Be the Reason You Haven't Had a Raise,* Bloomberg Businessweek (October 15, 2018), available at www.bloomberg.com/news/articles/meet-monopsony-creature-of-a-puzzling-labor-market, Ghilarducci & Farmand, *supra,* Bivens & Shierholz, *supra.*

A present classic monopsony example is the hospital: Since most areas have few hospital systems, these systems can dominate the labor markets for hospital employees.

Evidence that monopsony power is impacting on employees' abilities to find jobs is growing. *See* Bunker, *supra,* Steinbaum, *supra,* Alan B. Krueger, *Reflections on Dwindling Worker Bargaining Power and Monetary Policy,* August 24, 2018 Luncheon Address at the Jackson Hole Economic Symposium), available at www.kansascityfed.org/files/publicat/sympos.pdf, Farmand & Ghilarducci, *supra.* Though "monopsony has probably always existed in [American] labor markets," the counterbalancing forces have declined. "Union membership, for example, has fallen from a quarter of the U.S. workforce in 1980 to only 10.7 percent in 2017. Collective bargaining, which is much less common in the U.S today, was an effective counterweight to employer monopsony power." Krueger, *supra.* Also, more and more employees are contract, project, or temporary employees. *Krueger, supra,* Yuki Noguchi, *Freelanced: The Rise of the Contract Workforce* (heard on All Things Considered), National Public Radio (January 22, 2018), available at www.npr.org/freelanced-rise-of-the-contract-workforce (20% of American employees are such employees), Jay Shambaugh, Ryan Nunn & Lauren Bauser, *Up Front: Independent workers and the modern labor market,* Brookings Institution (July 7, 2018), available at www.brookings.edu/blog/up-front/2018/06/07/independent-workers-and-the-modern-labor-market (presenting various figures from various studies, including the Bureau of Labor Statistics, showing that at least 10% of US employees are such employees). About 25% of US employees are subject to binding non-competition or non-poaching agreements restricting their job mobility. Krueger, *supra.* The proliferation of employers has often given way to increasing concentration of employers and thus increasing collusion among employers. Krueger, *supra.* In addition, Great Recession memories remain fresh. During the Great Recession, unemployment mushroomed;

employees became desperate for jobs, and employers became used to having many resumes or job applications from employees willing to work on the employer's terms. Krueger, *supra.*

Older workers have much less bargaining power than before due to several factors:

> "Persistent noncompetitive conditions in older workers' labor markets suppresses bargaining power and can help explain older workers' compensation trends. Seven factors reduce older workers' bargaining power: one, eroding retirement security resulting in the lack of dignified off-ramps to retirement; two, insecure employment relationships which means early and unexpected layoffs, undesirable alternative work schedules, and diminished internal labor markets. Three, loss of union representation, Four, persistent age discrimination. Five, the relative geographical immobility of older workers reduces leverage with current employers. Six, since older workers work beside Earned-Income- Tax -Credit (EITC) eligible workers they receive EITC–induced lower wages but not the EITC supplements. Seven, large firms pay more than small firms but older workers are more likely to work for smaller firms."

Ghilarducci & Farmand, *supra.*

Regarding an employer's "voluntary" employment agreement on specific provisions, as Jean Sternlight, commenting about mandatory arbitration provisions, recognized: "` I put the term 'mandatory' in quotes as a nod to those who insist that arbitration imposed through contracts of adhesion should be categorized as voluntary. Personally, however, I cannot understand how a person can be said to have 'voluntarily' accepted arbitration when it is part of a small print contract of adhesion.'" Green, *supra,* quoting Jean R Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World,* 56 U Miami L Rev 831, 831 FN1 (2002).

E. THE EMPLOYMENT AGREEMENT PROVISION IS UNCONSCIONABLE.

Applying these principles here leads to the conclusion that the employment agreement provision is unconscionable. **Plaintiff Cann had no bargaining power. He was a laborer. He needed a job. In his acceptance of the six-month contractual limitations provision, he had no meaningful choice. He had to "take it or leave it." Defendant did not negotiate on the**

provision with him. Defendant did not even explain the provision to him. So, his acceptance was involuntary, the functional equivalent of duress. The provision was also substantively unconscionable. Though the provision by itself was not unconscionable, its employment application location and small print made it unconscionable. The provision's location was below the signature line, not where someone would expect to see a substantive provision. For a crucial substantive provision, the provision's print was smaller than it should have been. There was no warning in bold letters or caps on the provision's importance. For these reasons, the provision is unconscionable, and the lower court's dismissal is unjustified.

V. STARE DECISIS SHOULD NOT PREVENT OVERRULING OF *RORY'S* OVEREXPANDED FREEDOM OF CONTRACT DOCTRINE, ITS REJECTION OF THE REASONABLENESS ANALYSIS, AND ITS REFUSAL TO RECOGNIZE ADHESION CONTRACTS.

A. MICHIGAN STARE DECISIS PRINCIPLES.

Stare decisis is not "`an inexorable command.'" *Petersen v Magna Corp,* 484 Mich 300, 317; 773 NW2d 564 (2009), quoting *Robinson v Detroit,* 462 Mich 439, 463-464; 613 NW2d 307 (2000). *Accord, id* at 470-471 (Corrigan, J, concurring) (citation omitted). As a general rule, stare decisis is "`the preferred course[,] because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived reliability of the judicial process.'" *Id* at 463, quoting *Hohn v US,* 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998). But "stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions….'" *Petersen,* 484 Mich 300, 317, quoting *Robinson,* 462 Mich 439, 463-464.

Indeed, "willingness to reexamine precedent is actually an important component of the development of the common law. The common law is not immutable; rather, it is flexible and adaptable to changing conditions." *Id* at 471 FN2 (Corrigan, J, concurring) (citation omitted).

Sometimes, later "events and further reflection" reveal that the earlier decision's reasoning was erroneous, or that the earlier decision led to unforeseen consequences. *Id* at 470-471 FN2 (Corrigan, J, concurring), (citation omitted). "`When it becomes apparent that the reasoning of an opinion is erroneous, and that less mischief will result from overruling the case[,] rather than following it, it becomes the duty of the court to correct it." *Id* at 471 (Corrigan, J, concurring), quoting *People v Graves,* 458 Mich 476, 481; 581 NW2d 229 (1998) (our emphasis).

Analyzing whether a Michigan appellate court should overrule an earlier decision "should begin with the presumption that upholding the precedent involved is the preferred course of action." *Petersen,* 484 Mich 300, 317. This presumption is rebuttable. *Id.* The proponent of overruling should show that "a compelling justification exists to overturn the precedent." *Id.* Besides this rebuttable presumption, the Michigan Supreme Court has established a multi-factor test for evaluating and deciding whether to overrule an earlier decision:

1. Whether the appellate court decided the earlier decision wrongly.
2. Whether the decision is practically unworkable.
3. Whether overruling the decision would cause reliance interests "undue hardship."
4. Whether "changes in the law or facts no longer justify this decision."

Petersen, 484 Mich 300, 315. *See also, Robinson,* 462 Mich 439, 463-466 (first three factors).

B. OVERRULING *RORY* IS IMPERATIVE AND JUSTIFIED.

To prevent oppressive, one-sided employment contracts like the one here, overruling *Rory* is imperative and justified. The *Rory* Majority decided its case wrongly. The *Rory* Majority proclaimed freedom of contract as the rule. **But the *Rory* Majority ignored that some contracting situations are so unequal that one contracting party is all-powerful, while the**

other contracting party is all-powerless. The *Rory* Majority also ignored that some contracting situations are so unequal that one contracting party is dominant, meaning that it has far more contracting power than the other contracting party. Further, the *Rory* Majority overlooked that the all-powerful or dominant party has far more access to counsel than the all-powerless or weaker party. In addition, the *Rory* Majority overlooked that in many situations, the all-powerless or weaker party has no feasible or practical alternative to the contract offered. The *Rory* Majority implicitly based its decision on a contracting environment, where both parties have at least some negotiating power, where both parties have at least some access to counsel, and where both parties have at least a few other alternatives. But more and more, that contracting environment does not exist for the average individual looking for employment, insurance, computer repair, cable TV, and many other necessities, let alone optional goods and services.

Moreover, the *Rory* Majority based its overexpanded freedom of contract on contracting parties' actual precontract negotiations over contract provisions. But such negotiations occur less and less. **Therefore, *Rory* permits contractual oppression to thrive.** While benefitting the few, this oppression damages the many. Accordingly, the first above stare decisis factor strongly supports overruling *Rory*.

Regarding workability, though workable, the *Rory* Majority's decision is not the sole workable alternative. Reviewing important contract provisions, like contractual limitations period provisions, for reasonableness is feasible and practical. Contractual limitations provisions govern when and whether a contracting party has access to the courts, whether for breach of contract or new public policy impacting on the contract. **The *Herweyer* Court adopted objective and workable reasonableness evaluation factors.** The *Rory* Majority's criticism of

the reasonableness standard as subjective overlooks these factors and possible development of other objective and workable factors, whether for all or most contracts or for specific area contracts (employment, computer services, cable TV, etc.). So, the *Herweyer* alternative is just as workable as the *Rory* alternative. As a result, the second stare decisis factor is neutral. It does not prevent overruling *Rory.*

Reliance interests do not prevent overruling *Rory.* To prevent undue hardship to reliance interests, as alternatives to full retroactive overruling, prospective and limited retroactive overruling are available. Full retroactivity of overruling decisions is the general rule. But limited retroactivity is the preferred alternative. *Lindsey v Harper Hospital,* 455 Mich 56, 68; 564 NW2d 861 (1997), *superseded by statute in part on other grounds see Braverman v Garden City Hospital,* 480 Mich 1159; 746 NW2d 612 (2008), *Tebo v Havlick,* 418 Mich 350, 360; 343 NW2d 181 (1984), *In Re Kanija,* 308 Mich App 660, 671; 866 NW2d 862 (2014). Limited retroactivity restricts an overruling decision's application to cases to the case before the court or to that case and similar cases on appeal or otherwise pending in the court system, where at least one party raised and preserved the issue involved. *Tebo,* 418 Mich 350, 360, *In Re Kanija,* 308 Mich App 660, 671. While the Michigan Supreme Court has the ultimate decision on whether to overrule *Rory,* should it do so, how to address reliance interests would be an issue. The above application alternatives remove undue hardship to any reliance interests regarding *Rory* as a barrier to its overruling.

While changes in the law since *Rory* are not factors in any decision to overrule *Rory,* similar related factors are. As the *Rory* dissent pointed out, *Rory* was a regression from earlier Michigan contractual limitations period law, including *Herweyer, Camelot Excavating,* and *Tom Thomas.* Also, *Rory* put Michigan contracting law out of step with most other states' contracting

law for no good benefit or reason. *Rory*, 473 Mich 457, 493-494, 509 (Kelly, J, dissenting). So, *Rory* gave Michigan individuals, small businesses, small nonprofit organizations, and other weaker contracting parties far fewer protections than other states' similar parties. Accordingly, this other factor strongly supports overruling *Rory*.

As a result, analysis of the above overruling factors leads to the conclusion that overruling *Rory* is essential and justified.

CONCLUSION

THEREFORE, PLAINTIFF-APPELLANT RAYNARD CANN respectfully requests this Court to reverse the Macomb County Circuit Court's decision and to remand this case to that court for further proceedings in accordance with the reversal decision.

Dated: January 9, 2021

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CERTIFICATE OF SERVICE

I certify that I served copies of Brief of Plaintiff-Appellant and this Certificate of Service on January 9, 2021 via this Court's electronic filing system on:

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