

STATE OF MICHIGAN
IN THE SUPREME COURT

SAMANTHA LICHON,

Plaintiff-Appellee,

v

MICHAEL MORSE and
MICHAEL J. MORSE, PC,

Defendants-Appellants.

Supreme Court No. 159492

Court of Appeals No. 339972

Oakland CC: 17-158919-CZ

JORDAN SMITS,

Plaintiff-Appellee,

v

MICHAEL MORSE and
MICHAEL J. MORSE, PC,

Defendants-Appellants,

Supreme Court No. 159493

Court of Appeals No. 341082

Wayne CC: 17-008068-CZ

BRIEF *AMICUS CURIAE*
SUBMITTED BY HOME BUILDERS ASSOCIATION OF MICHIGAN
IN SUPPORT OF ITS POSITION ON THE PUBLIC POLICY ISSUE

Melissa A. Hagen (P42868)
McClelland & Anderson, LLP
Counsel for *Amicus Curiae*
Home Builders Association of Michigan
1142 S. Washington Ave
Lansing, MI 48910
517-482-4890

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STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction pursuant to MCR 7.303(A)(2) and MCR 7.302, Appellants having filed their Application for Leave to Appeal on April 25, 2019, and this Court having granted the Application for Leave to Appeal by Order entered September 18, 2019.

STATEMENT OF QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR BY DETERMINING THAT THERE ARE, OR SHOULD BE, PUBLIC POLICY EXCEPTIONS TO MANDATORY ARBITRATION CLAUSES?

The Court of Appeals answered, "No."

The Circuit Court, Did not answer.

Plaintiffs-Appellees, answered, "No."

Defendants-Appellants, answered, "Yes."

Amicus Curiae Home Builders Association of Michigan, answer, "Yes."

I. INTRODUCTION

Home Builders Association of Michigan is a statewide association whose members develop and build single and multi-family homes throughout Michigan (the “Association”). Members of the Association routinely enter into construction contracts which contain mandatory arbitration clauses similar to the following:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

The Association seeks leave to file this Brief *Amicus Curiae* because it believes that the majority opinion of the Court of Appeals, if not clarified and, in part, vacated by this Court, may have widespread ramifications, negatively impacting the reliability and enforceability of arbitration clauses in Michigan. More specifically, and as discussed more fully below, the Court of Appeals majority construed the language of an arbitration agreement so as to exclude claims for sexual assault and harassment from its purview – a ruling which the Association does not challenge. Rather, from the Association’s perspective, the troublesome aspect of the majority opinion of the Court of Appeals revolves around its ruling that its contract interpretation decision is supported by “strong public policy;” thereby advocating for Michigan’s adoption of judicially created public policy exceptions to mandatory arbitration agreements.

Judicially created public policy exceptions to mandatory arbitration clauses do not coincide with Michigan’s black-letter principles of contract and/or arbitration law. In point of fact, to date, no such exceptions exist. As a result, there are no guidelines or parameters by which to identify

and apply public policy exceptions to otherwise lawful, unambiguous arbitration agreements. Nor should such guidelines and parameters be judicially created. Contrary to the implications of the Court of Appeals majority, there is simply no precedent under Michigan law for the notion that some things are just too important or too egregious to arbitrate.¹ The establishment of such a fluid, unfettered and frameless precedent is a dangerous and unwarranted thing. The role of the judiciary is to apply what the law is, not create exceptions for what its members believe the law ought to be.

Further, arbitrations are favored in Michigan and create efficiencies in the resolution of disputes. Unambiguous arbitration agreements declare the intent and agreement of the parties. By contrast, the ad hoc creation of exceptions to those agreements not only destroys and rewrites the parties' agreement, but also creates the slippery slope of uncertainty in the enforceability of arbitration agreements.

For these reasons, as well as the potential implications of the Court of Appeals majority opinion upon arbitration agreements like those used by the Association's members, the Association seeks to address this Court on the public policy issue raised in the majority opinion of the Court of Appeals. In *Grand Rapids v Consumers Power Co*, 216 Mich 409, 418; 185 NW 852 (1921), this Court stated: “[t]his Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief *Amicus Curiae*” The Association files this brief in support of its position on the public policy issue.

¹ For example, in Michigan, arbitration clauses have been upheld in multiple contexts, including child custody disputes. *Dick v Dick*, 210 Mich App 576, 588; 534 NW2d 185 (1995).

II. STATEMENT OF FACTS

The facts of this case as alleged are disturbing and horrific. That notwithstanding, to the extent that the holding of the Court of Appeals majority was strictly one of contract interpretation limited to the facts of the case and the particular language of the arbitration clause at issue, the Association would have nothing to add. However, the Court of Appeals took its ruling beyond the four corners of the arbitration agreement, stating:

. . . central to our conclusion in this matter is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault.

Lichon v Morse, 327 Mich App 375, 394-395; 933 NW2d 506 (2019) (footnote omitted), Exhibit 1.

It is the establishment of judicially created public policy exceptions to mandatory arbitration agreements with which the Association cannot agree. The Court of Appeals majority opinion in this regard calls into question the validity and enforceability of the numerous arbitration agreements entered into now and in the future by the Association's members. Accordingly, for the reasons discussed below, this Court should vacate the above-quoted portion of the majority opinion of the Court of Appeals. This Court should rule that there are no public policy exceptions to otherwise enforceable arbitration agreements and that such agreements should be enforced as written.

III. ARGUMENT

A. The Court of Appeals Majority Opinion Conflicts with Michigan Contract Law

“The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.” *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 357; 51 S Ct 476; 75 L Ed 1112 (1931); see also

Port Huron Ed Ass'n v Port Huron Area School Dist, 452 Mich 309, 319; 550 NW2d 228 (1996), quoting *Dep't of Navy v Federal Labor Relations Authority*, 295 US App DC 239, 248; 962 F2d 48 (1992).

Terrien v Zwit, 467 Mich 56, 71-72; 648 NW2d 606 (2002). “Under this legal principle, the parties are generally free to agree to whatever they like and, in most circumstances, it is beyond the authority of the courts to interfere with the parties’ agreement.” *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62-63; 664 NW2d 776 (2003), citing *St Clair Intermediate School Dist v Intermediate Ed Ass'n*, 458 Mich 540, 570-572; 581 NW2d 707 (1998). It is likewise generally beyond the power of the legislature to interfere with contractual bargains reached by the parties thereto. *Allied Structural Steel Co v Spannaus*, 438 US 234, 242 (1978) (The Contract Clause of the United States Constitution imposes limits on the power of the states to abridge existing contractual relationships). See also, Michigan Const 1963, art 1, §10 – “[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.” Accordingly, freedom to contract is both central to Michigan’s jurisprudence generally and a cornerstone of Michigan’s contract law specifically.

It is from these principles that Michigan derives its rules of contract interpretation and the correlating limitations on the judiciary in that regard. When courts construe and abrogate unambiguous contract terms, they undermine the parties’ freedom of contract. Therefore, unambiguous contracts are not open for judicial interpretation and must be “enforced as written.” *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005) (emphasis in original).

Neither may courts “rebalance the contractual equities” through “subjective pos hoc judicial determinations of ‘reasonableness.’” *Id.* at 461. To the contrary, judicial assessment of

reasonableness is an invalid basis upon which to refuse to enforce unambiguous contractual provisions. *Id.* at 470. Accordingly, in general, only recognized traditional contract defenses, such as duress, waiver, estoppel, fraud and unconscionability may be used to avoid the enforcement of contract provisions. *Id.*

On the very rare occasion, a contract provision may be avoided where that provision violates public policy. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005), citing *Rory, supra* at 461. However, application of a public policy exception is restrictive and limited – not expansive. Courts are admonished to proceed with caution when invoking public policy to invalidate a contract provision and, the policy itself must be determined from objective legal sources and “clearly apparent” in the law. *Id.* at 722.

As noted by this Court, public policy “is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law.” *Terrien*, 467 Mich at 67. Stated otherwise:

In ascertaining the parameters of our public policy, we must look to “policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law.”

Rory, 473 Mich at 471, quoting *Terrien, supra* at 66-67 (emphasis supplied).

Thus, application of a public policy exception to the enforcement of a contract provision is not subjective and is not based on “trends,” “reasonableness” or “what feels right.” This limitation looms large in this case.

Here, the Court of Appeals majority failed to discuss, or even identify, provisions from a constitution, a statute or a common law principle that is reflective of its judicially created public

policy exception in this case. Rather, the only justifications given by the majority for the creation of a public policy exception are “that no individual should be forced to arbitrate his or her claims of sexual assault,” and that “the idea that two parties would knowingly and voluntarily agree to arbitrate a dispute over such an egregious and possibly criminal act is unimaginable.” *Lichon*, 327 Mich App at 395, Exhibit 1. These justifications are not, however, “clearly rooted in the law.” They are not found in a constitution. They are not found in a statute. They are not found in the common law. They are perhaps societal preferences, but are not what Michigan law requires in order to substantiate the invalidation of a contract provision based on public policy. The Court of Appeals ruling creating a public policy exception to the enforcement of an arbitration agreement was erroneous and should be vacated.

B. The Court of Appeals Majority Opinion Conflicts with Michigan Arbitration Law

Arbitration is a matter of contract and, when interpreting an arbitration agreement, courts apply the same legal principles that govern contract interpretation. *Altobelli v Hartmann*, 499 Mich 284, 295; 884 NW2d 537 (2016). Accordingly, when courts are asked to determine whether an arbitration agreement includes the subject matter of the dispute at issue, courts begin with an examination of the language of the arbitration clause and interpret the language according to its plain and ordinary meaning. Courts enforce the unambiguous language of arbitration agreements as written. *Id.* Courts then determine whether a plaintiff’s specific claim falls within that scope. *Id.* at 296. And, while a party cannot be required to arbitrate matters to which he/she did not agree to arbitrate, the general policy of this State is to favor arbitration. *Id.* at 295.

Notably, with very few exceptions (i.e., collective bargaining), Michigan statutory law (specifically, the Michigan Arbitration Act) is devoid of any exclusions to arbitration based on either the subject matter or type of claim. In fact, statutory claims, such as sexual harassment claims under the Elliott-Larsen Civil Rights Act, are generally arbitrable where the applicable arbitration clause so provides. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118; 596 NW2d 208 (1999). Similarly, Michigan common law has no such exclusions. And, until now, Michigan law did not provide for any exclusions to arbitration based on public policy.²

Instead, the considerations for determining whether a claim is subject to a mandatory arbitration clause, under Michigan law, are procedural fairness and the plain language of the clause itself. Specifically, in *Rembert*, a case not discussed in the majority opinion of the Court of Appeals, the plaintiff employee sued the defendant employer for workplace discrimination under the Elliott-Larsen Civil Rights Act and the Persons With Disabilities Civil Rights Act. Defendants moved for summary disposition based on an agreement to arbitrate, which the trial court granted. *Id.* at 126. While that ruling was on appeal, the Court of Appeals decided the case of *Rushton v Meijer, Inc (On Remand)*, 225 Mich App 156; 570 NW2d 271 (1997), in which the Court held that agreements to arbitrate employment-related discrimination claims were unenforceable as a matter of public policy. As a result, based on its obligation to follow *Rushton*, the Court of Appeals in *Rembert* reversed the trial court's grant of summary disposition.

² Admittedly, public policy exceptions to the enforcement of contracts is a valid legal principle under Michigan law – although sparingly used at best. And, since arbitration agreements are contracts, they are subject to that legal principle. However, again, as a *matter* of law, the public policy itself must be “clearly rooted *in* the law.” *Terrien v Zwi*t, 467 Mich 56, 67; 648 NW2d 606 (2002). As discussed *supra*, in this case, it is not.

However, the Court then convened a conflict panel of the Court of Appeals, ultimately abrogating Rushton, and held:

We conclude, from the state and federal authorities reviewed thus far, that predispute agreements to arbitrate statutory employment discrimination claims are valid if: (1) the parties have agreed to arbitrate the claims (there must be a valid, binding, contract covering the civil rights claims), (2) the statute itself does not prohibit such agreements, and (3) the arbitration agreement does not waive the substantive rights and remedies of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights.

Id. at 156. In ruling as it did, the Court expressly declined to adopt the plaintiff's position that an arbitration agreement violates public policy where it removes the aggrieved's constitutionally protected direct access to a judicial forum for resolution of his/her civil rights claims. *Rembert*, 235 Mich App at 130-131.³

The *Rembert* Court found support for its holding from several sources. First, the Court opined that federal law (the *Mitsubishi* trilogy), previously adopted in Michigan in *Scanlan v*

³ See also, *Lichon v Morse*, 327 Mich App 375; 933 NW2d 506 (2019) (O'BRIEN, J., dissenting), wherein she stated:

I offer no opinion on the majority's policy reasoning, though it appears to run counter to this Court's extensive reasoning in *Rembert*, 235 Mich App at 135-159, for why civil-rights claims in general are arbitrable. Among other things, **the *Rembert* Court acknowledged arguments that "the public policy advanced by [civil-rights] statutes would be undermined if these disputes were addressed in the relatively private forum of arbitration," but rejected those arguments**, in part, because they "were thoroughly considered and rejected by the United States Supreme Court in a trio of cases known as the *Mitsubishi* trilogy and, later, in *Gilmer* [500 US 20]." *Id.* at 135 (citations omitted).

Id. at 406 n 2 (emphasis supplied), Exhibit 1.

P&J Enterprises, Inc, 182 Mich App 347; 451 NW2d 616 (1990), supported its ruling. Based on the *Mitsubishi* trilogy, the *Scanlan* Court upheld predispute agreements to arbitrate statutory claims. *Rembert*, 235 Mich App at 129-130 and 140.

Second, the Court found support for its holding in the Michigan judiciary's recent enforcement of arbitration agreements in the employment context. *Id.* at 130. In particular, the Court reviewed Michigan case law in which this Court and the Court of Appeals held that just cause employers can require employees to challenge breaches of their employment contracts through arbitration. *Id.*, citing, among others, *Renny v Port Huron Hosp*, 427 Mich 415, 432; 398 NW2d 327 (1986).

The third supporting factor for the *Rembert* Court's decision was the Michigan Legislature's 1961 advancement of public policy in favor of arbitration by enacting the Michigan Arbitration Act ("MMA"), MCL 600.5001, *et seq* – patterned after the federal Uniform Arbitration Act. The Court quoted from Justice Taylor's dissent in *Rushton*:

[The MMA] allows predispute agreements to arbitrate civil rights claims, it establishes Michigan's public policy concerning this issue. **Obviously, if the Legislature wanted to preclude predispute agreements to arbitrate civil rights claims, it would have excluded such claims by name, just as it excluded collective bargaining agreements and certain real estate claims.** The express exclusion of some claims implies inclusion of those not mentioned. . . . Therefore, for this reason also, there is no justification for this Court to substitute its judgment for that of the contracting parties in declaring the parties' predispute agreement to arbitrate invalid. [*Rushton*, *supra* at 174-175, 570 NW2d 271.]

Id. at 133 (emphasis supplied).

Fourth, and finally, the *Rembert* Court found support for its decision in Michigan's civil rights statutes themselves – specifically, the absence of any prohibition or limitation contained therein as to the arbitration of claims based upon them. *Id.* at 158. The Court stated:

As we have seen in our discussion of the *Mitsubishi* trilogy, *Gilmer*, and *Scanlon*, courts will not preclude arbitration absent an express statutory prohibition.

Neither the CRA nor the PWDCRA contains such a provision. Section 803 of the CRA, MCL §37.2803; MSA §3.548(803), which provides that the CRA “shall not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of this state,” does not preclude arbitration agreements – a conclusion erroneously reached in *Rushton*, *supra*, 225 Mich App at 164-165; 570 NW2d 271.

Id.

In sum, the requirements for the enforcement of agreements to arbitrate statutory employment discrimination claims, aside from being within the scope of the agreement based on the plain language of the agreement itself, are as follows:

1. A valid contract;
2. A statute that does not prohibit arbitration agreements; and
3. Procedural fairness.

Id. at 156.⁴ These three factors are all present in this case. Accordingly, the Court of Appeals erred by creating a public policy exception to an otherwise valid arbitration agreement and that ruling should be vacated.

IV. CONCLUSION

In conclusion, there is simply no legal support for the ad hoc judicially created public policy exception to a valid arbitration agreement advocated by the Court of Appeals majority in this case. To the contrary, the Court of Appeals ruling in this regard runs contrary to the well-established public policy favoring arbitration and black-letter law regarding contracts and arbitration. The majority's public policy ruling opens the door to the genesis of additional public policy exceptions thereby creating unpredictability in the enforcement of arbitration agreements. As suggested by the dissent, perhaps the Legislature is the appropriate forum in which to address the arbitrability of sexual assault and harassment claims.

V. RELIEF REQUESTED

For all the foregoing reasons, the Home Builders Association of Michigan respectfully requests that this Honorable Court grant the Association's Motion for Leave to File this Amicus Brief, vacate that portion of the majority opinion of the Court of Appeals creating a public policy exception to the arbitration agreements at issue and rule that there are no public policy

⁴ Procedural fairness requires: (1) clear notice to the employee that he is waiving the right to adjudicate discrimination claims in a judicial forum and opting instead to arbitrate these claims; (2) right to representation by counsel; (3) neutral arbitrator; (4) reasonable discovery; and (5) a fair arbitral hearing. *Rembert*, 235 Mich App at 161-162. There is no claim in this case that the agreed-upon arbitration process is procedurally unfair.

exceptions to otherwise enforceable arbitration agreements and that such agreements should be enforced as written.

McCLELLAND & ANDERSON, LLP
Counsel for *Amicus Curiae*
Home Builders Association of Michigan

Date: February 6, 2020

By: /s/ Melissa A. Hagen
Melissa A. Hagen (P42868)

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EXHIBIT 1

327 Mich.App. 375
Court of Appeals of Michigan.

Samantha LICHON, Plaintiff-Appellant,

v.

Michael MORSE, and Michael J.
Morse, PC, Defendant-Appellees.

Jordan Smits, Plaintiff-Appellant,

v.

Michael Morse, Defendant-Appellee.

Jordan Smits, Plaintiff-Appellant,

v.

Michael Morse, and Michael J.
Morse, PC, Defendant-Appellees.

No. 339972, No. 340513, No. 341082

Submitted February 5, 2019, at Detroit.

Decided March 14, 2019, at 9:15 a.m.

Synopsis

Background: Former employees, a receptionist and paralegal, brought action against employer, a law firm, and attorney, the alleged abuser, alleging workplace sexual harassment in violation of the Elliot-Larsen Civil Rights Act (ELCRA), negligent and intentional infliction of emotional distress, negligence, gross negligence, and wanton and willful misconduct, and individually against attorney alleging sexual assault and battery. The Circuit Court, Oakland County, No. 17-158919-CZ, and the Circuit Court, Wayne County, No. 17-011128-CZ, granted employer's motion to compel arbitration. In paralegal's subsequent action solely against attorney alleging sexual assault and battery, negligent and intentional infliction of emotional distress, and negligence, gross negligence, and willful and wanton misconduct, the Circuit Court, Wayne County, 17-008068-CZ, granted attorney's motion for summary disposition. Employees appealed.

Holdings: The Court of Appeals, Jansen, P.J., held that:

[1] as a matter of first impression, alleged sexual assaults were not related to their employment under the parties' agreement, and thus were not subject to arbitration;

[2] complaint in paralegal's prior suit was not res judicata for subsequent suit; and

[3] contractual limitations period of six months for filing suit against employer did not apply to paralegal's claims of sexual assault and battery to bar her claims.

Affirmed in part, reversed in part, and remanded.

O'Brien, J. filed dissenting opinion.

West Headnotes (13)

[1] **Alternative Dispute Resolution**

🔑 Merits of controversy

When deciphering whether a plaintiff's claims are covered by the parties' arbitration clause, the Court of Appeals is not permitted to analyze the substantive merits of plaintiff's claims; rather, if the dispute is subject to arbitration, such matters are left to the arbitrator to decide.

[2] **Alternative Dispute Resolution**

🔑 Arbitrability of dispute

Generally, to ascertain whether the subject matter of a dispute is of the type that parties intended to submit to arbitration, the Court of Appeals begin with the plain language of the arbitration clause, and then consider whether a plaintiff's particular action falls within that scope.

[3] **Action**

🔑 Nature of remedy by action

The gravamen of an action is determined by considering the entire claim.

[4] **Action**

🔑 Nature of remedy by action

A court looks beyond the mere procedural labels to determine the exact nature of a claim to avoid artful pleading.

[5] Alternative Dispute Resolution**➤ Scope and standards of review**

If a plaintiff's claims can be characterized as arguably falling within the confines of the arbitration clause between the parties, any doubts are resolved in favor of arbitration, and the trial court should have granted defendant's motion to compel arbitration.

[6] Alternative Dispute Resolution**➤ Employment disputes**

Alleged sexual assaults suffered by former employees, a receptionist and paralegal, at the hands of attorney, their superior, were not related to their employment while working for former employer, a law firm, under the parties' mandatory dispute resolution procedure agreement, and thus were not subject to arbitration, despite the fact that the sexual assaults may not have happened but for employees' employment with the law firm, where employees' claims of sexual assault were unrelated to their employment as a receptionist and paralegal, and under no circumstances could sexual assault be a foreseeable consequence of employment in a law firm.

[7] Appeal and Error**➤ Conclusiveness and effect of prior rulings; res judicata and collateral estoppel**

The question whether res judicata bars a subsequent action is reviewed de novo by the Court of Appeals.

[8] Appeal and Error**➤ Rules of court in general**

The Court of Appeals reviews de novo the proper interpretation and application of a court rule.

[9] Action

➤ Claims Arising out of Same Transaction or Transactions Connected with Same Subject of Action

In determining whether two claims arise out of the same transaction or occurrence for purposes of the compulsory joinder of claims rule res judicata principles should be applied. Mich. Ct. R. 2.203(A).

[10] Judgment**➤ What constitutes distinct causes of action**

Complaint in former employee's prior suit against former employer, a law firm, and its attorney, her alleged abuser, alleging sexual assault and battery, negligent and intentional infliction of emotional distress, and negligence, gross negligence, and willful and wanton misconduct was not res judicata in employee's subsequent action against attorney individually, even though the claims against attorney in the subsequent action were nearly identical to the prior claims, and in fact, arose out of the same transaction, where employee's claims against attorney as an individual were alive and well.

[11] Appeal and Error**➤ Necessity of Ruling on Objection or Motion**

Former employer, a law firm, and attorney working for firm failed to preserve for appellate review their claim that the Court of Appeals should affirm the dismissal of former employee's actions alleging sexual assault and negligence on the basis that employee, a paralegal, agreed to a contractual limitations period of six months for filing suit against the firm, even though the claim was raised in the circuit court, where it was not addressed and decided.

[12] Appeal and Error**➤ Necessity of presentation in general**

The Court of Appeals had authority to review former employer's unpreserved claim that Court of Appeals should affirm the dismissal of former employee's actions alleging sexual assault and negligence on the basis that employee, a paralegal, agreed to a contractual limitations period of six months for filing suit against the firm, where the issue concerned a legal question

and all of the facts necessary for its resolution were present before Court.

[13] Limitation of Actions

🔑 Agreements as to period of limitation

Contractual limitations period of six months for filing suit against former employer, law firm, did not apply to former employee's claims of sexual assault and battery to bar her claims, although employee, a paralegal, agreed to the contractual limitations period when she signed the policy manual acknowledgment form, where employee's claims against the law firm and attorney, the alleged abuser, were not related to her employment as a paralegal at the firm.

****508** Oakland Circuit Court, LC No. 17-158919-CZ, [Shalina D. Kumar](#), Judge

Wayne Circuit Court, LC Nos. 17-011128-CZ, 17-008068-CZ, [Daniel A. Hathaway](#), J.

Attorneys and Law Firms

Fieger, Fieger, Kenney & Harrington, PC (by [Geoffrey N. Fieger](#), Southfield and [Sima G. Patel](#)) for plaintiffs.

Deborah Gordon Law (by [Deborah L. Gordon](#) and [Benjamin I. Shipper](#), Bloomfield Hills) and Starr, Butler, Alexopoulos & Stoner, PLLC (by [Joseph A. Starr](#), Bloomfield Hills and [Thomas Schramm](#), Detroit) for defendants.

Before: [Jansen](#), P.J., and [Beckerling](#) and [O'Brien](#), JJ.

Opinion

[Jansen](#), P.J.

***379** In Docket No. 339972, referred to by the parties as *the Lichon case*, plaintiff, Samantha Lichon (Lichon), appeals as of right the June 22, 2017, order granting summary disposition in favor of defendants, Michael Morse (Morse) and Michael J Morse, PC (the Morse firm), and compelling arbitration. We reverse, vacate the Oakland Circuit Court's June 22, 2017 order, and remand for proceedings consistent with this opinion.

In Docket No. 341082, referred to by the parties as *Smits I*, plaintiff, Jordan Smits (Smits), appeals as of right the July 18, 2017 written order and opinion granting summary disposition in favor of defendants and compelling arbitration. We reverse, vacate the ***380** Wayne Circuit Court's July 18, 2017 written opinion and order, and remand for proceedings consistent with this opinion.

In Docket No. 340513, referred to by the parties as *Smits II*, Smits appeals as of right the October 2, 2017 order granting summary disposition in favor of Morse. We affirm.

Docket Nos. 339972, 341082, and 340513 were consolidated by this Court in an order dated December 27, 2017. *Lichon v. Morse*, unpublished order of the Court of Appeals, entered December 27, 2017 (Docket Nos. 339972, 340513, and 341082). The parties have filed consolidated briefs on appeal, and this Court will address the merits of the cases together when possible.

I. RELEVANT FACTUAL BACKGROUND

A. THE LICHON CASE

The *Lichon case* arises out of Morse's alleged sexual assault and harassment of Lichon while Lichon was working for the Morse firm as a receptionist. Lichon alleges that Morse frequently sexually harassed her through unwelcome comments or conduct of an offensive or sexual nature. Lichon alleges that on multiple occasions, Morse sexually assaulted her during work hours by physically touching her in a sexual ****509** manner without her permission. According to Lichon, the unwanted touching included groping Lichon's breasts and groin area, while making comments including "you make me so hard" and "I want to take you into my office." Lichon claimed that she "complained to her superiors," and to the human resources department at the Morse firm, but no action was taken and the sexual assaults and sexual harassment continued. On February 17, 2017, Lichon was terminated from the Morse firm because of poor professional performance.

***381** On May 24, 2017, Lichon filed a four-count complaint against the Morse firm and against Morse individually. Lichon alleged workplace sexual harassment in violation of the Elliott-Larsen Civil Rights Act (the ELCRA), [MCL 37.2101 et seq.](#), against the Morse firm and Morse; sexual assault and battery against Morse individually; negligent and intentional infliction of emotional distress against the Morse firm and Morse; and negligence, gross negligence,

and wanton and willful misconduct against the Morse firm and Morse. On May 26, 2017, Lichon filed a first amended complaint, adding a fifth count of civil conspiracy against the Morse firm and Morse, alleging that defendants had sought to intimidate, pressure, or attempt to persuade or coerce her not to file a lawsuit.

In lieu of an answer, defendants moved to dismiss and compel arbitration, arguing that as a condition of her employment, Lichon had signed a Mandatory Dispute Resolution Procedure agreement (MDRPA), which requires Lichon to arbitrate her claims. Because Lichon's claims arise out of her "employment with and termination from" the Morse firm, pursuant to [MCR 2.116\(C\)\(7\)](#) and [MCR 3.602](#), defendants requested that the Oakland Circuit Court "compel [Lichon] to prosecute her claims exclusively by way of compulsory and binding arbitration and to dismiss this action."

The MDRPA, signed by Lichon on September 29, 2015, provides, in pertinent part:

This Mandatory Dispute Resolution Procedure shall apply to all concerns you have over the application or interpretation of the Firm's Policies and Procedures relative to your employment, including, but not limited to, any disagreements regarding discipline, termination, discrimination or violation of other state or federal employment or labor laws. This includes any claim over the denial of hire. This Procedure includes any claim against *382 another employee of the Firm for violation of the Firm's Policies, discriminatory conduct or violation of other state or federal employment or labor laws. Similarly, should the Firm have any claims against you arising out of the employment relationship, the Firm also agrees to submit them to final and binding arbitration pursuant to this Procedure.

* * *

The only exceptions to the scope of this Mandatory Dispute Resolution Procedure shall be for questions that may arise under the Firm's insurance or benefit programs (such as retirement, medical insurance, group life insurance, short-term or long-term disability or other similar programs). These programs are administered separately and may contain their own separate appeal procedures. In addition, this Procedure does not apply to claims for unemployment compensation, workers' compensation or claims protected by the National Labor Relations Act. While this Procedure

does not prohibit the right of an employee to file a charge with the Equal Employment Opportunity Commission ("EEOC") or a state civil rights agency, **510 it would apply to any claims for damages you might claim under federal or state civil rights laws. In addition, either Party shall have the right to seek equitable relief in a court of law pending the outcome of the arbitration proceeding.

The dispute-resolution procedure is outlined as follows: first, within one year an employee must file with a direct supervisor a "request for review of your concern stating your disagreement or concern and the action you request the Firm to take." The supervisor will date the request, provide the employee with a copy, and then "generally schedule a meeting with [the employee] to hear [the employee's] concerns and will provide [the employee] with a written decision within" 15 business days. Second, if the dispute is not resolved to the employee's satisfaction, a written request for *383 review must be filed directly with Morse within 15 days. Morse, or his "designated representative," will issue a written decision within 15 days. If the employee is still not satisfied, the final recourse is to submit a written request for arbitration to the firm within 15 days, and the employee "must deposit with the Firm \$500.00 or Five (5) Days' pay, whichever is less."

Lichon responded, arguing that her claims are related to the "sexual assault and harassment that she suffered at the hands of" Morse and accordingly do not " 'arise out of her employment and termination' " from the Morse firm. Lichon asserted that simply because a sexual assault happened at work does not mean that it is related to the plaintiff's employment and, in particular, that "[b]eing the victim of sexual assault has no relationship with [Lichon's] employment obligations as a receptionist, and is not a foreseeable consequence of her employment." She further argued that in fact the arbitration agreement "is neither valid nor enforceable.... The agreement is unenforceable as a matter of law because, in the context of the claims alleged here, the agreement is unconscionable, illusory and contrary to public policy." Thus, Lichon asserted that she is not required to arbitrate her claims.

The Oakland County Court held a hearing on defendants' motion on June 21, 2017. The parties argued consistently with their briefs. At the end of the hearing, the court granted defendants' motion, concluding on the record:

I find that this is a valid and enforceable arbitration agreement. I find that all of plaintiff's claims are inextricably intertwined and therefore all fall within the arbitration agreement and the workplace policies. I also find that Michael Morse named individually is also bound by the terms of the arbitration agreement as her employer of *384 Michael Morse, P.C., and I'm sending all of the claims to arbitration granting defendant[s'] [summary disposition] motion.

An order to the same effect was entered on June 22, 2017. Lichon moved for reconsideration; the court denied the motion in an order dated August 18, 2017. This appeal followed.

B. SMITS I

Smits I and *Smits II* share an identical fact pattern and arise out of Morse's alleged sexual assault of Smits while Smits was working for the Morse firm as a paralegal. In December 2015, the Morse firm held a company Christmas party for all staff at the Masonic Temple in Detroit, Michigan. According to Smits, during that party, Morse approached her from behind and grabbed her breasts in front of two other senior attorneys. Smits immediately removed Morse's hands from her breasts.

In January 2016, Smits reported the incident to the human resources department of the Morse firm. However, a representative from human resources told Smits **511 that "her number one priority [was] to protect Morse's reputation." Smits then "expressed her concerns" to one of the attorneys who had witnessed Morse sexually assault her. That attorney responded, "[W]hat was I supposed to do, you know how Michael is." In February 2016, Smits e-mailed "various supervising employees" at the Morse firm, indicating that she "was not comfortable working at the firm due to the Christmas incident" and tendering her resignation. After leaving the Morse firm, an attorney from the firm contacted Smits and "indicated that [Morse] would offer two weeks pay if [Smits] signed a non-disclosure agreement." Smits declined the offer. Morse then personally contacted Smits *385 and told her

to "be careful" because given his connections in the legal community, he could make it difficult for Smits to find work.

On May 30, 2017, in *Smits I*, Smits filed a four-count complaint against the Morse firm and against Morse individually. Smits alleged workplace sexual harassment in violation of the ELCRA against the Morse firm and Morse, sexual assault and battery against Morse individually, negligent and intentional infliction of emotional distress against the Morse firm and Morse individually, and negligence, gross negligence, and wanton and willful misconduct against the Morse firm and Morse individually.

In lieu of an answer, defendants moved for summary disposition pursuant to MCR 2.116(C)(7), asserting that there was a valid agreement to arbitrate or, alternatively, pursuant to MCR 2.116(C)(7), that the period of limitations had passed. In sum, defendants argued that Smits's claims should be dismissed pursuant to MCR 2.116(C)(7) because Smits had signed "a valid and enforceable agreement to arbitrate all aspects of her employment, including, but not limited to, allegations of discrimination discipline, termination, and discrimination, and other state and federal employment laws." Alternatively, defendants argued, Smits's claims should be dismissed pursuant to MCR 2.116(C)(7) because as part of her employment, Smits had agreed to a shortened limitations period with respect to litigation and that period had lapsed.

The MDRPA signed by Smits on February 7, 2014 is identical to the MDRPA signed by Lichon in Docket No. 339972. Additionally, in *Smits I* defendants attached to their motion the Employee Acknowledgment Form from the Employee Policy Manual for the Morse firm, signed by Smits on February 20, 2014. The form provides, in relevant part:

*386 I agree that any claim or lawsuit relating to my employment with Michael J. Morse, P.C. must be filed no more than six (6) months after the date of employment action that is the subject of the claim or lawsuit unless a shorter period is provided by law. I waive any statute of limitations to the contrary.

Defendants also filed a supplement to their motion to dismiss. Following the Wayne Circuit Court's order requiring that

defendants provide Smits with a copy of her personnel file and a complete copy of the “Firms Policies and Procedures,” defendants supplemented their motion with an additional copy of the MDRPA, a copy of the Morse firm’s Employee Policy Manual, and a copy of the Morse firm’s Agreement for At-Will Employment and Agreement For Resolution of Disputes. The latter agreement, signed by Smits on September 29, 2015, provides, in relevant part:

IV. ARBITRATION OF DISPUTES:

As a condition of my employment, I agree that any dispute or concern relating to my employment or termination of employment, including but not limited to claims arising under state or federal civil rights statutes, must be resolved pursuant **512 to the Firm’s [MDRPA] which culminates in final and binding arbitration. I have been provided with a copy of the Firm’s [MDRPA] and agree to be bound by this Dispute Procedure.

Smits responded, arguing that her sexual-assault claims are not related to her employment such that they come within the purview of the MDRPA. Likewise, Smits argued, “the policy manual truncating the statute of limitations only applies to a ‘claim or lawsuit relating to’ ” employment with the Morse firm. Smits further stated that because her claims are not “related” to her employment but, rather, stem “solely from Michael Morse’s sexual assaults,” the arbitration provision and the policy manual are inapplicable *387 to her claims. Smits also argued that the “arbitration provision itself is unenforceable because: it is procedurally and substantively unconscionable and illusory; Michael Morse personally is not a party to the [MDRPA] so it is inapplicable to him; and [d]efendants have forfeited enforcement of the agreement by not adhering to the supposed dispute resolution process when plaintiff made multiple complaints to her supervisors and the Human Resources department regarding the assault and [d]efendants did nothing.”

The Wayne Circuit Court heard arguments on defendants’ motion on July 6, 2017. At the end of the hearing, the court took the matter under advisement and indicated its intent to issue a written opinion and order. On July 18, 2017, the court entered its written opinion and order granting defendants’ motion and directing this matter to arbitration. The court concluded that the MDRPA signed by Smits is “a valid and enforceable agreement, supported by consideration and mutuality of obligation.” The court further stated that given the “allegations set forth in [Smits’s] own verified complaint,” her claims are related to her employment and

therefore governed by the MDRPA. Accordingly, the court ordered the matter to arbitration and retained “jurisdiction only to enforce any such arbitration award.”

Smits moved for reconsideration; the court denied the motion in an order dated November 3, 2017. This appeal followed.

C. *SMITS II*

The *Smits II* case arises out of the same set of facts as the *Smits I* case. However, in *Smits II*, on July 25, 2017, Smits filed a three-count complaint solely *388 against Morse as an individual, alleging sexual assault and battery, negligent and intentional infliction of emotional distress, and negligence, gross negligence, and willful and wanton misconduct.

In lieu of an answer, Morse moved to dismiss pursuant to [MCR 2.116\(C\)\(7\)](#), arguing that Smits's complaint should be dismissed with prejudice because it was barred by the doctrine of res judicata, the doctrine of collateral estoppel, an agreement to arbitrate, and/or a six-month contractual period of limitations. In response, Smits argued that because the Wayne Circuit Court in *Smits I* had dismissed the case on jurisdictional grounds, it did not make a determination on the merits and that she was therefore not precluded from filing the instant case against Morse individually. Smits asserted that because Morse did not sign the MDRPA, there is no valid contractual agreement between Morse and Smits to arbitrate and that “[a]bsent such a contract, [Smits] has the right to vindicate her rights in a court of law.”

The Wayne Circuit Court heard argument on Morse’s motion on September 29, 2017. Ruling from the bench, the court found that:

[B]ecause that prior suit included the same parties as this current Complaint **513 and because [Smits] concedes any claims here “arise out of the same transaction or occurrence” as were alleged in her former Complaint, res judicata and [the] compulsory joinder rule preclude the subsequent action.

[Morse’s] Motion for Summary Disposition is accordingly granted under [MCR 2.116\(C\)\(7\)](#), no costs, fees, or penalties of any kind.

An order to the same effect was entered on October 2, 2017. The appeal in Docket No. 340513 followed.

***389** II. CONDUCT “RELATED TO EMPLOYMENT” UNDER THE MDRPA

In Docket Nos. 339972 and 341082, plaintiffs first argue that because the MDRPA limits the scope of arbitration to only those claims that are “related to” plaintiffs’ employment and because sexual assault at the hands of an employer or supervisor cannot be related to their employment, the MDRPA is inapplicable to their claims against Morse and the Morse firm. We agree.

This Court has previously announced that it will review de novo a motion for summary disposition brought under MCR 2.116(C)(7). *Galea v. FCA U.S., LLC*, 323 Mich. App. 360, 368; 917 N.W.2d 694 (2018). Specifically, this Court explained:

We review de novo a trial court’s decision to grant or deny a motion for summary disposition under MCR 2.116(C)(7). *Hicks v. EPI Printers, Inc.*, 267 Mich. App. 79, 84, 702 N.W.2d 883 (2005). A motion under MCR 2.116(C)(7) is appropriately granted when a claim is barred by an agreement to arbitrate. *Maiden v. Rozwood*, 461 Mich. 109, 118 n. 3, 597 N.W.2d 817 (1999). “A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence.” *Id.* at 119 [597 N.W.2d 817]. However, “a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.” *Id.* Whether an arbitration agreement exists and is enforceable is a legal question that we review de novo. *Hicks*, 267 Mich. App. at 84, 702 N.W.2d 883 [*Galea*, 323 Mich. App. at 363.]

Likewise, questions regarding the interpretation of contractual language are subject to de novo review. *VHS Huron Valley-Sinai Hosp., Inc. v. Sentinel Ins. Co. (On Remand)*, 322 Mich. App. 707, 715, 916 N.W.2d 218 (2018).

***390** Neither plaintiffs nor defendants dispute the existence of an arbitration agreement. Both Lichon and Smits signed the MDRPA. However, the parties disagree whether the conduct at issue here—the alleged sexual assaults and batteries perpetrated by Morse as an individual—is conduct related to Lichon’s and Smits’s employment with the Morse firm such that plaintiffs must arbitrate their claims against Morse and the Morse firm. In short, this Court is asked to decide whether the sexual assault and battery of an employee at the hands of a

superior is conduct related to employment. We conclude that it is not.

[1] In *Bienenstock & Assocs., Inc. v. Lowry*, 314 Mich. App. 508, 515, 887 N.W.2d 237 (2016), this Court explained that an agreement to arbitrate presents a contractual matter between parties and that those parties are not required to submit matters they did not agree to arbitrate to an arbitrator. Specifically, this Court stated:

“[A]rbitration is simply a matter of contract between parties; it is a way to ****514** resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.” *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). In other words, “ ‘arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.’ ” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002), quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). “In this endeavor, as with any other contract, the parties’ intentions control.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) (quotation marks and citations omitted). [*Bienenstock & Assoc., Inc.*, 314 Mich. App. at 515, 887 N.W.2d 237 (alteration in *Bienenstock & Assoc., Inc.*.)]

***391** Our Supreme Court has also announced that it is the party seeking to avoid the arbitration agreement that bears the burden of “establishing that his or her claims fall outside the ambit of the arbitration agreement.” *Lebenbom v. UBS Fin. Servs., Inc.*, 326 Mich. App. 200, 211; 926 N.W.2d 865 (2018), 2018 WL 5275314, citing *Altobelli v. Hartmann*, 499 Mich. 284, 295; 884 N.W.2d 537 (2016). “Moreover, when deciphering whether plaintiff’s claims are covered by the parties’ arbitration clause, this Court is not permitted to analyze ‘the substantive merits’ of plaintiff’s claims. Rather, if the dispute is subject to arbitration, the merits of the dispute are left to the arbitrator to decide.” *Lebenbom*, 326 Mich. App. at 211, 926 N.W.2d at 870, (citation omitted).

As noted earlier, the MDRPA provides, in relevant part:

This [MDRPA] shall apply to all concerns you have over the application or interpretation of the Firm’s Policies and Procedures relative to

your employment, including, but not limited to, any disagreements regarding discipline, termination, discrimination or violation of other state or federal employment or labor laws. This includes any claim over the denial of hire. This Procedure includes any claim against another employee of the Firm for violation of the Firm's Policies, discriminatory conduct or other state or federal employment or labor laws. Similarly, should the Firm have any claims against you arising out of the employment relationship, the Firm also agrees to submit them to final and binding arbitration pursuant to this Procedure.

Generally speaking, to ascertain whether the subject matter of a dispute is of the type that parties intended to submit to arbitration, we again begin with the plain language of the arbitration clause. We then consider whether a plaintiff's particular action falls within that scope. We note that the gravamen of an action is determined by considering the entire claim. We look beyond the mere procedural labels to determine the exact nature of the claim. This is to avoid "artful pleading." [*Id.* at 299-300, 884 N.W.2d 537 (citations omitted).]

The only exceptions to the MDRPA are for insurance benefits, claims for unemployment compensation, workers' compensation, or claims protected by the National Labor Relations Act. Additionally, the Morse firm's policies (Firm Policies) provide, in relevant part:

*392 We are committed to preventing workplace violence and making Michael J. Morse, P.C. a safe place to work. This policy explains our guidelines for dealing with intimidation, harassment, violent acts, or threats of violence that might occur on our premises at anytime, at work-related functions, or outside work if it affects the workplace.

* * *

The Firm does not allow behavior in the workplace at any time that threatens, intimidates, bullies, or coerces another employee, a client, or a member of the public. We do not permit any act of harassment, including harassment that is based on an individual's sex, race, religion, age, national origin, height, weight, marital status, disability, sexual **515 orientation, or any characteristic protected by federal, state, or local law.

[2] [3] [4] [5] The sole issue for us to decide is whether the MDRPA "encompasses the subject matter of the dispute at issue in this case." *Altobelli*, 499 Mich. at 299, 884 N.W.2d 537.

See also *Lebenbom*, 326 Mich. App. at 211, 926 N.W.2d at 870-71, in which this Court explained that "we must review the arbitration clause and determine 'whether the *subject matter*' of the instant dispute is covered by the arbitration clause." (Citation omitted.) "If plaintiff's claims can be characterized as 'arguably' falling within the confines of the arbitration clause, any doubts are resolved in *393 favor of arbitration and the trial court should have granted defendant's motion to compel arbitration." *Id.*, 926 N.W.2d at 870, citing *DeCaminada v. Coopers & Lybrand, LLP*, 232 Mich. App. 492, 500, 591 N.W.2d 364 (1998).

[6] In Docket No. 339972, Lichon alleges that Morse repeatedly sexually assaulted and sexually harassed her in the workplace. Lichon claims that Morse repeatedly touched her in a sexual manner during work hours without her consent or her permission. The unwanted touching involved Morse groping Lichon's breasts and groin area, while pressing his own groin into her back and "audibly stating sexual comments, including ... 'you make me so hard,' and 'I want to take you into my office[.]'" In Docket No. 341082, Smits claims that Morse sexually assaulted her at a firm-sponsored Christmas party. Specifically, Smits claims Morse approached her from behind and groped her breasts without permission or consent in front of other senior attorneys. It is therefore clear that the gravamen of plaintiffs' complaints is that while working at the Morse firm, they were sexually assaulted and/or harassed by Morse as an individual either during work hours or at work-sponsored events.

Despite the fact that the sexual assaults may not have happened but for plaintiffs' employment with the Morse firm, we conclude that claims of sexual assault cannot be related to employment. The fact that the sexual assaults would not have occurred but for Lichon's and Smits's employment with the Morse firm does not provide a sufficient nexus between the terms of the MDRPA and the sexual assaults allegedly perpetrated by Morse. To be clear, Lichon's and Smits's claims of sexual assault are unrelated to their positions as, respectively, a receptionist and paralegal. Furthermore, under no circumstances could sexual assault be a foreseeable *394 consequence of employment in a law firm. Accordingly, the circuit courts erroneously granted defendants' motions to dismiss these actions and compel arbitration of plaintiffs' claims. Both Lichon and Smits shall be permitted to litigate their claims in the courts of this state because the claims fall outside the purview of the MDRPA. *Bienenstock & Assoc., Inc.*, 314 Mich. App. at 515, 887 N.W.2d 237.

This issue, whether the sexual assault and battery of an employee at the hands of a superior is conduct related to employment, is an issue of first impression in **516 Michigan. Although the parties have provided extensive authority in support of their respective positions, most is persuasive authority and none is directly on point.¹ We therefore note that central to our conclusion *395 in this matter is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault. Though we acknowledge that "[t]he general policy of this State is favorable to arbitration," *Detroit v. A. W. Kutsche & Co.*, 309 Mich. 700, 703, 16 N.W.2d 128 (1944), the idea that two parties would knowingly and voluntarily agree to arbitrate a dispute over such an egregious and possibly criminal act is unimaginable. See *Bienenstock & Assoc., Inc.*, 314 Mich. App. at 515, 887 N.W.2d 237 ("[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (quotation marks and citation omitted). The effect of allowing defendants to enforce the MDRPA under the facts of this case would effectively perpetuate a culture that silences victims of sexual assault and allows abusers to quietly settle these claims behind an arbitrator's closed door. Such a result has no place in Michigan law.

We caution future litigants that our conclusion with respect to the Morse firm is based on a very specific set of facts. Under different circumstances, we might have concluded that the gravamen of plaintiffs' claims *396 against the Morse firm were a failure to discipline, or adequately discipline, a fellow employee of the firm for offensive and egregious

sexual misconduct and/or sexual harassment. Accordingly, in such different circumstances, we might have **517 agreed with the circuit courts that the subject matter of plaintiffs' claims against the Morse firm fell under the mantle of the MDRPA and that plaintiffs had to arbitrate those claims in light of the language of the MDRPA. Recall that the MDRPA provides, in relevant part, that "[the MDRPA] shall apply to all concerns you have over the application or interpretation of the Firm's Policies and Procedures relative to your employment, including, but not limited to, any disagreements regarding *discipline*..." (Emphasis added.) In these cases, however, the corporate structure of the Morse firm precludes such a result. Morse has never disputed that he is the owner of the Morse firm. In fact, the Morse firm's most recent annual report, filed with the Michigan Department of Licensing and Regulatory Affairs, Corporations, Securities & Commercial Licensing Bureau, shows that Morse is the president, secretary, treasurer, director, and sole shareholder of the Morse firm. Essentially, Morse and the Morse firm are the same: Morse *is* the Morse firm, and he is solely legally responsible for the actions, or inaction, of the Morse firm.² Any recovery plaintiffs obtain from a jury or from an arbitrator would come out of the same pocket. Under these circumstances, plaintiffs' claims against *397 the Morse firm and Morse individually are so intertwined that they are impossible to separate. In reality, a claim of failure to discipline a fellow employee of the firm for offensive and egregious sexual misconduct and/or sexual harassment in these cases is essentially a claim that Morse failed to discipline himself for committing sexual assault and harassment in the workplace. For these reasons, it is impossible to separate plaintiffs' claims against defendants.

Plaintiffs raise several other arguments related to the MDRPA, including whether the MDRPA is unconscionable or illusory, and whether Morse, a nonsignatory, can enforce the MDRPA against plaintiffs in his capacity as an individual.³ However, given our conclusion that the circuit courts erroneously dismissed plaintiffs' complaints and compelled arbitration, we need not address plaintiffs' remaining claims of error.

III. RES JUDICATA AND COMPULSORY JOINDER

In Docket No. 340513, Smits argues that the Wayne Circuit Court erred by dismissing *Smits II*. Specifically, Smits argues on appeal that because the court did not make a decision in *Smits I* on the merits, but rather dismissed the action on jurisdictional grounds by ordering the matter proceed in

arbitration, dismissal on res judicata or compulsory-joinder grounds “was grossly improper.”

[7] [8] “The question whether res judicata bars a subsequent action is reviewed de novo by this Court.” *398 *Adair v. Michigan*, 470 Mich. 105, 119, 680 N.W.2d 386 (2004). Likewise, “[w]e review de novo the proper **518 interpretation and application of a court rule.” *Garrett v. Washington*, 314 Mich. App. 436, 450, 886 N.W.2d 762 (2016).

[9] Here, the circuit court did not dismiss *Smits II* solely on res judicata grounds. Rather, the court cited the doctrine of res judicata as well as the compulsory-joinder rule when dismissing *Smits II*. Regarding the doctrine of res judicata, our Supreme Court explained in *Adair*:

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. *Sewell v. Clean Cut Mgt., Inc.*, 463 Mich. 569, 575, 621 N.W.2d 222 (2001). This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Dart v. Dart*, 460 Mich. 573, 586, 597 N.W.2d 82 (1999). [*Adair*, 470 Mich. at 121, 680 N.W.2d 386.]

Relatedly, the compulsory-joinder rule is laid out in MCR 2.203(A), which provides:

In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has

against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

“In determining whether two claims arise out of the same transaction or occurrence for purposes of *399 MCR 2.203(A), res judicata principles should be applied.” *Garrett*, 314 Mich. App. at 451, 886 N.W.2d 762.

[10] In *Smits II*, Smits filed a complaint alleging sexual assault and battery, negligent and intentional infliction of emotional distress, and negligence, gross negligence, and willful and wanton misconduct against Morse individually. Smits's claims against Morse in *Smits II* are nearly identical to Smits's claims against Morse in *Smits I*, and in fact, arise out of the same “transaction.” Therefore, as already discussed, because Smits’s claims against Morse as an individual are alive and well, the doctrine of res judicata is not implicated. However, the circuit court correctly concluded that the compulsory-joinder rule, as articulated in MCR 2.203(A), bars her claims in *Smits II*. Accordingly, the court did not err by dismissing *Smits II*.

IV. ALTERNATIVE GROUNDS FOR AFFIRMANCE

Finally, in Docket No. 341082 and Docket No. 340513, defendants argue in the alternative that this Court should affirm the dismissal of *Smits I* and *Smits II* on the basis that Smits agreed to a contractual limitations period of six months.

[11] [12] This issue, although raised by defendants in the Wayne Circuit Court, was not addressed and decided by the court. Accordingly, it is unpreserved. *Mouzon v. Achievable Visions*, 308 Mich. App. 415, 419, 864 N.W.2d 606 (2014). However, this Court had authority to address the argument because the issue concerns “a legal question and all of the facts necessary for its resolution are present.” *Dell v. Citizens Ins. Co. of America*, 312 Mich. App. 734, 751 n. 40, 880 N.W.2d 280 (2015). Regardless, we do not find defendants’ alternative grounds for affirmance to be persuasive.

**519 *400 [13] The Employee Acknowledgment Form that imposes a six-month limitations period reads:

I agree that any claim or lawsuit relating to my employment with Michael J. Morse, P.C. must be filed no more than six (6) months after the date of employment action that is the subject of the claim or lawsuit unless a shorter period is provided by law. I waive any statute of limitations to the contrary.

Smits agreed to the contractual limitations period when she signed the Policy Manual Acknowledgment Form. However, this provision does not apply to the instant case. As discussed, Smits's claims against the Morse firm and Morse are not related to her employment as a paralegal at the Morse firm. Accordingly, the contractual limitations period does not apply to her claims, and defendants' argument is without merit.

In Docket No. 339972, we reverse, vacate the Oakland Circuit Court's June 22, 2017 order, and remand for proceedings consistent with this opinion.

In Docket No. 341082, we reverse, vacate the Wayne Circuit Court's July 18, 2017 written opinion and order, and remand for proceedings consistent with this opinion.

In Docket No. 340513, we affirm.

[Beckerling](#), J., concurred with [Jansen](#), P.J.

[O'Brien](#), J. (dissenting).

The parties agreed to arbitrate "any claim against another employee" for "discriminatory conduct." Based on this language, I would hold that plaintiffs' claims arguably fall within the scope of the arbitration agreement, and therefore I respectfully dissent.

In Docket No. 341082, plaintiff Jordan Smits's complaint alleged that defendant Michael Morse (Morse) ***401** approached Smits from behind at a company party and intentionally "groped her breasts without ... permission" for purposes of sexual gratification. In Docket No. 339972, plaintiff Samantha Lichon's complaint alleged in pertinent part that Morse, "on multiple occasions," approached her

"from behind, groped her breasts, and touched his groin to her rear while audibly stating sexual comments[.]" The complaint also alleged that Morse "stated sexually motivated comments" to Lichon and that he "made intentional and unlawful threats to physically and inappropriately touch [Lichon's] body in a sexual manner...." Plaintiffs, individually, filed claims against Morse and defendant Michael J Morse, PC (the Morse firm) as described by the majority. Both complaints included claims for sex discrimination under the Elliott-Larsen Civil Rights Act (the ELCRA), [MCL 37.2101 et seq.](#), and sexual assault and battery against Morse.

Both Smits and Lichon signed an arbitration agreement—the Mandatory Dispute Resolution Procedure agreement—with the Morse firm, which states, in pertinent part:

This Mandatory Dispute Resolution Procedure shall apply to all concerns you have over the application or interpretation of the Firm's Policies and Procedures relative to your employment, including, but not limited to, any disagreements regarding discipline, termination, discrimination or violation of other state or federal employment or labor laws. This includes any claim over the denial of hire. This Procedure includes any claim against another employee of the Firm for violation of the Firm's Policies, discriminatory conduct or violation of other state or federal employment or labor laws. Similarly, should the Firm have any claims ****520** against you arising out of the employment relationship, the Firm also agrees to submit them to final and binding arbitration pursuant to this Procedure.

***402** The trial courts relied on this language to hold, respectively, that Smits and Lichon had agreed to arbitrate their claims. The question on appeal is whether those decisions were proper.

“Arbitration is a matter of contract.” *Altobelli v. Hartmann*, 499 Mich. 284, 295, 884 N.W.2d 537 (2016) (quotation marks and citation omitted). The interpretation of contractual language is reviewed de novo. *VHS Huron Valley-Sinai Hosp. Inc. v. Sentinel Ins. Co. (On Remand)*, 322 Mich. App. 707, 715, 916 N.W.2d 218 (2018).

“Michigan jurisprudence favors arbitration, and the employment context is no exception.” *Rembert v. Ryan’s Family Steak Houses, Inc.*, 235 Mich. App. 118, 130, 596 N.W.2d 208 (1999). “[T]he parties’ agreement determines the scope of arbitration.” *Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC*, 276 Mich. App. 146, 163, 742 N.W.2d 409 (2007). As explained by this Court:

To ascertain the arbitrability of an issue, [a] court must consider whether there is an arbitration provision in the parties’ contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract. The court should resolve all conflicts in favor of arbitration. However, a court should not interpret a contract’s language beyond determining whether arbitration applies and should not allow the parties to divide their disputes between the court and an arbitrator. Dispute bifurcation defeats the efficiency of arbitration and considerably undermines its value as an acceptable alternative to litigation. [*Id.* (quotation marks and citations omitted; alteration in *Rooyakker*).]

There is no dispute about the existence of the arbitration agreement, nor do the parties contend that the issues to be arbitrated are exempted by the terms of the agreement. The only issue is whether the claims to be *403 arbitrated—which include claims that plaintiffs were sexually assaulted by their superior—are arguably within the scope of the parties’ arbitration agreement.

The majority concludes that we must decide “whether the sexual assault and battery of an employee at the hands of a

superior is conduct related to employment.” If that were the question before this Court, I would agree that sexual assault is not conduct related to employment. But I would more broadly frame the question before us as whether plaintiffs’ claims arguably fall within the scope of the arbitration agreement.

Arbitration agreements are treated as ordinary contracts, and so we apply general principles of contract to their interpretation. *Oakland-Macomb Interceptor Drain Drainage Dist. v. Ric-Man Constr., Inc.*, 304 Mich. App. 46, 55-56, 850 N.W.2d 498 (2014). Unambiguous contracts are not open to interpretation and must be enforced as written. *Rory v. Continental Ins. Co.*, 473 Mich. 457, 468, 703 N.W.2d 23 (2005).

The majority focuses on the phrase “relative to your employment” in the first sentence of the arbitration agreement. In so doing, I believe that the majority overlooks other portions of the contract that explain what claims the parties intended—and therefore arguably agreed—to arbitrate. Most relevant here, the parties agreed to arbitrate “any claim against another employee of the Firm for violation of the Firm’s Policies, discriminatory conduct or violation of other state or federal employment **521 or labor laws.” Thus, the parties unambiguously agreed to arbitrate “any claim against another employee of the Firm for ... discriminatory conduct”

Under the ELCRA—which both plaintiffs filed claims under—“[d]iscrimination because of sex includes sexual *404 harassment.” MCL 37.2103(i). The ELCRA then broadly defines conduct constituting sexual harassment:

Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:

- (i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
- (ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual’s employment, public accommodations or public services, education, or housing.
- (iii) The conduct or communication has the purpose or effect of substantially interfering with an individual’s

employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. [Id.]

Given this definition, sexual assault is sexual harassment.¹ See *405 *Radtke v. Everett*, 442 Mich. 368, 394-395, 501 N.W.2d 155 (1993) (acknowledging that sexual assault **522 is a form of sexual harassment that can form the basis for a claim for sex discrimination under the ELCRA). And sexual harassment is, under the ELCRA, discrimination because of sex. MCL 37.2103(i). The parties agreed to arbitrate any claim for discriminatory conduct against another employee. Therefore, in light of the unambiguous language in the parties' arbitration agreement, I believe that plaintiffs' claims arguably fall within the scope of the agreement.

Although I do not believe that an employee should be required to arbitrate allegations of sexual assault, I am constrained by the law and the terms of the employment contract to dissent in this case. I believe that our Legislature is the appropriate forum for addressing this policy matter. See *406 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) (explaining that “[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue”) (quotation marks and citation omitted; alteration in *Gilmer*).²

For these reasons, I respectfully dissent.

All Citations

327 Mich.App. 375, 933 N.W.2d 506

Footnotes

- 1 We note that our conclusion in this matter, that sexual assault is not related to employment in a law firm and that therefore claims of sexual harassment perpetrated by a superior are not subject to arbitration, is not an issue that has been directly confronted by other jurisdictions. However, our conclusion is consistent with the general conclusion reached by other courts in this country that sexual assault is not related to employment. See *Jones v. Halliburton Co.*, 583 F.3d 228 (CA 5, 2009) (holding that the plaintiff, a federal contractor residing in overseas housing, did not agree to arbitrate her claims stemming from the sexual harassment and gang rape of her by coworkers after-hours because those events were not related to her employment within the meaning of the arbitration provision); *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204 (CA 11, 2011) (concluding that the broadly drafted arbitration agreement did not encompass certain claims arising from an employee being drugged and sexually assaulted by coworkers because those acts did not arise out of, and were not related to her employment and were not a foreseeable result of the employment relationship); *Hill v. JJB Hilliard, W. L. Lyons, Inc.*, 945 S.W.2d 948, 951-952 (Ky. App., 1996) (holding that the plaintiff's allegations of rape against a supervisor did not arise out of her employment for purposes of the arbitration agreement despite the fact that the alleged rape was committed “by a co-worker and occurred while on a business trip”); *Smith ex rel. Smith v. Captain D's, LLC*, 963 So.2d 1116, 1121 (Miss., 2007) (“While recognizing the breadth of language in the arbitration provision, we unquestionably find that a claim of sexual assault neither pertains to nor has a connection with [the plaintiff's] employment.”); *Club Mediterranee, S.A. v. Fitzpatrick*, 162 So.3d 251, 252-253 (Fla. App., 2015) (stating that the fact that plaintiff's claim of sexual assault by an unknown assailant while sleeping in a dormitory room provided by her employer would not have arisen “but for the existence of her employment agreement is insufficient by itself to transform a dispute into one ‘arising out of’ her employment” and that there was no nexus between the sexual assault and the plaintiff's employment agreement); *Arnold v. Burger King*, 2015-Ohio-4485, ¶¶ 65, 67; 48 N.E.3d 69 (Ohio App., 2015) (holding that the plaintiff's claims “relating to and arising from the sexual assault [by a supervisor during work hours] exist independent of the employment relationship as they may be ‘maintained without reference to the contract or relationship at issue’ ” and that “ongoing verbal and physical contact culminating in sexual assault ... is not a foreseeable result of the employment”).
- 2 During oral argument, we took note of defendants' argument that the Morse firm's Firm Policies and Workplace Violence Prevention Plan, quoted earlier in this opinion, are expansive, which is unique. However we remain incredulous that these policies are stringently followed. In particular, given the nature of plaintiffs' claims, we question the sincerity of the firm policies as articulated by Morse, the sole shareholder of the Morse firm.
- 3 It is undisputed that an agent of the Morse firm, not Morse, signed the MDRPA on behalf of the Morse firm with respect to the agreements between the Morse firm, Lichon, and Smits. Additionally, no party has produced a copy of an MDRPA signed by Morse as an employee of the Morse firm agreeing to be bound as an individual by the terms of the MDRPA.

- 1 I base my reasoning solely on the language in the parties' arbitration agreement. I believe that the majority highlights an interesting, yet potentially problematic, national trend. When courts label an instance of "sexual harassment" as "sexual assault," they generally find that the conduct is unrelated to employment. See the cases listed in note 1 of the majority opinion. But see *Barker v. Halliburton Co.*, 541 F.Supp.2d 879, 886, 889 (S.D. Tex., 2008) (holding that the parties agreed to arbitrate the plaintiff's claim of sexual assault because the parties agreed to arbitrate all claims " 'related to ... employment' "). Yet when courts use the term "sexual harassment," they generally find that the conduct *is* related to employment. See *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 946-947 (C.A. 8, 2001) (holding that the plaintiff agreed to arbitrate her "claim of sexual harassment ... which arose during [the plaintiff's] employment with [the defendant]" because she agreed to arbitrate " 'any and all employment-related disputes' "); *Cruise v. Kroger Co.*, 233 Cal. App. 4th 390, 397, 183 Cal.Rptr. 17 (2015) (holding that the plaintiff's claims "for retaliation, sexual harassment, sexual and racial discrimination, failure to investigate and prevent harassment and retaliation, as well as her common law claims for wrongful termination in violation of public policy, intentional infliction of emotional distress and defamation, are all 'employment-related disputes' within the meaning of the above arbitration clause, and therefore clearly are covered disputes subject to the arbitration agreement"); *Kindred v. Second Judicial Dist. Court*, 116 Nev. 405, 411, 996 P.2d 903 (2000) (holding that the plaintiff agreed to arbitrate her sexual-harassment claim when the agreement that " 'any controversy or dispute arising between [the plaintiff] and [the defendant] in any respect to this agreement or your employment by [the defendant] shall be submitted for arbitration' "); *Freeman v. Minolta Business Sys., Inc.*, 699 So.2d 1182, 1187; 29,655 (La. App. 2 Cir. 09/24/97) (holding that the plaintiff's sexual-harassment claim "involve[d] violation of a term or condition of her employment" and therefore was "included in the scope of the arbitration clause of her employment contract"); *Arakawa v. Japan Network Group*, 56 F.Supp.2d 349, 353 (S.D.N.Y., 1999) ("All of [the plaintiff's] claims—sexual harassment, wrongful discharge and discrimination—arise out of or relate to her employment and are therefore claims that are subject to binding arbitration pursuant to the agreement."). While it is clear from the majority's holding that sexual assault is conduct unrelated to employment, it is unclear whether the majority is bucking the national trend and holding that *all* sexual harassment is conduct unrelated to employment.
- 2 I offer no opinion on the majority's policy reasoning, though it appears to run counter to this Court's extensive reasoning in *Rembert*, 235 Mich. App. at 135-159, 596 N.W.2d 208, for why civil-rights claims in general are arbitrable. Among other things, the *Rembert* Court acknowledged arguments that "the public policy advanced by [civil-rights] statutes would be undermined if these disputes were addressed in the relatively private forum of arbitration," but rejected those arguments, in part, because they "were thoroughly considered and rejected by the United States Supreme Court in a trio of cases known as the *Mitsubishi* trilogy and, later, in *Gilmer* [500 U.S. 20, 111 S.Ct. 1647]." *Id.* at 135, 596 N.W.2d 208 (citations omitted).