MICHIGAN ARBITRATION AND MEDIATION CASE LAW UPDATE

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I. INTRODUCTION

This update reviews significant Michigan cases issued since 2008 concerning arbitration and mediation. For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

II. ARBITRATION

A. Michigan Supreme Court Decisions

Does arbitrator decide attorney fee in lien case?

Ronnisch Construction Group, Inc v Lofts on the Nine, LLC, ___ Mich ___; 861 NW2d 630 (2015), granted leave to appeal and ordered parties to address whether COA erred in holding that plaintiff contractor, who filed claim of lien under Construction Lien Act (CLA), MCL 570.1101 *et seq*, and then filed Circuit Court action against property owner, alleging breach of contract, foreclosure of lien, and unjust enrichment claims, was entitled to award of attorney fees as MCL 570.1118(2) "prevailing party," when plaintiff prevailed in arbitration on contract claim, but neither arbitrator nor Circuit Court resolved plaintiff's foreclosure of lien claim. In ***Ronnisch Const Group, Inc***, 306 Mich App 203 (2014), plaintiff appealed from Circuit Court's denial of its request for CLA attorney fees. Because Circuit Court erroneously concluded that it was precluded from considering awarding MCL attorney fees, COA vacated portion of order dealing with attorney fees and remanded. Arbitrator declined to address plaintiff's request for attorney fees as prevailing lien claimant and reserved that issue for Circuit Court. Circuit Court denied attorney fees because defendant had complied with award. COA held plaintiff was prevailing lien claimant; fact that lien amount was determined by arbitrator instead of court or jury does not compel different conclusion. COA vacated denial of attorney fees, and remanded matter to Circuit Court to decide whether to grant attorney fees or not.

Duty to defend in arbitration.

Hastings Mut Ins Co v Mosher Dolan Cataldo & Kelly, Inc, 497 Mich 919; 856 NW2d 550 (2014), in lieu of granting leave to appeal, reversed COA (COA 296791). According to Supreme Court, COA erred in holding that insurer did not have duty to defend insured in arbitration case. Duty to defend is broader than duty to indemnify. Insurer has duty to defend, despite theories of liability asserted against insured that are not covered under policy, if there are any theories of recovery that fall within policy. Claimants in arbitration case alleged water damage that was not excluded from coverage by insurance policy exclusions. Because insurer had duty to defend, it was not entitled to restitution. Supreme Court remanded case to Circuit Court for further proceedings.

Is arbitration award "verdict" for case evaluation purposes?

Acorn Investment Co v Mich Basic Property Ins Ass'n, 495 Mich 338; 852 NW2d 22 (2014). Michigan Basic rejected case evaluation and appraisal panel's award was less favorable to Michigan Basic than case evaluation. Supreme Court held that requirement, that action "proceed to verdict," was satisfied. Under definition of "verdict" … a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c). In this case, action proceeded to judgment as result of a ruling on a motion when Circuit Court granted Acorn's motion for entry of judgment. Acorn may recover its actual costs because motion for entry of judgment caused case to "proceed to verdict" when Circuit Court ruled on motion. Because Circuit Court had discretion to award such costs to Acorn, Supreme Court reversed COA and remanded case to Circuit Court for further proceedings.

COA vacates second award and confirms first award.

City of Holland v French, 495 Mich 942; 843 NW2d 485 (2014), denied leave to appeal from ***City of Holland***, 309367 (June 18, 2013). Justice Markman dissented. Initial arbitrator determined that City lacked "just cause" to terminate defendant and that it must reinstate her with back pay. Circuit Court vacated this award and required a second arbitration. Second arbitrator ruled in favor of City, and Circuit Court affirmed. In split decision, COA reversed Circuit Court's vacation of first arbitration award and remanded for entry of order enforcing first award.

Arbitrator, not MERC, to decide past practice issue.

Macomb Co v AFSCME, 494 Mich 65 (2013) (Young, Markman, Kelly, and Zahara [majority]; McCormack and Cavanagh [dissent]; Viviano [took no part]). Employer did not commit ULP when it refused to bargain with union over employer's decision to change actuarial table used to calculate retirement benefits. ULP complaints concerned subject covered by CBA. CBA grievance process was appropriate avenue to challenge employer's actions. Arbitrator, not MERC, is best equipped to decide whether past practice has matured into new term or condition of employment.

Arbitrator can hear claims arising after referral to arbitration.

Wireless Toyz Franchise, LLC v Clear Choice Commc'n, Inc, ___ Mich ___, 825 NW2d 580 (2013) (Young, Cavanagh, Markman, Kelly, Zahra, and McCormack), in lieu of granting leave to appeal, reversed COA judgment, for reasons stated in COA dissenting opinion, and reinstated Circuit Court order, denying defendants' motion to vacate award and confirming award.

Judge Servitto's dissent in ***Wireless Toyz Franchise, LLC,*** 303619 (May 31, 2012) (Cavanagh and Fort Hood [majority] and Servitto [dissent]), indicated stipulated order intended arbitration would include claims beyond those that were pending because it allowed further discovery, gave arbitrator powers of Circuit Court judge, and stated that award would represent "full and final resolution" of matter. Order did not exclude new

claims from arbitration. Parties' intent appears to have been that arbitrator would determine all claims in case. Claims that were not pending at time order was entered were not outside scope of arbitrator's powers.

Shareholder arbitration agreement covers discrimination claims.

Hall v Stark Reagan, PC, 493 Mich 903; 823 NW2d 274 (2012) (Young, Markman, MB Kelly and Zahra [majority]; Hathaway, Cavanagh and M Kelly [dissent]). Supreme Court reversed that part of COA judgment, ***Hall***, 294 Mich App 88; 818 NW2d 367 (2012) (Gleicher and Stephens [majority] and Kelly [dissent]), which had held that matter was not subject to arbitration. Supreme Court reinstated Circuit Court order granting summary disposition in favor of defendants and ordering arbitration. Dispute in this case concerned motives of defendant shareholders in invoking separation provisions of Shareholders' Agreement. According to majority, this, including allegations of violations of Civil Rights Act, MCL 37.2101 *et seq*, is a "dispute regarding interpretation or enforcement of . . . the parties' rights or obligations" under Shareholders' Agreement, and was subject to binding arbitration pursuant to Agreement.

Dissents stated Shareholders Agreement provided only for arbitration of violations of Agreement, and not for allegations of discrimination under Civil Rights Act.

CBA just cause provision gives arbitrator authority.

36th Dist Ct v Mich Am Fed of State Co and Muni Employees, ___ Mich ___ (SC 298271)(2012), in lieu of granting leave to appeal, reversed that portion of COA judgment that reversed award of reinstatement and back pay. According to Supreme Court, MCR 3.106 does not preclude such relief where CBA has just cause standard for termination. In ***36th Dist Ct***, 295 Mich App 502 (2012), COA had ruled that because CBA did not abrogate Chief Judge's statutory or constitutional authority to appoint court officers, arbitrator exceeded his jurisdiction by requiring Chief Judge to re-appoint grievants to their former positions. One issue was whether term of CBA had ended, and therefore no contract to arbitrate existed, when court officers were not reappointed. Although some issues survive expiration of CBA, the right to only be terminated for just cause does not extend beyond term of CBA. COA ruled that Circuit Court erred in ruling that arbitrator should decide whether CBA had terminated. The grievances were properly subject to arbitration. Because CBA did not abrogate Chief Judge's statutory or constitutional authority to appoint court officers, arbitrator exceeded his jurisdiction by requiring Chief Judge to re-appoint grievants to their former positions.

Parental pre-injury waivers and arbitration.

Woodman ex rel Woodman v Kera LLC, 486 Mich 228; 785 NW2d 1 (2010), was a five (Justices Young, Hathaway, Kelly, Weaver, and Cavanaugh) to two (Justices Markman and Corrigan) decision authored by Justice Young, which held that parental pre-injury waiver is unenforceable under Michigan common law because, absent special circumstances, parent does not have authority to contractually bind his or her child. In reaching this conclusion, Justice Young cited *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167; 405 NW2d 88 (1987). In *McKinstry*, pregnant mother signed

medical waiver requiring arbitration of any claim on behalf of her unborn child. Mother contested validity of waiver after her child was injured during delivery. Court considered effect of Medical Malpractice Arbitration Act, MCL 600.5046(2) (since repealed by 1993 PA 78), which provided: A minor child shall be bound by a written agreement to arbitrate disputes, controversies, or issues upon the execution of agreement on his behalf by parent or legal guardian. Minor child may not subsequently disaffirm agreement. In *McKinstry*, Court held that statute required that arbitration agreement signed by mother bound her child. According to Justice Young, McKinstry acknowledged that arbitration agreement would not have been binding under common law. He indicated that *McKinstry's* interpretation of MCL 600.5046(2) was departure from common law rule that parent has no authority to release or compromise claims by or against child. He indicated that common law can be modified or abrogated by statute. Child can be bound by parent's act when statute grants that authority to parent. Justice Young believed that MCL 600.5046(2) changed common law to permit parent to bind child to arbitration agreement.

Supreme Court upholds labor award concerning take-home vehicle.

Kentwood v Police Officers Labor Council, 483 Mich 1116; 766 NW2d 869 (2009). Supreme Court denied City's application for leave to appeal. This resulted in affirmation of COA reversal of Circuit Court's vacatur of labor arbitration award. Arbitrator granted grievance and held that grievant was to be assigned a take-home vehicle. Arbitrator determined there was past practice of assigning take-home vehicles and burden was on employer to prove that it had repudiated this practice without objection by union. Arbitrator stated "past practice became a distinct and binding working condition that could not be altered without the mutual consent of the parties where the [CBA] is silent on the assignment of take-home vehicles." Arbitrator held that policy manual provision was only valid "to the extent that it was consistent with the [CBA], including established practices." Arbitrator concluded that Police Chief's decision not to assign take-home vehicle was inconsistent with past practice of assigning take-home vehicles. Justice Markman dissented, with Justice Corrigan joining, indicating that he would reinstate Circuit Court's order vacating award. Dissent indicated that CBA does not refer to take-home vehicles, and department policy accords Police Chief discretion in assigning such vehicles. Dissent said: "I am cognizant of the broad authority vested in the arbitrator under the CBA when disputes arise, but I am also cognizant that such authority is not boundless. If the collective bargaining process, public or private, is going to work effectively, faithful regard must be given to contracts and agreements. The people of Kentwood, through their elected representatives, have chosen to cede a part of their administrative control over public employees from their elected city council to the arbitrator. Where, however, they have clearly not ceded such authority, as here, the regular processes of local self- government must be permitted to prevail."

***Ex parte* submission to arbitration panel inappropriate.**

In ***Gates v USA Jet Airlines, Inc***, 482 Mich 1005; 756 NW2d 83 (2008), Supreme Court vacated award and remanded case to Circuit Court because one of parties submitted to arbitration panel an *ex parte* submission in violation of arbitration rules.

Submission may have violated MRPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) and 3.5(b) (prohibiting ex parte communication with judge, juror, or other official regarding pending matter).

Preliminary injunction vacated - six to one decision.

Detroit Fire Fighters Ass'n v Detroit, 482 Mich 18; 753 NW2d 579 (2008), was public labor law dispute between Union and City. The issue was whether Circuit Court properly issued preliminary injunction to prevent implementation of City's proposed layoff and restructuring plan. Union contended that layoff and restructuring plan violated "*status quo*" provision, MCL 423.243, of Michigan Compulsory Arbitration of Labor Disputes for Police and Fire Departments Act, MCL 423.231 *et seq*, by, in part, jeopardizing remaining firefighters' safety. The *status quo* provision is violated where restructuring and layoff plan alters condition of employment, namely firefighter safety. A Circuit Court must conclude that employer's challenged plan is so "inextricably intertwined with safety" that its implementation would impermissibly alter *status quo* by altering this employment "condition." Circuit Court found that there were issues of fact concerning whether layoffs would have impact on firefighters' safety which is a mandatory subject of bargaining. COA affirmed Circuit Court. ***Detroit Fire Fighters Ass'n***, 271 Mich App 457 (2006). Supreme Court held that injunction had been erroneously entered. The *status quo* provision states that: "[d]uring the pendency of proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under this act." MCL 423.243. Whether layoff and restructuring plan jeopardizes employee safety requires a scrutiny of plan details and finding that plan is "inextricably intertwined with safety" such that it would have "significant impact" on safety. If Circuit Court concludes that standards for preliminary injunction have been met and chooses to issue injunction, it must promptly decide merits of *status quo* claim. Supreme Court held that Circuit Court erred when it issued preliminary injunction preventing implementation of restructuring plan. Circuit Court, in effect, issued permanent injunction where underlying merits of alleged *status quo* violation would never be resolved, contrary to requirements of MCR 3.310(A)(5). Supreme Court also held that, when safety claim is alleged, public employer's challenged action alters *status quo* during pendency of Act 312 arbitration only if action is so "inextricably intertwined with safety" that the action would alter a "condition of employment."

Preliminary injunction vacated - four to three decision.

Pontiac Fire Fighters Union v Pontiac, 482 Mich 1; 753 NW2d 595 (2008), addressed whether Circuit Court abused its discretion in issuing preliminary injunction preventing City from implementing its plan to lay off Union members. Union filed complaint seeking preliminary injunction against City's proposed layoffs pending resolution of ULP charge, collective bargaining, or interest arbitration. Circuit Court granted preliminary injunction after ruling that Union satisfied four traditional elements

for injunctive relief. COA upheld preliminary injunction in split, unpublished decision. 271497 (November 30, 2006). Supreme Court held that Circuit Court had abused its discretion. Court concluded that Union had failed to meet its burden of establishing that irreparable harm would result without injunction. Supreme Court reversed COA and vacated Circuit Court order granting preliminary injunction.

Failure to tape record domestic relations arbitration hearing.

Kirby v Vance, 481 Mich 889; 749 NW2d 741 (2008), in lieu of granting leave to appeal, reversed COA and held that arbitrator exceeded arbitrator's authority under DRAA, MCL 600.5070 *et seq*, when arbitrator failed to adequately tape record arbitration proceedings. Circuit Court erred when it failed to remedy arbitrator's error by conducting its own evidentiary hearing. Supreme Court remanded case to Circuit Court for entry of order vacating award and ordering another arbitration before same arbitrator.

Parties covered by arbitration.

Werdlow v Detroit Policemen & Firemen Ret Sys Bd of Trs, 477 Mich 893; 722 NW2d 428 (2006), in lieu of granting leave to appeal, vacated, in part, COA decision and remanded case to Circuit Court for entry of order granting summary disposition to defendants. COA correctly held that Circuit Court lacked jurisdiction to grant relief requested by plaintiffs because defendant unions were not parties to the arbitration. Section 10, MCL 423.240, of Michigan Compulsory Arbitration of Labor Disputes for Police and Fire Departments Act, MCL 423.231 *et seq*, provides that awards are final and binding on parties.

Continued existence of common-law arbitration.

Wold Architects & Eng'rs v Strat, 474 Mich 223; 713 NW2d 750 (2006), held that common-law arbitration is not preempted by Michigan Arbitration Act, MCL 600.5001 *et seq*. Common-law arbitration agreements continue to be unilaterally revocable before award is made. Statutory arbitration has to comply with MAA, including that written arbitration agreement provide that award is enforceable in Circuit Court. With such compliance, party cannot withdraw from arbitration process. With common-law arbitration, arbitration agreement is unilaterally revocable before award is made. The parties' conduct during arbitration process of non-written acquiescence in proceeding under arbitration rules that provided for court enforcement did not transform common-law arbitration into statutory arbitration. Agreement to proceed with court enforceable arbitration had to be in writing. Supreme Court affirmed COA determination that Circuit Court erred in denying plaintiff's motion to vacate award.

Formal hearing format not required.

Miller v Miller, 474 Mich 27; 707 NW2d 341 (2005), held that DRAA, MCL 600.5070 *et seq*, does not require formal hearing during arbitration concerning property issues similar to that which occurs in regular trial proceedings.

B. Michigan Court of Appeals Published Decisions

Arbitration in UIM No Fault Case

Nickola v MIC Gen Ins Co, ___ Mich App ___, 322565 (September 24, 2015). This case discusses attorney fee and interest issue arising from a protracted Uninsured Motorist case that included an arbitration.

COA Partially Confirms and Partially Vacates Award in Defamation Case

In ***Hope-Jackson v Washington***, ___ Mich App ___ , 319810 (August 18, 2015), COA affirmed confirmation of that part of award in defamation case concerning tolling, defamation, presumed damages, actual malice, and $360,000 in per se damages; and reversed confirmation of that part of award concerning $140,000 exemplary damages. Since there had been no request for a retraction, COA ruled that arbitrator's granting of exemplary damages was an error of law on the face of the award. MCL 600.2911(2).

Pre-arbitration hearing submission of exhibits.

Fette v Peters Constr Co, ___ Mich App ___, 320803 (May 21, 2015). Michigan Arbitration Act (MAA), MCL 600.5001 *et seq*, controlled this case; not Uniform Arbitration Act (UAA), MCL 691.1681 *et seq*. COA concluded record did not support plaintiffs' contention that arbitrator considered exhibits that defendant electronically shared before hearing in making award determination. Even if award were against great weight of evidence or was not supported by substantial evidence, COA would be precluded from vacating award. Allowing parties to electronically submit evidence prior to hearing did not affect plaintiffs' ability to present any evidence they desired.

Lay-offs go to court, not STC or CBA.

Baumgartner v Perry Public Schools, ___ Mich App ___ (313945, 314158, 314696 (March 12, 2015), lv dn ___ Mich ___ (2015). COA held that Legislature exercised its constitutional authority concerning teacher layoffs. Legislature made merit, not seniority, controlling factor in layoff decision making. It did this by removing teacher layoffs as subject of collective bargaining and this removed unions and administrative agencies from dispute-resolution process in this specific realm of public-sector labor law. Legislature gave school boards power to make layoff decisions, and gave courts sole and exclusive power to review school boards' decisions.

Dispute with individuals not within arbitration agreement.

Altobelli v Hartmann, 307 Mich App 612 (November 4, 2014); app lv app pdg. COA affirmed Circuit Court's order denying defendants' motion to compel arbitration, reversed Circuit Court's order granting partial summary disposition in favor of plaintiff, and remanded for further proceedings. Circuit Court found that dispute did not fall within scope of arbitration clause. COA agreed with Circuit Court that dispute between plaintiff and individual defendants was not arguably within arbitration clause.

Pre-award lawsuit concerning arbitrator selection.

Oakland-Macomb Interceptor Drain Drainage Dist v Ric-Man Constr, Inc, 304 Mich App 46; 850 NW2d 408 (2014) (Saad and Sawyer [majority]; Jansen [dissent]), is an example of viewpoint that "[n]o part of the arbitration process is more important than that of selecting the person who is to render the decision[,]" Elkouri & Elkouri, How Arbitration Works (7th ed), p 4-37, and "[c]hoosing an arbitrator may be the most important step the parties take in the arbitration process." Abrams, Inside Arbitration (2013), p 37. In *Oakland-Macomb Interceptor Drain Drainage Dist*, AAA did not appoint a member of the arbitration panel who had specialized qualifications required in agreement to arbitrate. Agreement modified AAA rules by mandating qualifications for the panel and outlining manner in which AAA must appoint panel. Plaintiff brought suit against defendant and AAA to enforce these requirements. Circuit Court ruled in favor of defendant and AAA. Court of Appeals in a split decision reversed.

Issue was whether plaintiff could bring pre-award lawsuit concerning arbitrator selection process. According to majority, courts usually will not entertain suits to hear pre-award objections to arbitrator selection. But, when a suit is brought to enforce essential provisions of agreement concerning criteria for choosing arbitrators, courts will enforce such mandates.

According to majority, agreement to arbitrate made specialized qualifications of panel central to entire agreement; and, when such a provision to arbitrate is central to agreement, the Federal Arbitration Act (FAA), 9 USC 1, *et seq*, provides that it should be enforced by courts prior to the arbitration hearing. "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed … ." 9 USC 5.

According to majority, party may petition court before award has been issued if (1) arbitration agreement specifies detailed qualifications arbitrator(s) must possess and (2) arbitration administrator fails to appoint arbitrator that meets these qualifications. Court may issue order, pursuant to § 4 of FAA, requiring that arbitration proceedings conform to terms of arbitration agreement. Majority awarded plaintiff its Circuit Court and COA costs and attorney fees.

Judge Jansen's dissent indicated that party cannot obtain judicial review of qualifications of arbitrators prior to award. There was no claim that selection of panel member involved fraud or any other fundamental infirmity that would invalidate arbitration agreement, or any claim that appointee had inappropriate relationship with a

party. Although appointee might not have had requirements for appointment set forth in agreement, plaintiff was required to wait until after issuance of award in order to raise issue in a proceeding to vacate. 9 USC 10.

Offsetting decision-maker biases can arguably create neutral tribunal.

White v State Farm Fire and Cas Co, 293 Mich App 419; 809 NW2d 637 (2011) (Borrello, Meter, and Shapiro [concurring]), discussed whether MCL 500.2833(1)(m) appraiser who receives contingency fee for appraisal is sufficiently neutral. COA indicated at fn 7 "[c]ourts have repeatedly upheld agreements for arbitration conducted by party-chosen, non-neutral arbitrators, particularly when a neutral arbitrator is also involved. These cases implicitly recognize it is not necessarily unfair or unconscionable to create an effectively neutral tribunal by building in presumably offsetting biases." *Whitaker v Citizens Ins Co of Am*, 190 Mich App 436, 440 (1991).

Michigan Constitution trumps CBA.

AFSCME v Wayne Co, 292 Mich App 68; 811 NW2d 4 (2011), held that under judicial branch's inherent constitutional authority Third Circuit Court's judges have exclusive authority to determine assignment or selection of particular court clerk to serve in judge's courtroom. Promulgation of Local Administrative Order was proper exercise of Circuit Court's authority, and Circuit Court was not bound by CBA, arbitrator's ruling, on narrow issue of courtroom assignments. COA ruled that a PERA, MCL 423.201 et seq, aegis CBA and arbitration award that encroach on judicial branch's inherent constitutional powers cannot be enforced to the extent of encroachment.

Arbitrator to determine timeliness issue.

AFSCME v Hamtramck Housing Comm, 290 Mich App 672 (2010), held that determination of timeliness and defense of laches must be made by arbitrator in assessing whether claim is arbitrable.

Complaint must be filed to obtain award confirmation.

Jaguar Trading Limited Partnership v Presler, 289 Mich App 319 (2010), held that complaint must be filed to obtain confirmation of award. Having failed to invoke Circuit Court jurisdiction under Michigan Arbitration Act (MAA), MCL 600.5001 *et seq*, by initiating a civil action by filing a complaint, plaintiff was not entitled to confirmation of award. The issue was whether plaintiff, as a party seeking confirmation under MCR 3.602(I) and MAA was required to file a complaint in order to invoke Circuit Court jurisdiction. COA held that, because no action was pending between parties, plaintiff was required to file a complaint to initiate a civil action under MAA. Court further held that, since plaintiff had timely filed the award with court clerk, the matter was remanded so plaintiff could file a complaint in Circuit Court. MCR 3.602(I).

COA affirms denial of motion to modify award.

Nordlund & Assoc, Inc v Village of Hesperia, 288 Mich App 222; 792 NW2d 59 (2010), affirmed Circuit Court's denial of motion to modify award. COA indicated that it must carefully evaluate claims of arbitrator error to ensure that such claims are not being used as a ruse to induce Court to review merits of award. MCR 3.602(K)(2)(a) allows for modification or correction of award only when it is based on mathematical miscalculation or evident mistake in a description. Because plaintiff's alleged error concerned interpretation of contract, and not descriptions or mathematical calculations, there was not evident mistake.

How many correction motions are allowed?

In ***Vyletel-Rivard v Rivard***, 286 Mich App 13; 777 NW2d 722 (2009); lv gtd 486 Mich 938; 782 NW2d 502 (2010), stip dism ___ Mich ___ (2010), defendant challenged Circuit Court's order denying motion to vacate award concerning tort damages in DRAA, MCL 600.5070, *et seq*, case. COA affirmed Circuit Court's denial because Court concluded that defendant's motion to vacate was not timely filed. On March 28, 2008, defendant, pursuant to MCL 600.509(2), filed motion to vacate "arbitration awards" of November 13, and December 7, 2007, as to tort damages. Party has 21 days to file motion to vacate in DRAA case. MCR 3.602 (J)(2). Lesson of this case is to think very carefully before filing second round of reconsideration motions rather than filing notice of appeal. See generally *Moody v Pepsi-Cola Metro Bottling Co*, 915 F2d 201 (6th Cir 1990).

Six-year limitation period for action to vacate labor arbitration award.

Ann Arbor v AFSCME, 284 Mich App 126 (2009). In this public employer labor arbitration case, COA stated there is no statute or court rule providing a limitations period specifically for actions seeking to vacate labor arbitration awards arising from CBAs. According to COA, actions to vacate awards are more akin to actions to enforce awards than to actions for unfair representation. An action to vacate labor arbitration award is subject to six-year limitations period. COA further pointed out that as long as Arbitrator is arguably construing or applying CBA and acting within scope of his or her authority, court may not overturn the decision even if convinced that Arbitrator committed serious error. Previously *Rowry v University of Michigan*, 441 Mich 1(1992), had held that plaintiff ordinarily has six years to seek enforcement of labor arbitration award and recognized that in certain cases this time period may be substantially diminished if plaintiff's arbitration award grants equitable relief and a delay in its enforcement is shown to prejudice defendant in a way that evokes laches to bar plaintiff's claim.

COA approves probate arbitration.

In split decision, ***In re Nestorovski Estate***, 283 Mich App 177; 769 NW2d 720 (2009), held that probate proceedings are not inherently unarbitrable.

C. Michigan Court of Appeals Unpublished Decisions

Race to the Courthouse

New River Construction, LLC v Nat'l Mgt & Preservation Svs, LLC, 324465 (July 21, 2015). COA, after considering totality of circumstances, held that Circuit Court abused its discretion when it denied motion to set aside default judgment. Plaintiff is bound to arbitrate its breach of contract claim and defendant would have been entitled to summary disposition on these matters.

COA confirms binding mediation award.

In ***Cummings v Cummings***, 318724 (May 19, 2015), plaintiff appealed Circuit Court order which denied plaintiff's motion to vacate "binding mediation award." COA affirmed. COA held binding mediation is equivalent to arbitration and subject to same judicial review. According to COA, parties agreed to binding mediation, which like arbitration, does not require a certain degree of formality. Relief from untimely award was not warranted where appellant failed to allege what substantial difference would have resulted from a timely award. In addition, according to COA, cases where award was vacated due to *ex parte* communication involved a violation of arbitration agreement prohibiting such conduct. The binding mediation agreement did not contain a clause prohibiting *ex parte* communication, so there is no indication that mediator exceeded his powers by acting beyond material terms of parties' contract. COA said "Plaintiff also asserts that the mediator badgered witnesses, but the only example he gives is that the mediator poked a witness with a pencil. While poking a witness with a pencil, if that is exactly what occurred, is inappropriate, it does not show a concrete bias." COA pointed out the hearings were often hostile or aggressive. Although there were times where mediator's behavior was not indicative of 'a good mediator' or necessarily professional, mediator did the best he could to control the situation he was presented with and keep calm when hearings became aggressive."

COA confirms award in spite of discovery and witness interview issues.

Perry v Portage Pub Sch Bd of Ed, 319170 (March 12, 2015), app lv app pdg. In this AAA employment arbitration case, plaintiff appealed Circuit Court's order denying plaintiff's motion to vacate award. COA affirmed. Prior to arbitration, employer retained investigator who created a report. Employee requested copy of report before arbitration hearing. Employer declined, indicating it would provide report to employee only if employee realized this would make document subject to public disclosure under Public Records Act. In addition, employee asked authorization to interview potential employee witnesses. Employee did not request to take formal depositions. At arbitration hearing, employer utilized investigator as witness. Arbitrator issued award in favor of employer. Circuit Court refused to vacate award. COA agreed with Circuit Court that (1) employer did not refuse to produce the report but rather correctly conditioned such production on a

realization of Public Records Act implications, and (2) employee could have used deposition procedure to interview witnesses but chose not to.

Dismissal order to permit arbitration is not final appealable order.

***ITT Water & Wastewater USA Inc v L D'Agostini & Sons, Inc*, 319148 (March 10, 2015)** Circuit Court entered stipulation and order of dismissal without prejudice. The order stated that parties entered into arbitration and tolling agreement concerning their claims. Circuit Court retained jurisdiction over case and case could be reopened under MCR 3.602(I) upon party's motion "for purposes of confirming any award rendered pursuant to the arbitration agreement of the parties." Order also stated that it resolved the last pending claim and closed the case. MCR 2.602(A)(3). Then defendant filed appeal challenging Circuit Court's prior orders granting partial summary disposition in favor of plaintiff. COA held that stipulated order of dismissal entered by Circuit Court pursuant to parties' agreement to submit their claim and counterclaim to arbitration is not appealable by right, and COA lacked jurisdiction over appeal. COA noted that after entry of judgment on an award, defendant could challenge in an appeal by right Circuit Court's orders granting partial summary disposition in favor of plaintiff.

All of artwork invoice claims subject to arbitration.

***Beck v Park W Galleries, Inc*, 319463 (March 3, 2015)**, app lv app pdg. COA affirmed Circuit Court's ruling that arbitration agreements were enforceable despite the challenge to the invoices as a whole, reversed Circuit Court's ruling that all of claims were not subject to arbitration, and remanded for entry of order granting defendants' motion for summary disposition. Arbitration clauses in parties' agreements provided that any issues of arbitrability should be resolved by arbitrator, and not court. Because parties' agreements contained such a clause, and the basis for plaintiffs' challenge to validity of the agreements was not directed specifically to agreements to arbitrate, Circuit Court correctly held that plaintiffs' claims were subject to arbitration.

Judge Hoekstra dissented indicating he agreed with majority in concluding that invoices containing arbitration clauses are subject to arbitration but he disagreed that invoices that did not contain arbitration clauses were also subject to arbitration.

Successors have to comply with arbitration clause.

Marjorie Brown Trust v Morgan Stanley Smith Barney, LLC, 317993 (February 5, 2015), app lv app pdg. The main issue was whether dispute over investment account is subject to arbitration, as specified in account agreement, or whether dispute can proceed in Michigan judicial system. Plaintiff admitted her account with Smith Barney Shearson was subject to arbitration agreement, but asserted that defendants Morgan Stanley Smith Barney and Citigroup Global Markets were not successors to Smith Barney Shearson, and were not parties to arbitration agreement. Defendants produced evidence that Morgan Stanley Smith Barney and Citigroup Global Markets were successors of Smith Barney Shearson, through a series of consolidations. COA agreed with Circuit Court that

defendants were successors of Smith Barney Shearson and agreement to arbitrate was binding on plaintiff.

Labor arbitration award *res judicata* in subsequent court proceeding.

In ***Heffelfinger v Bad Axe Public Schools,*** 318347 (December 2, 2014), lv dn ___ Mich ___ (2015), teacher was separated pursuant to Last Chance Agreement. LCA provided separation could be arbitrated. Separation issue went to arbitration. Arbitrator upheld separation. Teacher filed court action arguing that LCA violated Teachers' Tenure Act, MCL 38.71 *et seq*. COA held that award was *res judicata* and precluded teacher's court case. In a prior decision, COA held that collateral estoppel applies to positions taken in a prior arbitration. ***Thomas v Miller Canfield Paddock & Stone***, 314374 (October 21, 2014).

Past practice issues go to arbitration.

Wayne Co v AFSCME, 312708 (October 9, 2014). COA held that, if CBA covers term or condition in dispute, enforceability of provision is left to arbitration. The CBA grievance and arbitration procedures were bypassed. Scope of MERC's authority in reviewing claim of refusal-to-bargain when parties have a separate grievance or arbitration process is limited to whether CBA covers subject of the claim. When there is evidence that past practice has modified CBA, it is left to arbitrator to make determination on the issue and not MERC. See generally ***Macomb Co v AFSCME***, 494 Mich 65; 833 NW2d 225 (2013).

USAF pension consideration in DRAA arbitration.

Torres v Torres, 314453 (August 19, 2014) (Gleicher and O'Connell [majority]; and Hoekstra [dissent]), lv dn ___ Mich ___ (2015). Parties submitted divorce case to arbitration. Evidence submitted to arbitrator revealed that husband was entitled to USAF pension. Arbitrator's initial decision overlooked USAF pension. When wife brought this omission to arbitrator's attention, he acknowledged existence of unvested pension but refused to value or equitably divide it. As a result, award on its face improperly treated pension as husband's separate property. COA reversed Circuit Court's affirmance of award and remanded for reconsideration of the pension distribution.

Award from hearing with one party absent confirmed.

Blue River Financial Group, Inc v Elevator Concepts Ltd, 315971 (July 29, 2014); and ***Elevator Concepts Ltd v Blue River Financial Group, Inc***, 314803 (July 29, 2014). Arbitration hearing took place. Defendants did not attend. There was no answer or response to plaintiff's demand for arbitration. There was no transcript of arbitration. Arbitrator issued award in favor of plaintiff. Plaintiff filed motion to enforce award. Defendants argued there was no agreement to arbitrate, and arbitrator had no authority to

issue award against them. Plaintiff contended that defendants waived any challenge to award because they never objected to plaintiff's demand for arbitration. Circuit Court granted plaintiff's motion to enforce award. COA affirmed and indicated that to determine arbitrability, court must consider whether there is arbitration provision in parties' contract, whether dispute is arguably within arbitration clause, and whether dispute is expressly exempt from arbitration by terms of contract, and doubts about arbitrability are resolved in favor of arbitration. COA indicated that court may not hunt for errors in award, and facially valid damage award should not be disturbed.

Arbitrator failured to comply with arbitration agreement.

In ***Visser v Visser***, 314185 (July 15, 2014), a domestic relations matter, parties agreed to arbitration in order to resolve issues relating to child custody, parenting time, child support, and property. Parties agreed that, pursuant to MCL 600.5077(2), if child custody, child support, and/or parenting time were at issue, a court reporter would be hired to transcribe portion of arbitration proceedings affecting those issues. They agreed that arbitrator must adhere to MRE. After successfully mediating custody and parenting time issues, arbitration was held to decide child support and property issues. Without presence of court reporter, and without adhering to MRE, arbitrator entered award and proposed judgment. Defendant argued arbitrator exceeded his authority in failing to apply MRE and failing to hire court reporter. Circuit Court ruled in favor of plaintiff, entered arbitrator's proposed judgment and denied defendant's motion to vacate award. COA held that because of arbitrator's failure to comply with arbitration agreement by neither utilizing MRE nor obtaining court reporter, Circuit Court erred in refusing to vacate provision of award and proposed judgment concerning child support.

Does arbitrator or Court decide sanctions issue?

G&B II, PC v Gudeman, 315607 (July 15, 2014), lv dn ___ Mich ___ (2015). An attorney-fee dispute resulted in arbitration, where parties negotiated a payment plan. Plaintiff returned to Circuit Court seeking sanctions against defendant's counsel, contending that counsel's defense was frivolous. Circuit Court denied sanction request, ruling that it should have been directed to arbitrator. COA affirmed, for reasons different than those used by Circuit Court. Plaintiff could have sought sanctions in arbitration. It did not do so. Given the brief time Circuit Court "conducted" the underlying action, COA declined to disturb Circuit Court's conclusion that it could not reasonably assess a sanction. Arbitration agreement gave arbitrator authority to resolve any disagreement between the parties "in connection with, or in relation to this Agreement, or otherwise." The imposition of sanctions in arbitration for attorney misconduct during arbitration proceedings is consistent with language of arbitration agreement, broad powers granted to arbitrators, and court rules. AAA Rules governing commercial arbitration do not prohibit sanctioning attorney for arguing a frivolous defense. AAA, Commercial Arbitration Rules & Mediation Procedures, R-58(a). Regardless of arbitrator's power to sanction an attorney, Circuit Court did not clearly err by refusing to do so.

Court must resolve dispute regarding validity of arbitration agreement.

Queller v Young and Meather Properties, LLC, 315862 (June 17, 2014). Circuit Court granted defendant's motion to compel arbitration. Circuit Court determined that alleged fraud in the inducement claim could be raised in arbitration. COA reversed. According to COA, before court can order party to arbitration, court must resolve any dispute regarding validity of underlying agreement; existence of arbitration agreement and enforceability of its terms are questions for court, not arbitrator.

CBA must be exhausted before court action.

Gliwa v Lenawee Co, 313958 (May 27, 2014), concerned termination of plaintiff's employment. Defendants appealed from Circuit Court order denying their motion for summary disposition. COA reversed. According to COA, Circuit Court erred by failing to grant summary disposition in favor of defendants on plaintiff's claims of wrongful discharge; plaintiff's position was in collective bargaining unit; he was bound by CBA; and his failure to utilize CBA grievance procedure required summary disposition in favor of defendants. Where CBA mandates that internal remedies be pursued, a party must exhaust those remedies before filing a court action.

COA reverses Circuit Court order to disqualify arbitrator.

Thomas v City of Flint, 314212 (April 22, 2014) (Donofrio and Cavanagh [majority]; Jensen [concurring]. During course of pending arbitration, neutral arbitrator inadvertently sent e-mail to plaintiff's counsel that was intended for one of arbitrator's own clients. Plaintiff's counsel then requested neutral arbitrator to recuse herself and she declined. Circuit Court granted plaintiff's motion to disqualify neutral arbitrator. Plaintiff appealed. COA indicated arbitrator should be disqualified if, based on objective and reasonable perceptions, arbitrator has serious risk of actual bias, the appearance of impropriety standard is applicable to arbitrators; and arbitrators are not judges and are not subject to Code of Judicial Conduct. Unintentional e-mail did not give rise to objective and reasonable perception that serious risk of actual bias existed. MCR 2.003(C)(1)(b). COA reversed Circuit Court's order granting plaintiff's motion to disqualify.

In concurrence's viewpoint, if plaintiff wished to challenge impartiality of neutral arbitrator, he was required to wait until after award was issued and file a motion to vacate. MCR 3.602(J)(2)(b).

COA reverses Circuit Court vacatur of award.

Hillsdale Co Medicare Care and Rehabilitation Ctr v SEIU, 310024 (April 22, 2014). Plaintiff discharged employee LPN because she allegedly used inappropriate language concerning residents. Employer self-reported situation to Michigan Department of Community Health's Bureau of Health Systems (BHS). Without interviewing employee, BHS concluded that "resident verbal abuse was substantiated to have occurred

by" employee. SEIU took matter to arbitration. Arbitrator found there was not just cause for discharge and reinstated employee with back pay. Arbitrator did not give deference to BHS conclusion because BHS had not interviewed employee. Employer filed complaint seeking to have award vacated on grounds that reinstating employee would violate Section 20173a(1), Public Health Code. MCL 333.20173a. Employer argued that award was inconsistent with BHS conclusion. Because of BHS conclusion, Circuit Court vacated award. COA held that Circuit Court should have considered arguments that BHS had denied due process to employee and had not complied with its own investigatory requirements. COA reversed Circuit Court order and remanded for evidentiary hearing concerning whether there was substantiated BHS finding that employee engaged in abuse and, if so, whether that finding was made pursuant to appropriate investigation.

COA reverses Circuit Court confirmation of award.

In ***Rogensues v Weldmation, Inc***, 310389 and 311211 (February 11, 2014), lv dn ___ Mich ___ (2014), defendant appealed Circuit Court judgment confirming an arbitration award. COA held that Circuit Court erred in confirming award and that defendant did not enter into an arbitration agreement with plaintiff and was not bound by employment agreement plaintiff had with defendant. Defendant was not required to file motion to vacate award under MCR 3.602(J) in order to affirmatively defend against confirmation of award. Circuit Court erroneously failed to consider defendant's defense that no arbitration agreement existed before confirming award. Defendant was not required to arbitrate dispute plaintiff had with defendant. Arbitrator exceeded her authority when she concluded that defendant was bound by plaintiff's employment agreement to arbitrate plaintiff's claim that he was entitled to a severance payment.

COA affirms Circuit Court vacatur of awards.

In ***AFSCME v Charter Twp of Harrison***, 312541 (January 16, 2014), COA affirmed Circuit Court vacatur of arbitration award. CBA provided, "[i]n the event that either party fails to answer or appeal within the time limits prescribed, the grievance will be considered decided in favor of the opposite party." Employer failed to answer grievance within required time limits, but award did not decide grievance in AFSCME's favor. According to COA, this was erroneous. Employer's failure to respond to grievance within 10 days triggered CBA's default provision. Award was beyond scope of authority granted arbitrator under CBA, and did not draw its essence from CBA.

Cannot compel arbitration by non-signatory.

Ric-Man Constr Inc v Neyer, Tiseo & Hindo Ltd, 309217 (March 26, 2013). COA held Circuit Court erred by concluding that defendant had right to compel arbitration between it and plaintiff, based on plaintiff's arbitration agreement with a third entity. COA indicated that, although arbitration is favored by public policy as a means for resolving disputes, arbitration is voluntary, and party cannot be required to submit to arbitration a dispute which it has not agreed to submit.

Arbitration award can be *res judicata* in subsequent lawsuit.

Sloan v Madison Heights, 307580 (March 21, 2013). COA affirmed Circuit Court ruling that prior award was *res judicata* on issue of whether City had unilateral right to change retiree insurance carriers. Grievances were based on CBA language that was substantially similar to language contained in plaintiffs' CBAs. A substantial identity of interests existed between retirees represented by former union and those represented by present union. Plaintiffs' interests were presented and protected in the arbitration.

Arbitrator cannot render "default" award without a hearing.

Hernandez v Gaucho, LLC, 307544 (February 19, 2013). Parties arbitrated plaintiff's employment termination claim. Arbitrator ruled in favor of employee. Award was based on default of employer, who had failed to provide discovery during arbitration proceeding. Arbitrator did not conduct arbitration hearing, hear testimony, or take any proofs. Employee moved to confirm award and defendants moved to vacate. Circuit Court was concerned that arbitrator never took any evidence and there were *ex parte* communications between arbitrator and attorneys. Circuit Court granted motion to vacate and denied motion to confirm. COA affirmed. According to COA, arbitrator can hear testimony, take evidence, and issue an award in the absence of one of parties if that party, although on notice, has defaulted or failed to appear. Arbitrator may not issue an award solely on basis of default of one of parties, but must take sufficient evidence from non-defaulting party to justify award. § 15 of Uniform Arbitration Act (UAA) provides, even when arbitrator is entitled to proceed in absence of defaulting party, arbitrator is required to "hear and decide the controversy on the evidence … ." MCL 691.1695(3). UAA, MCL 691.1681 *et seq*, 2012 PA 371 (July 1, 2013).

Rule 31, AAA Commercial Arbitration Rules (October 1, 2013); Rule 29, AAA Employment Arbitration Rules (November 1, 2009); and Rule 26, AAA Labor Arbitration Rules (July 1, 2013), provide that:

> Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made [based] solely on the default of a party. The arbitrator shall require the other party to submit such evidence as may be required for the making of an award.

Rule 12603, FINRA Code of Arbitration for Customer Disputes (April 16, 2007), and Rule 13603, FINRA Code of Arbitration for Industry Disputes (April 16, 2007), provide that:

> If a party fails to appear at a hearing after having been notified of the time, date and place of the hearing, the panel may determine that the hearing may go forward, and may render an award as though all parties had been present.

Successor to arbitration agreement must prove it is successor.

Brown v Morgan Stanley Smith Barney, 307849 (February 19, 2013). In this customer against brokerage firm case the issue was whether agreement to arbitrate that customer had signed with a non-party prior brokerage firm inured to benefit of defendant brokerage firm. COA found no evidence which definitively explained the relationship, if any, between defendants and either Smith Barney Inc. or Smith Barney Shearson Inc. Thus, according to COA, defendant brokerage firm was not entitled to order compelling arbitration. This case shows that, if a party argues that arbitration agreement with another entity inures to the party's benefit, it should have a clear paper trail showing relationship between party and other entity.

Effect of union not taking case to CBA arbitration.

Kucmierz v Dep't of Corrections, 309247 (February 12, 2013). Employee brought lawsuit against employer arguing termination of employee was improper. Parties stipulated to dismiss court case so entities could go to CBA arbitration between union and employer. Union eventually decided not to take matter to arbitration and there was no arbitration. Employee then moved to set aside dismissal of court case. Circuit Court set aside dismissal. COA reversed. Employee alleged parties had mistaken belief that union was going to arbitrate the case. The stipulation and order provided that parties agreed to dismiss proceeding with prejudice because it was the subject of agreement to arbitrate. Stipulation did not provide that matter would actually be arbitrated or that dismissal was contingent on arbitration occurring. Nothing in stipulation precluded union and employer from reaching a settlement agreement to avoid arbitration process. Employee failed to show that mutual mistake occurred and he was not entitled to relief from dismissal order.

Party did not waive objection to arbitration by participating in arbitration.

Fuego Grill, LCC v Domestic Uniform Rental, 303763 (January 22, 2013) (Murray and Shapiro [majority]; and Markey [dissent]), lv den, ___ Mich ___ (2013). Issue was whether Circuit Court erred in concluding there was not an agreement to arbitrate between parties. Plaintiff did not waive issue of arbitrability through participation in arbitration, as it argued during arbitration that no contract existed and, before award was issued, it filed complaint in Circuit Court seeking to preclude arbitration because no contract to arbitrate existed. Absence of valid agreement to arbitrate is defense to action to confirm award. It is for court, not arbitrator, to determine whether agreement to arbitrate exists.

Judge Markey's dissent concluded that on basis of Michigan's policy favoring arbitration and because plaintiff's claims were within scope of arbitration clause that plaintiff signed, that plaintiff may not relitigate its fact-based defenses in Circuit Court.

Three-year limitation precludes claim and arbitration.

Krueger v Auto Club Ins Ass'n, 306472 (January 8, 2013). Arbitration agreement required that arbitration demand must be filed within three years from date of accident or insurer will not pay damages. Insured did not file arbitration demand within three years of accident. Insured argued that three years did not start until insurer communicated that

it was denying the claim. According to COA, policy requires that any arbitration demand be filed within three years of accident, and such language does not bar insured from filing arbitration demand in order to comply with three year time limitation even if disagreement has not yet arisen. Therefore arbitration demand was untimely.

Arbitration PTO award vacated.

MSX Int'l Platform Services, LLC v Hurley, 300569 (May 22, 2012) (Owens, Jansen [dissent], and Markey), lv dn ___ Mich ___ (2012), reversed Circuit Court's denial of motion to vacate award. Issue was whether employer's written PTO policy granted employee a vested right to PTO. COA found nothing in record that supported the notion of an express contract or agreement concerning compensation for PTO; and there was no basis for finding that there was a contract or agreement that entitled employee to PTO. Judge Jansen dissented, indicating that whether arbitrator's interpretation of contract is wrong is irrelevant.

Another strict interpretation of arbitration agreement issue submission.

Cohen v Park West Galleries, Inc, 302746 (April 5, 2012) (Murphy, Hoesktra, and Murray [concurring/dissent]), lv dn ___ Mich ___ (2012). Plaintiffs appealed Circuit Court's ruling that all of plaintiffs' claims were subject to arbitration agreement. COA held that only claims subject to arbitration were those arising from agreements containing an arbitration clause. Michigan law generally requires that separate contracts be treated separately, and language of agreements that contained arbitration clause did not reference past purchases.

Non-signatories sometimes subject to arbitration agreement.

Tobel v AXA Equitable Life Ins Co, 298129 (February 21, 2012), affirmed Circuit Court's order compelling plaintiffs to submit their claims to arbitration. Because parties performed under terms of agreements, plaintiffs could not avoid terms of agreements on ground that promises made at beginning of agreements rendered agreements illusory. Non-signatories may be bound by arbitration agreement based on estoppel where they are seeking direct benefit from contract while trying to disavow arbitration provision.

Pre-existing tort claim commenced after domestic relations arbitration.

Chabiaa v Aljoris, 300390 (February 21, 2012). Under domestic relations arbitration agreement, arbitrator was to decide property division and support. After arbitration, Circuit Court entered judgment of divorce pursuant to award. The judgment provided that it resolved all pending claims and closed the case. Subsequently, plaintiff filed assault and battery complaint against defendant for events that preceded the arbitration. According to COA, scope of arbitration agreement did not include resolution of tort claims, and assault and battery cause of action could be brought in separate proceeding after domestic relations case and arbitration.

Arbitration submission language again strictly interpreted.

Midwest Mem Group, LLC v Singer, 301861, 301883 (February 14, 2012), lv dn ___ Mich ___ (2012). Defendants appealed Circuit Court order denying their motions to compel arbitration. Defendants maintained that language of arbitration provisions covered plaintiffs' allegations. COA in a convoluted and complicated opinion affirmed Circuit Court ruling that arbitration clauses did not cover controversy at issue.

Party did not waive its right to arbitration.

Flint Auto Auction, Inc v The William B Williams Sr Trust, 299552 (November 22, 2011). According to COA, party is prejudiced by inconsistent acts of other party when it has expended resources to litigate merits of its case. Plaintiff argued that it expended tremendous resources due to defendants' discovery requests. Defendants argued that plaintiff's burden was minimal. According to COA, party must expend more than just some time and resources in litigation to constitute sufficient prejudice. While plaintiff expended some effort responding to discovery requests, it had not exerted the level of effort COA had previously found to require waiver. In light of public policy favoring arbitration, plaintiff had not satisfied its burden of establishing waiver.

Order to compel arbitration vacated.

Gardella Homes, Inc v LaHood-Sarkis, 298332 (October 11, 2011). Construing the releases in the modification agreement with the promissory note, COA held that Circuit Court erred in holding that promissory note was subject to arbitration. Engrafting arbitration clause onto promissory note would contravene parties' intent to settle matter with a payment obligation that was not subject to defenses or counterclaims. Because promissory note did not contain arbitration clause, COA vacated Circuit Court's arbitration order.

Second union can be necessary party to labor arbitration.

Macomb Co v Police Officers Ass'n of Mich, 299436 (September 20, 2011), involved dispute between County, POAM, and MCPDSA regarding call-in priority for overtime. Arbitrator issued award in favor of POAM holding there had been no violation of POAM's CBA, and overtime call-in procedures were binding past-practice. COA concluded that MCPDSA was necessary party to the litigation. MCPDSA's CBA addressed call-in procedures, and arbitrator's jurisdiction could not extend to deciding terms of MCPDSA's CBA without MCPDSA being added as party to arbitration. To properly interpret POAM's CBA, it was necessary for arbitrator to consider other related CBAs. Because COA found that MCPDSA was necessary party to arbitration, it vacated Circuit Court order and remanded to arbitrator for further proceedings.

Party should have raised case evaluation issue with arbitrator.

In ***J L Judge Constr Services v Trinity Electric, Inc,*** 295783 (August 2, 2011), after case evaluation, parties agreed to arbitration. Defendants prevailed in arbitration so as to be arguably entitled to case evaluation costs. Instead of requesting these costs from arbitrator, defendants requested them from Circuit Court. AAA rules provided that award

may include attorneys' fees if they were authorized by law and arbitrator was entitled to assess fees. Despite authority to grant attorney fees, arbitrator held that parties were to bear their own fees. According to COA, defendants should have submitted the attorney fee issue to arbitrator.

Non-party cannot filed motion concerning arbitration award.

In ***Dubuc v Dep't of Environmental Quality***, 298712 (July 14, 2011), non-party attorney filed motion to modify arbitration award. Circuit Court granted motion. COA vacated Circuit Court's order indicating that it was impermissible for non-party to file motion in a case in which he was not a party.

Arbitration issue submission language again strictly interpreted.

Hantz Group, Inc v Van Duyn, 294699 (June 30, 2011). Plaintiffs alleged violations of non-solicitation agreements with defendant former-employees. COA ruled Circuit Court erred in ordering parties into arbitration. Non-solicitation agreements did not contain arbitration clauses. Only agreement to arbitrate was based on FINRA membership, and plaintiffs had not agreed to arbitrate claims arising out of non-solicitation agreements.

Arbitration remedy may preclude MERC order.

Flint v Police Officers Labor Council, 295913 (April 14, 2011), reversed MERC order in favor of charging parties. Flint argued that MERC should have dismissed ULP charges on basis of arbitration provisions in CBAs. COA agreed with Flint that matter was covered by CBA arbitration provisions. COA vacated MERC's order and remanded for further proceedings consistent with its opinion. On remand, it is MERC's responsibility to determine if alleged ULPs should be dismissed.

Federal Arbitration Act does not allow appeal of order to state court.

Midwest Memorial Group LLC v Citigroup Global Markets, Inc, 301867 (March 18, 2011), a Federal Arbitration Act, 9 USC 1 et seq, case, held that 9 USC 16(a)(1)(B) does not create right to appeal state court order denying arbitration to a state appellate court. 9 USC 16(a)(1)(B) only provides for appeal from order denying petition to order arbitration under 9 USC 4. 9 USC 4 only allows for petitions for arbitration to a United States District Court.

COA supports award concerning tenure and promotion.

Central Mich Univ Faculty Ass'n v Central Mich Univ, 293003 (February 10, 2010), involves tenure and promotion. University appealed Circuit Court order that vacated award denying grievance regarding grievant's application for promotion and remanding matter to arbitrator to consider grievant's application without consideration of quality of the works submitted for publication. University argued that Circuit Court erred in vacating award denying promotion grievance and remanding matter to arbitrator. COA held that because award drew its essence from CBA, Circuit Court's review of award

ceased, and Circuit Court erred in vacating and remanding award. COA indicated that it was noteworthy that Circuit Court did not articulate scope of judicial review of an award and did not make any statements indicating that it understood its limited role in reviewing award. According to COA, Circuit Court did not grasp concept of judicial deference in context of labor arbitration. Plaintiff Association cross-appealed portion of Circuit Court order confirming arbitrator's denial of grievance regarding tenure. COA affirmed Circuit Court order confirming award denying tenure.

Individual supervisor not covered by arbitration agreement.

In ***Riley v Ennis***, 290510 (February 25, 2010), lv dn ___ Mich App ___ (July 26, 2010), plaintiff brought employment discrimination case against only his individual supervisor. Defendant moved to dismiss because of arbitration agreement between plaintiff and non-party corporate employer. Circuit Court granted defendant's motion to dismiss the action. COA reversed, indicating that although defendant signed the employment contract, contract specified that he did so "For the Agency." According to COA, corporation can only act through its officers and agents. Arbitration agreement was applicable to corporate employer but not to individual supervisor.

Arbitration agreement may benefit non-signatory.

Lyddy v Dow Chemical Co, 290052 (January 19, 2010), found that terms of arbitration agreement, incorporating claims against any entity for whom or with whom GSI had done or might be doing work during time of employment, precluded plaintiff's suit against Dow. The issue was whether plaintiff's agreement with GSI required plaintiff to arbitrate his claims against Dow. COA held that, in certain instances, arbitration agreement may extend to persons who were not parties to agreement.

Labor arbitration retained jurisdiction supplemental award partially vacated.

In ***Police Officers Ass'n of Mich v Leelanau Co***, 285132 (November 10, 2009), COA partially vacated and partially confirmed labor arbitration award. Arbitrator ruled there was no just cause to terminate Sheriff's Deputy. Arbitrator required a psychological fitness for duty examination; and retained jurisdiction to resolve any issues concerning implementation of award. Circuit Court refused to vacate reinstatement order, but held arbitrator exceeded his authority by retaining jurisdiction providing for fitness for duty examination. COA basically affirmed Circuit Court. Concerning retention of jurisdiction, Article 6(E)(1)(a) of Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the FMCS, NAA, and AAA states: "Unless otherwise prohibited by agreement of the parties or applicable law, an arbitrator may retain remedial jurisdiction without seeking the parties' agreement. If the parties disagree over whether remedial jurisdiction should be retained, an arbitrator may retain such jurisdiction in the award over the objection of a party and subsequently address any remedial issues that may arise." Elkouri and Elkouri, How Arbitration Works, 6th Ed, pp 333-337; *CUNA Mut Ins Soc'y v Office & Prof'l Employees*, 443 F3d 556 (7th Cir 2006); and *Sterling China Co v Allied Workers*, 357 F3d 546 (6th Cir 2004). Concerning interest, Elkouri and

Elkouri, p 1219, indicates: "The modern view is that the award of interest is within the inherent power of an arbitrator, and in fashioning a 'make-whole' remedy it appears that a growing number of arbitrators are willing to exercise the discretion to award interest where appropriate." *St Joseph Co, Mental Health Facility*, 86 LA 305 (Howlett, 1985). COA did not discuss Code of Professional Responsibility for Arbitrators of Labor-Management Disputes or other authority concerning Arbitrator retaining jurisdiction.

Refusal to vacate FINRA award and sanctions granted.

Healey v Spoelstra, 281686, 288223 (October 22, 2009), refused to vacate FINRA award for $617,822 in damages and $75,766.67 for sanctions. Circuit Court refused to vacate award because plaintiffs' complaint was untimely in that it was filed more than 21 days after award was delivered to plaintiffs and there were no legal grounds to vacate. MCR 3.602(J)(2). COA affirmed Circuit Court's ruling that plaintiffs' grounds for moving to vacate were frivolous and in granting sanctions. MCL 600.2591. One lesson from this case includes filing notices of appeal by earliest interpretation of when they might be due, rather than latest interpretation. Another lesson from this case is that on occasion appellate court sanctions party appealing from an award.

Labor arbitration award involving lay-off return vacated.

Frankfort v Police Officers Ass'n of Mich, 286523 (September 15, 2009), arose out of City hiring new employee for a position rather than recalling an employee from prior layoff. Issue before arbitrator was whether or not previously laid off employee had recall rights in light of new CBA language. In a two (Meter and Murray) to one (Beckering) decision, COA vacated award and remanded matter to arbitrator. Dissent indicated that, if arbitrator erred in his analysis, arbitrator, in making the analysis, was interpreting provisions of CBA. Majority cited but distinguished *Mich Family Res, Inc v SEIU*, 475 F3d 746 (6th Cir 2007)(en banc). *Mich Family* is leading Sixth Circuit case on standard for reviewing labor arbitration awards. In *Mich Family*, Union appealed District Court's decision vacating award. Sixth Circuit reversed and directed District Court to enter order enforcing award because arbitrator was "acting within the scope of his authority," company had not accused arbitrator with fraud or dishonesty in making award, arbitrator was "arguably construing ... the contract" when he awarded employees a cost of living increase, and company had shown no more than that arbitrator made an error, perhaps even a "serious error," in interpreting CBA. *United Paperworkers Int'l Union v Misco*, 484 US 29, 38–39 (1987). *Mich Family* indicated that the following questions should be looked at in deciding whether to vacate a labor arbitration award. Did arbitrator act: "outside [the arbitrator's] authority" by resolving a dispute not committed to arbitration? Did arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing award? And in resolving legal or factual disputes in the case, was arbitrator "arguably construing or applying the contract"? As long as arbitrator does not offend any of these requirements, request for judicial intervention should be denied even though arbitrator made "serious," "improvident" or "silly" errors in resolving merits of dispute. *Mich Family* further indicated that arbitrator does not exceed arbitrator's

authority every time arbitrator makes an interpretive error. Arbitrator exceeds that authority only when CBA does not commit dispute to arbitration. Lesson from *City of Frankfort* is that on occasion Michigan appellate court might not give same deference to labor arbitration award as Federal court would under *Mich Family*.

Evaluation notification labor arbitration award vacated.

Northville Education Ass'n v Northville Public Schools, 287076 (August 20, 2009), vacated labor arbitration award and remanded matter to arbitrator. CBA required teacher be given prior notification of eligibility to opt for goal based evaluation. Because teacher was on maternity leave at time notification would have been given, School District did not give notification. Teacher was subsequently given less favorable and less flexible evaluation method and ultimately an individual improvement plan. Teacher grieved arguing that she should have received notification of more favorable goal based evaluation. Arbitrator denied grievance. According to arbitrator, teacher knew about goal based evaluation option because of her prior participation in it, and by not requesting it again, she was "estopped" from complaining about technical non-notification. Circuit Court found that arbitrator had added term to CBA and therefore exceeded his authority, and estoppel was inapplicable because terms of CBA did not permit equitable considerations of "estoppel." It is interesting that this is a case where labor organization, not employer, was party bringing action to vacate award.

COA confirms labor arbitration award.

Mich Ass'n of Police v Pontiac, 281353 (March 26, 2009), reversed vacatur of labor arbitration award. Grievant police officer was discharged for allegedly filing a false report. Arbitrator found that report was exaggerated but granted grievance and reinstated grievant because of "disparate treatment." Parties agreed award drew its essence from CBA. Employer argued that award violated public policy. COA held that Manual of Conduct is not law or legal precedent for purpose of creating "public policy." COA indicated: "public policy of not falsifying police reports will not be weakened by enforcing ... award as there is no evidence that when reinstated the grievant will falsify a report." COA issued similar public policy decision in ***Pontiac v Mich Ass'n of Police***, 280919 (February 19, 2009).

COA approves non-detailed arbitration award.

Mehl v Fifth Third Bank, 278977 (December 11, 2008), held arbitrator did not exceed arbitrator's authority because award did not contain detailed findings of fact and conclusions of law, setting forth arbitrator's reasoning.

COA rejects arbitration of post-CBA term grievance.

Grand Rapids Employees Ind Union v Grand Rapids, 280360 (October 16, 2008), lv dn ___ Mich ___ (June 3, 2009), held that Union cannot maintain right to compel arbitration of grievances where CBA excludes arbitration of grievances when administrative action is filed on same matter.

COA affirms Circuit Court orders favoring arbitration.

In the following cases COA affirmed orders ordering arbitration, confirming awards, or declining to vacate awards. ***Ellis v Ellis***, 321972 (August 6, 2015)(transcript); ***Martinez v Degiulio***, 321616 (July 30, 2015) (DRAA); ***Fremont Community Digester, LLC v Demoria Bldg Co, Inc***, 320336 (June 25, 2015); ***Bidasaria v Central Mich Univ***, 319596 (May 14, 2015); ***Andary v Andary,*** 319299 (February 10, 2015); ***Warren v Flint Community Schools***, 318825 (January 15, 2015); ***Wyandotte v POAM***, 318563 (January 13, 2015) (vacatur reversed); ***Lowry v Lauren Bienenstock & Associates Inc*** , 317516 (December 23, 2014) (agreement to arbitrate enforced); ***McAlpine v Donald A Bosco Bldg Inc***, 316323 (December 18, 2014); ***Theater Group 3, LLC v Secura Ins Co***, 317393 (November 13, 2014); ***Mastech v Bleichert, Inc***, 317467 (November 13, 2014); ***Israel v Putrus ,*** 316249 (November 4, 2014) (confirmation affirmed and sanctions granted); ***Ross v Ross***, 319576 (September 24, 2014); ***C&L Ward Bros Co v Outsource Solutions, Inc***, 315794 (September 2, 2014); ***Roty v Quality Rental, LLC***, 313056 (August 12, 2014); ***Brown v Titan Ins Co***, 315119 (July 24, 2014); ***Kosiur v Kosiur***, 314841 (April 22, 2014); ***Emrick v Menard Builders, Inc***, 314038 (April 17, 2014); ***Pugh v Crowley***, 313471 (April 8, 2014); ***Command Officers Ass'n of Sterling Heights v Sterling Heights***, 310977 (December 17, 2013); ***Taylor v Great Lakes Casualty Ins Co***, **308213** (September 19, 2013); ***Mager v Giarmarco, Mullins & Horton, PC***, 309235 (June 25, 2013); ***Holland v French***, 309367 (June 18, 2013) (Gleicher and Murphy [majority], O'Connell [dissent]); ***Yacisen v Woolery***, 308310 (May 30, 2013); ***Platt v Berris***, 297292 and 298872 (April 23, 2013); ***Derwoed v Wyandotte***, 308051 (April 16, 2013) (CBA); ***California Charley's Corp v Allen Park***, 295575, 295579 (April 9, 2013); ***Herman J Anderson, PLLC v Christ Liberty Ministry***, 307931 (March 14, 2013); ***Haddad v KC Property Service, LLC***, 306548 (February 21, 2013); ***Detroit v Detroit Police Officers Ass'n***, 306474 (February 12, 2013); ***Suchyta v Suchyta***, 306551 (December 11, 2012); ***James D Campo, Inc v Trevis***, 305112 (December 4, 2012); ***Wendy Sabo & Associates, Inc v Am Associates, Inc***, 305575 (December 4, 2012); ***Rouleau v Orchard, Hiltz and McCliment, Inc***, 308151 (October 25, 2012); ***Vandekerckhoue v Scarfore***, 301310 (October 11, 2012); ***Bies-Rice v Rice***, 295631, 295634, 300271 (September 4, 2012) , lv den, ___ Mich ___ (2013); ***Piontkowski v Marvin S Taylor, DDS, PC,*** 303963 (July 10, 2012) (Gliecher, M J Kelly, and Boonstra[dissent]); ***Kutz v Kutz***, 300864 (May 1, 2012); ***Turkal v Schartz***, 303574 (April 17, 2012); ***MacNeil v MacNeil***, 301849 (March 15, 2012); ***Leverett v Delta Twp***, 302557 (March 15, 2012); ***Olabi v Alwerfalli and Mfg Eng Solutions, Inc***, 300541 March 13, 2012); ***Suszek v Suszek***, 299167 (February 28, 2012); ***Armstrong v Rakecky***, 301423 (February 21, 2012)*; **Hantz Financial Services, Inc v Monroe***, 301924 (January 24, 2012); ***CCS, LLC v IWI Ventures, LLC***, 300940 (January 24, 2012); ***Frankfort v Police Officers Ass'n of Mich, Inc***, 298307 (October 18, 2011),

lv dn ___ Mich ___ (2012); ***McDonald Ford, Inc v Citizens Bank & Citizens Banking Corp***, 296814, 299324 (September 27, 2011); ***Bird v Oram***, 298288 (September 27, 2011); ***Souden v Souden***, 297676, 297677, 297678 (September 20, 2011) (remand for clarification); ***Reynolds v Parklane Investments, Inc***, 298777 (September 20, 2011); ***Police Officers Ass'n of Mich v Lake Co***, 298055 (August 11, 2011) (Saad [dissent], Jansen, and Donofrio); ***Oakland Co v Oakland Co Deputy Sheriff's Ass'n***, 297022 (August 9, 2011)*; **J L Judge Constr Services v Trinity Electric, Inc***, 295783 (August 2, 2011); ***Cumberland Valley Ass'n v Antosz***, 294799 (May 26, 2011) (postponement of arbitration hearing request issue); ***Roosevelt Park v Police Officers Labor Council***, 295588 (May 12, 2011) , lv den___ Mich ___ (2011) (vacation reversed); ***Schroeder v Muller Weingarten Corp***, 296420 (April 26, 2011); ***WHRJ, LLC v Taylor***, 295299 (March 29, 2011) (vacatur reversed); ***Wilson Motors Inc v Credit Acceptance Corp***, 295409 (March 22, 2011); ***Smaza v ARS Investments***, 293933 (March 15, 2011); ***Sharonann v WHIC-USA, Inc***, 295800 (March 10, 2011); ***Detroit Police Officers Ass'n v Detroit***, 293510 (February 15, 2011); ***Nat'l Environmental Group, LLC v Landfill Avoidance Sys, LLC***, 292454 (January 20, 2011); ***Kulongowski v Brower***, 293996 (November 9, 2010); ***Select Construction Co, Inc v LaSalle Group, Inc***, 293143 (November 2, 2010); ***Merkel v Lincoln Consolidated Schools***, 292795 (October 19, 2010); ***Cipriano v Cipriano***, 289 Mich App 361; 808 NW2d 230 (2010), lv dn ___ Mich ___ (2012); ***Putruss v Mary A & Edward P O'halloran Trust***, 291160 (August 5, 2010); ***EnGenius, Inc v Ford Motor Co***, 290682 (July 29, 2010); lv gtd, 488 Mich 1052; 794 NW2d 615 (2011); ***Realty v MLP Enterprises, Inc***, 289598 (June 17, 2010); ***Joseph Chevrolet, Inc v Hunt***, 290882 (June 8, 2010) (vacatur reversed); ***Gonzalez v Ecopro Recycling, Inc***, 285376 (April 22, 2010); ***Rubenfaer v PHC of Mich, Inc***, 289044 (April 20, 2010); ***Crowley v Crowley***, 288888 (April 15, 2010); ***Pontiac v Pontiac Firefighters Local 376***, 289866 (March 18, 2010); ***Center Line v Police Officers Ass'n***, 289248 (February 9, 2010) (affirmed orders denying motions to vacate); ***Considine v Considine***, 283298 (December 15, 2009); ***Washington v Washington***, 283 Mich App 667; 770 NW2d 908 (2009); and ***Harleysville Lake States Insurance Co v Kangas***, 282500 (April 21, 2009).

III. MEDIATION

A. Michigan Supreme Court Decisions

Mediated agreement concerning parental rights.

In re Wangler/Paschke, ___ Mich ___, (April 1, 2015) (SC 149537), granted leave to appeal from ***In re Wangler/Paschke***, 305 Mich App 438 (May 27, 2014). Parties were ordered to brief (1) meaning of phrase "dispositional order" within context of termination of parental rights proceeding; (2) whether termination order constituted the first dispositional order; and (3) whether and to what extent collateral attack analysis in *In re Hatcher*, 443 Mich 426 (1993), extends to respondent's due process challenge. In ***In re Wangler/Paschke***, 305 Mich App 438 (2014) (Hoestra and Sawyer [majority]; Gleicher [dissent]), parties entered into mediated agreement. Respondent failed to comply with mediated ordered services. Pursuant to agreement, Circuit Court accepted her plea and took jurisdiction over minor children. Respondent's attorney agreed that mediation agreement authorized court to take jurisdiction over children. Court stated it was taking

"formal jurisdiction" and authorized petitioner to file supplemental petition asking for termination of respondent's parental rights. On appeal, respondent argued that her written plea that was incorporated into mediation agreement was invalid and could not form basis for court to take jurisdiction over children. Court ordered parties to engage in mediation immediately after preliminary hearing wherein it found probable cause to authorize the petition and ordered temporary placement of children. During mediation, parties negotiated agreement that was signed by all participants, including respondent. Agreement set forth consequences of court's acceptance of respondent's admission plea.

Judge Gleicher's dissent indicated that before court may exercise jurisdiction based on parent's plea it must satisfy itself that parent knowingly, understandingly, and voluntarily waived certain rights. MCR 3.971(C)(1). No dialogue between court and parent had occurred. The mediation employed as a substitute for the adjudicative trial improperly bypassed due process MCR protections, and Circuit Court never obtained jurisdiction.

Supreme Court denies leave to appeal in "pressure to settle" case.

Vittiglio v Vittiglio, 493 Mich 936; 825 NW2d 584 (2013), denied leave to appeal from ***Vittiglio***, 297 Mich App 391 (2012). In *Vittiglio* COA affirmed Circuit Court's holding that audio recorded settlement agreement at mediation session was binding and "a certain amount of pressure to settle is fundamentally inherent in the mediation process." COA affirmed Circuit Court's holding that plaintiff was liable for sanctions because plaintiff's motions were filed for frivolous reasons and Circuit Court did not abuse its discretion in awarding costs and attorney fees.

Confidentiality in mediation.

Detroit Free Press Inc v Detroit, 480 Mich 1079; 744 NW2d 667 (2008), held that Circuit Court did not abuse its discretion when it dissolved non-disclosure provision and permitted disclosure of deposition. Justice Kelly's concurring opinion indicated "[a]ny communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties." MCR 2.411(C)(5). Although deposition recited "statements made during mediation," City did not argue for redaction. Because City did not argue for redaction, Circuit Court did not abuse its discretion in not ordering it.

B. Michigan Court of Appeals Published Decisions

C. Michigan Court of Appeals Unpublished Decisions

Mediated agreement not binding contract.

In split decision, ***Control Room Technologies, LLC v Waypoint Fiber Networks, LLC***, 320553 (April 28, 2015), held that Circuit Court erred in concluding that mediated settlement agreement was binding contract. Majority decision indicated considering essential terms that were omitted from settlement agreement, and circumstances surrounding its execution, the three-page handwritten settlement agreement was so cursory in its treatment of complex matters that parties did not intend document to be

binding contract. Circuit Court erred in concluding that settlement agreement was enforceable contract.

Dissent indicated the settlement agreement was sufficiently definite to be an enforceable contract. Agreement was not a three page document. It incorporated a 50 page plus document. The incorporated document provided essential terms for agreement.

Repeated challenges to mediated agreement sanctionable.

Annis v Annis, 319577 (April 16, 2015), affirmed Circuit Court's finding that plaintiff's challenges to binding nature of mediated settlement agreement, even after Circuit Court found it enforceable, violated MCR 2.114(D)(2), and affirmed Circuit Court's awarding of sanctions for this violation.

Unsigned mediated settlement agreement not enforced.

Central Warehouse Operations, Inc v Riffell, 319183 (March 24, 2015). Parties negotiated oral settlement agreement with aid of "facilitator." Parties' attorneys were not present at that "meeting," and agreement was not reduced to writing. According to COA, while parties acknowledged some form of agreement was made, agreement was nothing more than agreement to agree and not enforceable settlement agreement.

COA sets aside mediated settlement agreement.

Heiden v Heiden, 318245 (February 26, 2015), vacated mediation agreement. Before their marriage, parties signed "antenuptial agreement" describing husband's premarital personal injury lawsuit settlement as his separate property. Twenty-four years later, wife filed for divorce. According to COA, Circuit Court incorrectly ruled that antenuptial agreement applied only in event of death, not divorce. Matter then proceeded to mediation after this incorrect legal conclusion. Parties failed to consider during mediation whether disputed property belonged to husband alone or became part of marital estate. Parties reached mediation agreement predicated on inaccurate description of their separate and marital property. Property division and spousal support award disparately favored wife. Judgment was entered reflecting this agreement. COA vacated property division and spousal support award in judgment and remanded to Circuit Court to set aside mediation agreement. Circuit Court must accept that antenuptial agreement applies to this divorce proceeding.

Undisclosed pregnancy at mediation.

Cieslinski v Cieslinski, 319609 (November 13, 2014). held that Circuit Court should have set aside consent judgment when husband alleged that (1) wife deliberately withheld information that she was pregnant with another man's child before he signed consent judgment of divorce, and (2) knowledge of her pregnancy would have affected his decision to sign consent judgment because he would have been concerned about wife's ability to properly parent children. Circuit Court abused its discretion when it failed to hold evidentiary hearing after husband in essence alleged that wife fraudulently obtained consent judgment. *Kiefer v Kiefer*, 212 Mich App 176; 536 NW2d 873 (1995).

Incomplete mediated agreement not enforced.

Kendzierski v Macomb Co, 316508 (September 23, 2014), held that signed mediated settlement agreement that resolved only damages issue but left unresolved other issues was not enforceable. **This case is must read for those interested in how to make sure there is enforceable agreement.** According to COA, court cannot force parties to settle lawsuits and cannot make contract for parties where there is no contract. Plaintiffs failed to establish that contract to settle dispute existed. Mere discussions and negotiation, including unaccepted offers, cannot be substituted for requirements of contract. Even if valid oral contract to settle dispute resulted during "facilitation," it was not enforceable because agreement was not made in open court and written evidence of agreement to settle case, subscribed by defendant or its attorney, did not exist. MCR 2.507(G).

Mediated settlement agreement enforced.

In ***Faustina v Town Center***, 311385 (August 7, 2014), mediation agreement was reached. When plaintiff failed to comply with agreement, plaintiff testified at motion hearing that she signed agreement, but her medical bills, which she had tried to show the attorneys, were not taken into account. Circuit Court held that agreement was binding, ordered plaintiff to sign release of claims, and ordered that defendants were not required to turn over settlement checks until plaintiff signed a release, and dismissed case with prejudice. Since there was meeting of minds as to agreement's essential terms, COA held there was no abuse of discretion in Circuit Court's order enforcing settlement agreement.

Mediated agreement set aside by COA.

Hayes v Morris, 315586 (July 29, 2014). Parties were ordered to domestic relations mediation. MCR 3.216. Parties reached settlement that provided for largely equal division of marital estate. No judgment based on agreement was entered. Then husband died. In *Tokar v Albery*, 258 Mich App 350; 671 NW2d 139 (2003), parties, during divorce proceedings, submitted property issues to binding arbitration. After filing of award but before entry of judgment, husband died. *Tokar* held that trial court correctly denied motion to enforce award because "trial court retains ultimate control over a divorce action" and "award, standing alone, does not have full force and effect unless and until the trial court enters a judgment of divorce based on that award." Court mentioned two possible exceptions under which award could be enforced: (1) if entry of judgment would have been "ministerial" and (2) if decedent had acted in reliance on award. Court found that entry of judgment would not have been "ministerial" because, in part, there were issues of furnishings remaining and before the judgment of divorce was entered, parties had option to reconcile or stipulate to an agreement different from the award. The same reasoning held true in the present case. Court found no reliance by decedent. To show reliance, meaningful proof of conduct indicating parties in good faith believed they were divorced is required. Such reliance had not been shown in this case.

Mediation in parental rights case.

In re Vanalstine, Minors, 312858 (April 11, 2013). Circuit Court ordered parties to participate in mediation, which resulted in mediation agreement concerning parental rights to minor children. Eventually mother did not comply with agreement and Court terminated her parental rights. COA indicated that contrary to mother's assertion, Circuit Court did not terminate her parental rights solely for her failure to comply with agreement. Circuit Court's decision was based on mother's conduct, which included but was not limited to her failure to comply, and which led to Circuit Court's assessment of the statutory termination factors. COA found it unnecessary to resolve whether defense of impossibility could render such an agreement void or voidable.

Post arbitration-mediation conduct of arbitrator-mediator.

Hartman v Hartman, 304026 (August 7, 2012), concerned same individual serving as arbitrator and mediator and post-arbitration/mediation conduct of arbitrator-mediator and defense counsel. Circuit Court ordered parties to mediation. When mediation failed, parties agreed to arbitrate using mediator as arbitrator. Arbitrator issued some awards covering minor issues. Before arbitration on major issues, parties agreed to again mediate utilizing arbitrator as mediator. This mediation failed. Parties then reached settlement agreement on their own. At entry of judgment hearing, plaintiff stated that he had concerns about arbitrator acting as neutral. He did not ask to have settlement agreement set aside. The final judgment hearing was continued for four weeks. Plaintiff's counsel contacted arbitrator to inform arbitrator of the dates. Arbitrator informed plaintiff's counsel that arbitrator was going to be in Florida and staying at home of defense counsel while defense counsel would also be present. Plaintiff's counsel then contacted defense counsel to request a new arbitrator to handle remaining issues. Defense counsel refused the request.

Plaintiff filed motions to remove arbitrator, have new arbitrator appointed, and obtain relief from settlement agreement. Defendant argued that arbitration awards were moot because settlement had been reached. Defense counsel argued that what occurred between himself and arbitrator was hospitality and that numerous attorneys, including judges, had stayed at defense attorney's Florida home. Circuit Court denied plaintiff's motion, stating that there was no appearance of impropriety because parties ultimately reached settlement agreement and that trip to Florida occurred 30 days after mediation. A judgment of divorce was entered. Circuit Court held that there was no evidence of clear or actual bias by arbitrator and no evidence to prove that what occurred between arbitrator and defense counsel rose to level of clear actual partiality.

COA affirmed Circuit Court's denial of plaintiff's motion to set aside settlement agreement and judgment of divorce. COA stated that:

> The totality of the circumstances in the case at bar rises to a level that would have required the arbitrator to be removed from arbitrating or mediating the remaining matters. However, the final matters that remained outstanding at the time of the arbitrator's and defense counsel's vacation together were settled by the judge. The arbitration awards issued before

> the settlement agreement became moot because the settlement agreement handled those matters. The only issue not moot is whether the settlement agreement can be set aside. We find that it cannot. … .

Hartman is an interesting case concerning Circuit Court's refusal to set aside settlement agreement and judgment of divorce on basis of alleged apparent conduct committed by arbitrator-mediator, especially where, according to COA, "totality of the circumstances … rises to a level that would have required the arbitrator to be removed from arbitrating or mediating the remaining matters."

The post-arbitration-mediation conduct in *Hartman* raises issues under several conduct guidelines for neutrals. For example, prior to February 1, 2013, the Michigan Supreme Court State Court Administrative Office Standards of Conduct for Mediators indicated:

> (4) Conflict of Interest … (b) The need to protect against conflicts of interest also governs **conduct that occurs … after the mediation**. A mediator must avoid the appearance of conflict of interest … **after the mediation.** Without the consent of all parties, a mediator **shall not subsequently** establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances that would raise legitimate **questions** about the integrity of the mediation process. A mediator **shall** not establish a personal or intimate relationship with any of the parties that would raise legitimate **questions** about the integrity of the mediation process. Emphasis added.

Since February 1, 2013, the Michigan Supreme Court State Court Administrative Office Mediator Standards of Conduct Standards has indicated:

> **Standard III. Conflicts of Interest**
> A. A mediator should avoid a conflict of interest or the appearance of a conflict of interest **both during and after mediation**. A conflict of interest is a dealing or relationship that could reasonably be viewed as creating an **impression of possible** bias or as raising a **question** about the impartiality or self-interest on the part of the mediator. …
> G. In considering whether establishing a personal or another professional relationship with any of the **participants after the conclusion of the mediation process** might create a **perceived** or actual conflict of interest, the mediator should consider factors such as time elapsed since the mediation, consent of the parties, the nature of the relationship established, and services offered. Emphasis added.

The Model Standards of Conduct for Mediators (September 2005) of the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution states:

> STANDARD III. CONFLICTS OF INTEREST …

> F. **Subsequent to a mediation**, a mediator **shall** not establish another relationship with any of the participants in any matter that would raise **questions** about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations **following a mediation** in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships **might** create a **perceived** or actual conflict of interest. Emphasis added.

The Code of Ethics for Arbitrators in Commercial Disputes (March 1, 2004) indicates:

> CANON I: AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS. …
> C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. **For a reasonable period of time after the decision of a case**, persons who have served as arbitrators **should** avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the **appearance** that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. … . Emphasis added.

It is not clear from *Hartman* whether plaintiff argued that his negotiating positions in reaching "settlement agreement" were influenced by arbitrator's prior arbitration decisions and/or mediator's viewpoints and comments. To degree there was a relationship between plaintiff's negotiating positions and the arbitration decisions and mediation process, question exists whether plaintiff was entitled to make settlement decisions in an environment without prior arbitration decisions and mediator comments that came from a neutral whose post arb-med conduct raised alleged apparent standards of conduct issues.

Circuit court can enter judgment on mediation agreement.

Unit 67, LLC v Hudson, 303398 (June 7, 2012), affirmed Circuit Court entry of consent judgment because defendant had agreed to terms of property consent judgment and mediator did not engage in fraudulent conduct.

Mediation agreement evidenced parties' mutual intent.

Roe v Roe, 297855 (July 19, 2011), held that mediation agreement evidenced mutual intent of parties to value retirement assets and was enforceable. Property settlement provisions in divorce judgment typically are final and cannot be modified by court.

Mediation resolution does not deprive court of its authority and obligations.

In re BJ, 296273 (January 20, 2011), held that MCR 3.216 domestic relations mediation is not binding but is subject to acceptance or rejection by parties. Parents' utilization of ADR does not deprive court of its Child Custody Act, MCL 722.23, authority and obligations.

Circuit Court cannot order PPO to mediation.

In ***Baker v Holloway***, 288606 (January 26, 2010) ("Suppressed"], respondent appealed Circuit Court order denying her motion to terminate *ex parte* PPO. Instead of having a hearing on merits of whether PPO should have been terminated, respondent was ordered to mediate her dispute with petitioner. Respondent claimed Circuit Court erred by requiring her to mediate because she was entitled to prompt hearing on merits of PPO. COA held that mediation may not be required as condition to having a hearing on merits of PPO. COA vacated order denying respondent's motion to terminate PPO and remanded for evidentiary hearing to determine whether PPO should be terminated.

Court rejects mediation custody agreement.

In ***Roguska v Roguska***, 291352 (September 29, 2009), a domestic relations mediation, MCR 3.216, *et seq*, case involving custody, COA held that Circuit Court did not err in rejecting parties' mediated agreement concerning custody, finding that no custodial environment existed with respect to one of parties' children, and applied proper standard in evaluating custody factors. Defendant argued that Circuit Court erred by rejecting parties' mediated agreement regarding custody. Parties negotiated mediation settlement agreement that was signed by mediator, both parties, and their attorneys. Circuit Court held hearing and heard testimony that agreement existed regarding custody, parenting time, property and child support. Parties stated that consent judgment was consistent with mediated agreement. However, during hearing, plaintiff testified that she thought defendant was "lying" during mediation. Circuit Court rejected agreement regarding custody, and Court set a trial date. COA held that Circuit Court is not bound by parties' agreements regarding child custody. Regardless of existence of agreement, Child Custody Act (CCA), MCL 722.21 *et seq*, requires Circuit Court to determine independently the custodial placement that is in best interests of children, because statutory best interest factors are paramount when court enters order affecting custody. Circuit Court did not act erroneously while exercising its discretion or applying law to set aside custody portion of agreement. Circuit Court's apparently hearing testimony concerning statements made during mediation might be considered in light of MCR 3.216(H)(8) which provides that:

> Statements made during the mediation … may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to (a) the report of the mediator under subrule (H)(6), (b) information reasonably required by court personnel to administer and evaluate the mediation program, (c) information necessary for the court to

resolve disputes regarding the mediator's fee, or (d) information necessary for the court to consider issues raised under MCR 2.410(D)(3) or 3.216(H)(2).

Public body mediation and Open Meetings Act.

In ***Hunt v Green Lake Twp***, 283524 (May 21, 2009), Township failed to have its entire Board of Trustees at mediation; and failed to submit pre-mediation written position submission as required by pre-trial order. COA held Township made good faith attempt to comply with mediation attendance requirements by having some Board members present because full membership attendance would have created public meeting under Open Meetings Act. MCL 15.261, *et seq*. COA further held Township's failure to provide mediation submission did not materially harm plaintiff because Township had adequately previously provided plaintiff with rational for its position.

Mediation settlement binding.

In ***Miller v Miller***, 282997 (March 24, 2009), a domestic relations case, parties signed mediated settlement agreement. Plaintiff moved to set aside agreement arguing she was tricked by her attorney, she misunderstood agreement, and agreement gave other party unconscionable advantage. Circuit Court denied motion and COA affirmed.

Lee Hornberger is an arbitrator and mediator in Traverse City, Michigan. He received the George N. Bashara, Jr. Award from the State Bar of Michigan's Alternative Dispute Resolution Section in 2014 in recognition of exemplary service. He is a member of the State Bar of Michigan's Representative Assembly and Alternative Dispute Resolution Section Council, Editor of *The ADR Quarterly*, Chair of the ADR Committee of the Grand Traverse-Leelanau-Antrim Bar Association, a former President of the Grand Traverse-Leelanau-Antrim Bar Association, and Chair of the Traverse City Human Rights Commission. He is an arbitrator with the American Arbitration Association, Federal Mediation and Conciliation Service, Financial Industry Regulatory Authority, Forum, Michigan Employment Relations Commission, and National Futures Association. He is a Hearing Officer, Grand Traverse Band of Ottawa and Chippewa Indians; and on the Hearing Officer list, Little Traverse Bay Bands of Odawa Indians. He can be reached at 231-941-0746 and leehornberger@leehornberger.com .

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