MICHIGAN ARBITRATION, CASE EVALUATION, AND MEDIATION 2011-2012 CASE LAW UPDATE

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I. INTRODUCTION

This article supplements "Michigan Arbitration, Case Evaluation, and Mediation 2010-2011 Case Law Update," *Labor and Employment Lawnotes* (Summer 2011), by reviewing significant Michigan cases concerning arbitration, case evaluation, and mediation issued since May 2011. For the sake of brevity, this article uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

II. ARBITRATION

A. Michigan Supreme Court Decisions

There do not appear to have been any Michigan Supreme Court decisions concerning arbitration during the review period.

B. Michigan Court of Appeals Published Decisions

1. Court determines whether contract to arbitrate exists

In ***36th Dist Ct v Mich Am Fed of State Co and Muni Employees***, 295 Mich App 502 (2012) (Murray, Talbott, and Servitt), one issue was whether the term of the CBA had ended, and therefore no contract to arbitrate existed, when the court officers were not reappointed. Although some issues survive expiration of a CBA, the right to only be terminated for just cause does not extend beyond the term of the CBA. The Court of Appeals ruled that the Circuit Court erred in ruling that the arbitrator should decide whether the CBA had terminated. The grievances were properly subject to arbitration.

Because the CBA did not abrogate the Chief Judge's statutory or constitutional authority to appoint court officers, the arbitrator exceeded his jurisdiction by requiring the Chief Judge to re-appoint the grievants to their former positions.

2. **Arbitration clause does not cover CRA cause of action**

Hall v Stark Reagan, PC, 294 Mich App 88, (2011) (Kelly [dissent], Gleicer, and Stephens), lv gtd 491 Mich 891 (2012). Plaintiff ex-employees alleged that defendants violated the Civil Rights Act, MCL 37.2101 *et seq*, by discriminating against them. The Circuit Court held that an arbitration agreement barred the lawsuit. The employees argued the arbitration clause in the Shareholder Agreement did not apply to the dispute. The Court of Appeals indicated that the Shareholder Agreement made no mention of any relationships between the parties other than those impacted by the disposition of stock and reversed the Circuit Court decision that had ordered arbitration.

Judge Kelly's dissent opined that the Circuit Court properly ordered arbitration and that the Shareholder Agreement was inextricably linked to plaintiffs' claims.

3. Offsetting decision-maker biases can arguably create neutral tribunal

White v State Farm Fire and Cas Co, 293 Mich App 419 (2011) (Borrello, Meter, and Shapiro [concurring]), was not an arbitration case. It discussed whether a MCL 500.2833(1)(m) appraiser who receives a contingency fee for an appraisal is sufficiently neutral. The Court of Appeals 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), quoting *Tate v Saratoga S & L Ass'n*, 216 Cal App 3d 843, 852 (1989), disapproved of on other grounds by *Advanced Micro Devices*, *Inc v Intel Corp*, 9 Cal App 4th 362; 885 P2d 994 (1994).

C. Michigan Court of Appeals Unpublished Decisions

1. Strict interpretation of arbitration agreement

Wireless Toyz Franchise, LLC v Clear Choice Commc'n, Inc, 303619 (May 31, 2012) (Cavanagh, Fort Hood, and Servitto [dissent]). The Court of Appeals reversed the Circuit Court order denying a motion to vacate an arbitration award. The stipulated order to submit the case to arbitration and the arbitration agreement provided that only claims filed and pending in the Circuit Court at the time the arbitration agreement was entered into were properly before the arbitrator. The arbitrator exceeded his authority when he considered the issue of whether defendants engaged in innocent misrepresentation that induced plaintiff to enter into the franchise relationships. According to the Court of Appeals, MCR 2.118(C)(1), "issues not raised by the pleadings are tried by express or implied consent of the parties," applied to trials, not arbitrations.

2. Arbitration PTO award vacated

MSX Int'l Platform Services v Hurley, 300569 (May 22, 2012) (Owens, Jansen [dissent], and Markey), reversed the Circuit Court's denial of a motion to vacate an award. The issue was whether the employer's written PTO policy granted the employee a vested right to PTO. The Court of Appeals found nothing in the 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 the employee

to PTO. Judge Jansen dissented, indicating that whether an arbitrator's interpretation of a contract is wrong is irrelevant.

3. Another strict interpretation of arbitration agreement issue submission

Cohen v Park West Galleries, Inc, 302746 (April 5, 2012) (Murphy, Hoesktra, and Murray [concurring/dissent]). Plaintiffs appealed the Circuit Court's ruling that all of plaintiffs' claims were subject to an arbitration agreement. The Court of Appeals held that the 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 the language of the agreements that contained the arbitration clause did not reference past purchases.

4. Vacating of domestic relations arbitration award reversed

In ***MacNeil v MacNeil***, 301849 (March 15, 2012) (O'Connell, Sawyer, and Talbot), plaintiff appealed the successor Circuit Court judge's order vacating a domestic relations arbitration award. The Court of Appeals reversed. According to the Court of Appeals, the successor judge misconstrued the arbitrator's assessment of witness credibility as an indication that the arbitrator was prejudiced against defendant, and the successor judge incorrectly determined that the arbitrator was required to reopen the proofs to receive additional evidence of defendant's change in circumstances.

5. Non-signatories sometimes subject to arbitration agreement

Tobe v AXA Equitable Life Ins Co, 298129 (February 21, 2012) (Servitto, Talbot and K F Kelly), affirmed the Circuit Court's order compelling plaintiffs to submit their claims to arbitration. Because the parties performed under the terms of the agreements,

plaintiffs could not avoid the terms of the agreements on the ground that the promises made at the beginning of the agreements rendered the agreements illusory. Non-signatories may be bound by an arbitration agreement based on estoppel where they are seeking a direct benefit from the contract while trying to disavow the arbitration provision.

6. Pre-existing tort claim commenced after domestic relations arbitration

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

7. Arbitration submission language again strictly interpreted

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

8. **Party did not waive its right to arbitration**

Flint Auto Auction, Inc v The William B Williams Sr Trust, 299552 (November 22, 2011) (Murphy, Beckering and Krause). According to the Court of Appeals, a party is prejudiced by inconsistent acts of the other party when it has expended resources to litigate the 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 the Court of Appeals, a 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 the Court of Appeals had previously found to require waiver. In light of the public policy favoring arbitration, plaintiff had not satisfied its burden of establishing waiver.

9. Order to compel arbitration vacated

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

10. **Second union can be necessary party to labor arbitration**

Macomb Co v Police Officers Ass'n of Mich, 299436 (September 20, 2011) (Sawyer, Jansen, and Wilder). This case involved a labor dispute between the County,

POAM, and MCPDSA regarding call-in priority for overtime. The arbitrator issued an award in favor of POAM holding there had been no violation of any provision of POAM's CBA, and the overtime call-in procedures were a binding past-practice. The Court of Appeals concluded that MCPDSA was a necessary party to the litigation. MCPDSA's CBA specifically addressed call-in procedures, and the arbitrator's jurisdiction could not extend to deciding the terms of MCPDSA's CBA without MCPDSA being added as a party to the arbitration. To properly interpret POAM's CBA, it was necessary for the arbitrator to consider other related CBAs. Because the Court of Appeals found that MCPDSA was a necessary party to the arbitration, it vacated the Circuit Court order and remanded to the arbitrator for further proceedings.

11. Non-party cannot filed motion concerning arbitration award

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

12. **Arbitration issue submission language again strictly interpreted**

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

13. Court of Appeals affirms Circuit Court orders favoring arbitration

In the following cases the Court of Appeals affirmed orders ordering arbitration or declining to vacate awards. *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) (Meter, Servittot, and Stephens); *Turkal v Schartz*, 303574 (April 17, 2012) (Kelly, Fitzgerald, and Donofrio); *Leverett v Delta Twp*, 302557 (March 15, 2012) (Krause, Donofrio, and Fort Hood); *Olabi v Alwerfalli and Mfg Eng Solutions, Inc*, 300541 March 13, 2012) (Saad, Kelly, and Kelly); *Suszek v Suszek*, 299167 (February 28, 2012)(Saad, K F Kelly, and M J Kelly); *Armstrong v Rakecky*, 301423 (February 21, 2012) (Saad, K F Kelly, and M J Kelly*); Hantz Financial Services, Inc v Monroe,* 301924 (January 24, 2012) (Sawyer, Whitbeck and M J Kelly) (FINRA statute of limitations case); *CCS, LLC v IWI Ventures, LLC*, 300940 (January 24, 2012) (Shapiro, Whitbeck, and Gleicher); *Frankfort v Police Officers Ass'n of Mich, Inc*, 298307 (October 18, 2011) (M J Kelly, Fitzgerald, and Whitbeck), lv dn ___ Mich ___ (2012), (labor arbitration award); *McDonald Ford, Inc v Citizens Bank & Citizens Banking Corp*, 296814, 299324 (September 27, 2011) (Shapiro, Wilder, and Murray); *Bird v Oram*, 298288 (September 27, 2011) (M J Kelly, Owens, and Borrello); *Souden v Souden*, 297676, 297677, 297678 (September 20, 2011) (M J Kelly, Owens, and Borrello) (remand for clarification); *Reynolds v Parklane Investments, Inc*, 298777 (September 20, 2011) (Murphy, Fitzgerald, and Talbot); *Police Officers Ass'n of Mich v Lake County*, 298055 (August 11, 2011) (Saad [dissent], Jansen, and Donofrio) (reinstatement enforcement); *Oakland Co v Oakland Co Deputy Sheriff's Ass'n*, 297022 (August 9, 2011) (Fitzgerald, Sawyer,

and Beckering) (pension-service credits*); J L Judge Constr Services v Trinity Electric, Inc*, 295783 (August 2, 2011) (Sawyer, Markey, and Fort Hood)(case evaluation sanctions); *Cumberland Valley Ass'n v Antosz*, 294799 (May 26, 2011) (Owens, Connell, and Meter) (postponement of arbitration hearing request issue); *Roosevelt Park v Police Officers Labor Council,* 295588 (May 12, 2011) (Sawyer, Whitbeck, and Wilder), lv den___ Mich ___ (2011) (Circuit Court order vacating arbitration award reversed by Court of Appeals).

III. MCR 2.403 CASE EVALUATION

A. Michigan Supreme Court Decisions

There do not appear to have been any Michigan Supreme Court decisions concerning case evaluation during the review period.

B. Michigan Court of Appeals Published Decisions

1. Extremely important required reading attorney fee case

Van Elslander v Thomas Sebold & Assocs, Inc, ___ Mich App ___, 301822 (June 28, 2012) (Talbot, O'Connell, and Sawyer),), lv den___ Mich ___ (2012), and *Smith v Khouri*, 481 Mich 519 (2008), should be carefully studied concerning hourly rates, fee agreements, time sheets, case evaluation, and attorney fee petitions. Plaintiff appealed the award of case evaluation costs of $776,076.48. The Court of Appeals affirmed in part and reversed in part. Plaintiff rejected the $173,500 case evaluation. The first jury trial resulted in a $680,838.82 award for plaintiff. Defendants appealed. The Court of Appeals reversed and remanded. The second jury trial resulted in a no cause of action verdict for defendants. Plaintiff contested the case evaluation costs award, arguing that the issue tried on remand was not comparable to the issues originally submitted for

case evaluation and that the favorable outcome he obtained at the first trial should preclude an award of costs. The Court of Appeals affirmed the granting of costs.

The Court of Appeals exhaustively discussed the Circuit Court's rulings concerning recovery of (a) expert witness fees, (b) appeal bond costs, (c) transcript costs from the first trial, (d) deposition transcript costs, (e) deposition witness preparation costs, (f) non-dispositional motion fees, and (g) subpoena fees. The Court of Appeals remanded the case to the Circuit Court on some of these miscellaneous issues.

Michigan Court of Appeals Unpublished Decisions

1. Sometimes the first will be the last

In ***Shafer Redi-Mix, Inc v J Slagter & Son Constr Co***, 297765 (June 14, 2012) (Borrello, O'Connell, and Talbot), defendants appealed the Circuit Court awarding them case evaluation costs of $100,000. The case evaluation had been $100,000 in favor of plaintiff. Plaintiff rejected the evaluation, recovered a verdict of $107,781.51, and was liable for case evaluation costs. Defendants requested costs of $199,000. The Circuit Court awarded $100,000. The Court of Appeals affirmed the Circuit Court's determination of S100,000 costs rather than the higher amount requested by defendants. The Circuit Court considered *Wood v DAIIE*, 413 Mich 573 (1982), and MRPC 1.5(a). Because costs are limited to a reasonable fee, it was appropriate for the Circuit Court to examine whether the extent of defense counsel's preparation was reasonable. According to the Circuit Court, there was too much lawyering, the preparation was overly thorough, and the number of hours was too great. The Court of Appeals considered whether the Circuit Court's decision was within the range of reasonable and principled outcomes. This case should be read in conjunction with *McDonnell v Colburn*, 292601 (October 21,

2010) (Murphy, Beckering, and MJ Kelly), where the Court of Appeals held that the Circuit Court's denial of costs s did not fall outside the range of principled outcomes.

2. Another attorney fee amount determination case

Ponte v Hazlett, No 298193; 298194 (April 24, 2012) (Hoesktra, Sawyer, and Saad). Plaintiff argued that the Circuit Court erred in awarding case evaluation costs that were not necessitated by plaintiff's rejection of the case evaluation. The Court of Appeals held that the Circuit Court abused its discretion in awarding attorney fees related to events that occurred before, and simultaneously with, plaintiff's rejection of the case evaluation, but properly exercised its discretion in awarding fees related to trial and defending against plaintiff's motion for a new trial because those fees were necessitated by plaintiff's rejection of case evaluation. The case was remanded for recalculation of the amount of case evaluation costs. This decision is important concerning measurement of case evaluation costs, hours included in fee calculation, importance of accurate time sheets, and allocation of attorney time.

3. Effect of non-revealed to the court case evaluation acceptance

In ***Petz v Coffman Electrical Equip Co***, 301289 (January 17, 2012) (Hoekstra, Markey, and Borrello), the Court of Appeals affirmed the Circuit Court order setting aside a summary disposition order. The Circuit Court did not know that both parties had accepted case evaluation. The circumstances were extraordinary because the parties accepted the case evaluation weeks before the summary disposition order was entered. The dismissal based on acceptance of the evaluation had not yet been entered because payment does not have to occur for 28 days. MCR 2.403.

4. Party should have raised case evaluation issue with arbitrator

In ***J J Judge Constr Services v Trinity Electric, Inc*****,** 295783 (August 2, 2011) (Sawyer, Markey, and Fort Hood), after case evaluation, the parties agreed to arbitration. Defendants prevailed in arbitration so as to be arguably entitled to case evaluation costs. Instead of requesting these costs from the arbitrator, defendants requested them from the Circuit Court. The AAA rules provided that the award may include attorneys' fees if they were authorized by law and the arbitrator was entitled to assess fees among the parties. Despite authority to grant attorney fees, the arbitrator held that the parties were to bear their own fees. According to the Court of Appeals, defendants should have submitted the attorney fee issue to the arbitrator.

5. Effect of statutory interest on case evaluation

Berger v Katz, 291663, 293880 (July 28, 2011) (Wilder [dissent], Saad and Donofrio), lv den___ Mich ___ (2012). In this complicated case there was a unitary verdict, claims and counter-claims, and issues decided by the jury and issues decided by the judge. Plaintiffs appealed the Circuit Court's refusal to grant case evaluation costs. According to the Court of Appeals, the Circuit Court should have added the statutory interest figure to the jury verdict amounts. The Court of Appeals reversed the Circuit Court's order denying costs and remanded for a determination of costs. Judge Wilder's dissent would have affirmed the Circuit Court's denial of costs

IV. MEDIATION

A. Michigan Supreme Court Decisions

There do not appear to have been any Michigan Supreme Court decisions concerning facilitative mediation during the review period.

B. Michigan Court of Appeals Published Decisions

There do not appear to have been any published Michigan Court of Appeals decisions concerning facilitative mediation during the review period.

C. Michigan Court of Appeals Unpublished Decision

1. Mediated agreement enforced

Unit 67, LLC v Hudson, No 303398 (June 7, 2012) (Donofrio, Jansen, and Shapiro). The Court of Appeals affirmed a Circuit Court entry of consent judgment because defendant had agreed to the terms of the consent judgment and the mediator did not engage in fraudulent conduct.

2. Mediated agreement enforced

Roe v Roe, 297855 (July 19, 2011) (Talbot, Hoekstra, and Gleicher). The Court of Appeals held that the mediation agreement evidenced the intent of the parties to value the retirement assets, the agreement was enforceable and binding, and property settlement provisions in a divorce judgment typically are final and cannot be modified by the court.

V. CONCLUSION

Michigan appellate decisions since May 2011 concerned the following ADR issues.

1. Who rules concerning arbitrability? *36 Dist Ct*.
2. Scope of arbitration agreement. *Hall*, *Wireless Toyz Franchise, LLC*, *Cohen*, *Tobe*, *Chabiaa*, *Midwest Mem Group, LLC*, *Gardella Homes, Inc*, *Hantz Group, Inc*, and *JJ Judge Constr Services*.
3. An arbitration award will sometimes be vacated. *MSX Int'l Platform Services*.

4. Arbitration right waiver. *Flint Auto Auction, Inc*.

5. Second union might be necessary party. *Macomb Co*.

6. Attorney fee calculation. *Van Elslander*, *O'Neill*, *Shafer Redi-Max, Inc*, *Ponte*, and *Berger*.

About the Author

Lee Hornberger is an arbitrator and mediator in Traverse City, Michigan. He is a member of the Representative Assembly of the State Bar of Michigan, Chair of the ADR Committee of the Grand Traverse-Leelanau-Antrim Bar Association, and a former President of the Grand Traverse-Leelanau-Antrim Bar Association. He is an arbitrator with the American Arbitration Association, Federal Mediation and Conciliation Service, Financial Industry Regulatory Authority, Michigan Employment Relations Commission, National Arbitration Forum, and National Futures Association. He can be reached at 231-941-0746 or leehornberger@leehornberger.com .