MICHIGAN ARBITRATION AND MEDIATION CASE LAW UPDATE
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LEE HORNBERGER
ARBITRATOR AND MEDIATOR

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 For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions.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

Arbitration in UIM no fault case.

Nickola v MIC General Ins Co, ___ Mich ___, 152535 (May 12, 2017), in lieu of granting leave to appeal from 312 Mich App 374; 878 NW2d 480 (2015), reversed that portion of COA decision denying plaintiff penalty interest under Uniform Trade Practices Act (UTPA), MCL 500.2001 et seq. COA discussed attorney fee and interest issues arising from protracted Uninsured Motorist case that included an arbitration.

Waiver of right to arbitration.

Nexteer Automotive Corp v Mando American Corp, ___ Mich ___ , 153413 (2017), denied leave to appeal from 314 Mich App 391; 886 NW2d 906 (2016). Party waived right to arbitration when it stipulated arbitration provision did not apply. In his dissent from denial, Justice Markman agreed COA correctly held party claiming opposing party had expressly waived contractual right to arbitration does not need to show it will suffer prejudice if waiver is not enforced. Prejudice is not element of express waiver. He dissented from denial because he believed COA erred by holding defendant expressly waived right to arbitration by signing preliminary case management order that contained checked box next to statement: "An agreement to arbitrate this controversy . . . exists . . . [and] is not applicable." He would have reversed COA on express waiver finding and remanded for consideration of whether defendant's conduct gave rise to implied waiver, waiver by estoppel, or no waiver.

Does arbitrator decide attorney fee in lien case?

Ronnisch Construction Group, Inc v Lofts on the Nine, LLC, 499 Mich 544; 886 NW2d 113 (2016) (Justices Viviano, Markman, McCormack, and Bernstein). Plaintiff can seek attorney fees under MCL 570.1118(2), of Construction Lien Act (CLA), where plaintiff received favorable award on related breach of contract claim but did not obtain judgment on construction lien claim.

Arbitrator did not address attorney fee claim but reserved issue for Circuit Court. Circuit Court may award attorney fees to plaintiff because plaintiff was lien claimant who prevailed in action to enforce construction lien through foreclosure. This affirmed COA. 306 Mich App 203 (2014).

Dissent (Justices Young, Zahra, and Larsen) said recovery of CLA attorney fees is permitted only to lien claimants who prevail on construction lien. Because plaintiff did not meet definition of CLA lien claimant, and because it voluntarily extinguished its lien claim before Circuit Court could have so determined, plaintiff was not entitled to fees.

Dispute with individuals within arbitration agreement.

Altobelli v Hartmann, 499 Mich 284; 884 NW2d 537 (2016). Plaintiff's tort claims against individual principals of law firm fell within scope of arbitration clause that required arbitration for any dispute between firm and former principal. Plaintiff, a former principal, challenged actions individual defendants performed in their capacities as agents carrying out business of firm. Supreme Court said this was a dispute between firm and former principal that fell within scope of arbitration clause and was subject to arbitration. Supreme Court reversed those portions of COA opinion, 307 Mich App 612; 816 NW2d 913 (2014), which held matter was not subject to arbitration.

Not all artwork invoice claims subject to arbitration.

Beck v Park West Galleries, Inc, 499 Mich 40; 878 NW2d 804 (2016), partially reversed COA 319463 (2015), considered whether arbitration clause in invoices for artwork purchases applied to disputes arising from previous artwork purchases when invoices for previous purchases did not refer to arbitration. Court held arbitration clause contained in later invoices cannot be applied to disputes arising from prior sales with invoices that did not contain clause. Court reversed part of COA judgment that extended arbitration clause to parties' prior transactions that did not refer to arbitration.

Court recognized policy favoring arbitration of disputes arising under CBAs but said this does not mean arbitration agreement between parties outside collective bargaining context applies to any dispute arising out of any aspect of their relationship.

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 (296791). COA erred in holding insurer did not have duty to defend insured in arbitration case. Insurer had duty to defend, despite theories of liability asserted against insured that are not covered under policy, if there are theories of that fall within policy.

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). Basic rejected case evaluation. Appraisal panel's award was less favorable to Basic than case evaluation. Supreme Court held requirement 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." Acorn may recover its actual costs because motion for entry of judgment caused

case to "proceed to verdict" when Circuit Court ruled on motion. Supreme Court reversed COA and remanded case to Circuit Court.

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 309367 (June 18, 2013). Justice Markman dissented. First arbitrator held City lacked just cause to terminate defendant and must reinstate her with back pay. Circuit Court vacated and required second arbitration. Second arbitrator ruled in favor of City, and Circuit Court affirmed. In split decision, COA reversed Circuit Court's vacatur of first 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; 833 NW2d 225 (2013) (Young, Markman, Kelly, and Zahra [majority]; McCormack and Cavanagh [dissent]; Viviano [took no part]). Employer did not commit ULP when it refused to bargain with union over decision to change actuarial table used to calculate retirement benefits. ULP complaints concerned subject covered by CBA. CBA grievance process was avenue to challenge employer's actions. Arbitrator, not MERC, is best equipped to decide whether past practice has matured into term or condition of employment.

Arbitrator can hear claims arising after referral to arbitration.

Wireless Toyz Franchise, LLC v Clear Choice Commc'n, Inc, 493 Mich 933, 825 NW2d 580 (2013), in lieu of granting leave to appeal, reversed COA, for reasons in COA dissent, and reinstated Circuit Court order, denying defendants' motion to vacate award and confirming award. Dissent in 303619 (May 31, 2012), said stipulated order intended arbitration would include claims beyond those pending because it allowed further discovery, gave arbitrator powers of Circuit Court, and award would represent full and final resolution. Claims 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 part of COA judgment, 294 Mich App 88; 818 NW2d 367 (2012), which held matter was not subject to arbitration. Supreme Court reinstated Circuit Court order ordering arbitration. Dispute 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 . . . parties' rights or obligations" under Shareholders' Agreement, and was subject to arbitration pursuant to Agreement.

Dissents said Shareholders Agreement provided only for arbitration of violations of Agreement, 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, 493 Mich 879; 821 NW2d 786 (2012), in lieu of granting leave to appeal, reversed part of COA judgment that reversed award of reinstatement and back pay. Supreme Court said MCR 3.106 does not preclude such

relief where CBA has just cause standard for termination. In 295 Mich App 502 (2012), COA ruled that because CBA did not abrogate Chief Judge's statutory or constitutional authority to appoint court officers, arbitrator exceeded jurisdiction by requiring Chief Judge to re-appoint grievants to their positions.

Parental pre-injury waivers and arbitration.

Woodman ex rel Woodman v Kera LLC, 486 Mich 228; 785 NW2d 1 (2010), five (Justices Young, Hathaway, Kelly, Weaver, and Cavanaugh) to two (Justices Markman and Corrigan) decision authored by Justice Young, held 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, citing *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167; 405 NW2d 88 (1987). In *McKinstry*, pregnant mother signed waiver requiring arbitration of any claim on behalf of her unborn child. Mother contested validity of waiver after child was injured during delivery. Court considered effect of Medical Malpractice Arbitration Act, MCL 600.5046(2) (repealed 1993 PA 78), which provided minor bound by written agreement to arbitrate disputes upon execution of agreement on his behalf by parent or guardian. Minor may not subsequently disaffirm agreement. *McKinstry* held statute required arbitration agreement signed by mother bound her child. Justice Young said *McKinstry* acknowledged arbitration agreement would not have been binding under common law and *McKinstry's* interpretation of MCL 600.5046(2) was departure from common law that parent has no authority to release or compromise claims by or against child. He said common law can be modified or abrogated by statute. Child can be bound by parent's act when statute grants authority to parent. Justice Young said 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), denied City's application for leave to appeal. This affirmed COA reversal of Circuit Court's vacatur of labor arbitration award. Arbitrator held grievant was to be assigned take-home vehicle because there was past practice of assigning take-home vehicles and burden was on employer to prove it had repudiated practice without objection by union. Arbitrator held past practice became binding working condition that could not be altered without mutual consent of parties where CBA is silent on assignment of take-home vehicles. Arbitrator held policy manual provision was only valid to extent it was consistent with CBA, including established practices. Arbitrator concluded decision not to assign vehicle was inconsistent with past practice. Justice Markman dissented, with Justice Corrigan joining, indicating he would reinstate Circuit Court's order vacating award. Dissent said CBA does not refer to take-home vehicles, and department policy accords Chief discretion in assigning vehicles.

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

Gates v USA Jet Airlines, Inc, 482 Mich 1005; 756 NW2d 83 (2008), vacated award and remanded case to Circuit Court because one of parties submitted to arbitration panel *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 regarding pending matter).

Preliminary injunction vacated - six to one decision.

In ***Detroit Fire Fighters Ass'n v Detroit***, 482 Mich 18; 753 NW2d 579 (2008), issue was whether Circuit Court properly issued preliminary injunction to prevent implementation of City's layoff plan. Union contended 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 jeopardizing firefighters' safety. *Status quo* provision violated where layoff plan alters condition of employment, firefighter safety. Circuit Court must conclude employer's plan is so "inextricably intertwined with safety" that its implementation would alter *status quo* by altering this employment condition. Circuit Court found there were issues of fact whether layoffs would have impact on firefighters' safety which is mandatory subject of bargaining. COA, 271 Mich App 457 (2006), affirmed Circuit Court. Supreme Court held injunction erroneously entered. Whether layoff plan jeopardized employee safety requires scrutiny of plan and finding that plan is "inextricably intertwined with safety" such that it would have "significant impact" on safety. If Circuit Court concludes standards for preliminary injunction have been met and chooses to issue injunction, it must promptly decide merits of *status quo* claim. Supreme Court held Circuit Court erred when it issued preliminary injunction. Circuit Court, in effect, issued permanent injunction where underlying merits of alleged *status quo* violation would never be resolved, contrary to MCR 3.310(A)(5). Supreme Court held, when safety claim is alleged, employer's challenged action alters *status quo* during pendency of Act 312 arbitration only if action is so "inextricably intertwined with safety" that action would alter "condition of employment."

Preliminary injunction vacated - four to three decision.

Pontiac Fire Fighters Union v Pontiac, 482 Mich 1; 753 NW2d 595 (2008). Circuit Court abused its discretion in issuing preliminary injunction preventing City from implementing plan to lay off Union members. Union sought preliminary injunction against layoffs pending resolution of ULP charge, collective bargaining, or interest arbitration. Circuit Court granted preliminary injunction after ruling Union satisfied four elements for injunctive relief. COA upheld preliminary injunction in split, decision. 271497 (November 30, 2006). Supreme Court said Union failed to meet burden of establishing 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 (278731) and held arbitrator exceeded authority under DRAA 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 and remanded case to Circuit Court for entry of order granting summary disposition to defendants. COA correctly held

Circuit Court lacked jurisdiction to grant relief requested by plaintiffs because 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). Common-law arbitration not preempted by former Michigan Arbitration Act, MCL 600.5001 *et seq*. Common-law arbitration agreements unilaterally revocable before award. Statutory arbitration has to comply with MAA, including written agreement providing award is enforceable in Circuit Court. With such compliance, party cannot withdraw from arbitration. With common-law arbitration, arbitration agreement is unilaterally revocable before award. 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.

Formal hearing format not required.

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

B. Michigan Court of Appeals Published Decisions

Consolidated of arbitration cases under FAA.

Lauren Bienenstock & Associates, Inc v Bienenstock, 314 Mich App 508; 887 NW2d 237 (2016). Arbitrator has authority under Federal Arbitration Act, 9 USC § 1 *et seq*, to determine whether multiple arbitration cases should be consolidated when arbitration agreement is silent on issue. COA did not address Michigan Uniform Arbitration Act, MCL 691.1681 *et seq*, because issue was controlled by federal law.

COA partially confirms and partially vacates award in defamation case.

Hope-Jackson v Washington, 311 Mich App 602; 877 NW2d 736 (2015), affirmed confirmation of part of award in defamation case concerning tolling, defamation, presumed damages, actual malice, and $360,000 in *per se* damages; and reversed confirmation of part of award concerning $140,000 exemplary damages. Since there had been no retraction request, arbitrator's granting of exemplary damages was error of law on face of award. MCL 600.2911(2).

Pre-arbitration hearing submission of exhibits.

Fette v Peters Constr Co, 310 Mich App 535; 871 NW2d 877 (2015). Michigan Arbitration Act, MCL 600.5001 *et seq*, controlled; not Uniform Arbitration Act, MCL 691.1681 *et seq*. Record did not support plaintiffs' contention arbitrator considered exhibits defendant electronically shared before hearing in making award determination. Even if award against great weight of evidence or not supported by substantial evidence, COA precluded from vacating

award. Allowing parties to electronically submit evidence prior to hearing did not affect plaintiffs' ability to present evidence they desired.

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

Baumgartner v Perry Public Schools, 309 Mich App 507; 872 NW2d 837 (2015), lv dn ___ Mich ___ (2015). Legislature exercised its constitutional authority concerning teacher layoffs. Legislature made merit, not seniority, controlling factor in layoffs by removing layoffs as collective bargaining subjects and this removed unions and administrative agencies from dispute-resolution process. Legislature gave school boards power to make layoff decisions, and gave courts exclusive power to review such decisions.

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), reflects viewpoint no part of arbitration process is more important than selecting arbitrator. Elkouri & Elkouri, *How Arbitration Works* (7th ed), p 4-37; and Abrams, *Inside Arbitration* (2013), p 37. AAA did not appoint arbitration panel member who had specialized qualifications required in agreement to arbitrate. Plaintiff sued defendant and AAA to enforce requirements. Circuit Court ruled in favor of defendant and AAA. Court of Appeals in split decision reversed.

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

Agreement to arbitrate made specialized qualifications of panel central to entire agreement. When such provision is central to agreement, Federal Arbitration Act (FAA), 9 USC 1, *et seq*, provides it should be enforced by courts prior to arbitration hearing. 9 USC 5. Party may petition court before award if (1) arbitration agreement specifies detailed qualifications arbitrator must possess and (2) arbitration administrator fails to appoint arbitrator who meets these qualifications. Court may issue order, pursuant to § 4 of FAA, requiring arbitration proceedings conform to arbitration agreement. Majority awarded plaintiff Circuit Court and COA costs and attorney fees.

Judge Jansen's dissent said party cannot obtain judicial review of qualifications of arbitrators prior to award. No claim that selection involved fraud or other fundamental infirmity that would invalidate arbitration agreement, or any claim appointee had inappropriate relationship with a party. Although appointee might not have requirements for appointment set forth in agreement, plaintiff was required to wait until after award to raise issue in 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), discussed whether MCL 500.2833(1)(m) appraiser who receives contingency fee for appraisal is sufficiently neutral. COA said courts have upheld agreements for arbitration conducted by party-chosen, non-neutral arbitrators, particularly when neutral arbitrator is also involved. These cases implicitly recognize it is not necessarily unfair or unconscionable to create effectively neutral tribunal by building in offsetting biases.

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 of court clerk to serve in judge's courtroom. Promulgation of Local Administrative Order was proper exercise of Circuit Court authority, and Circuit Court was not bound by CBA, arbitrator's ruling, on issue of courtroom assignments. COA ruled that PERA, MCL 423.201 et seq, aegis CBA and award that encroach on judicial branch's inherent constitutional powers cannot be enforced to extent of encroachment.

Arbitrator to determine timeliness issue.

AFSCME v Hamtramck Housing Comm, 290 Mich App 672; 804 NW2d 120 (2010). 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; 808 NW2d 495 (2010). 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 civil action by filing complaint, plaintiff not entitled to confirmation of award. Issue was whether plaintiff, as party seeking confirmation under MCR 3.602(I) and MAA was required to file complaint to invoke Circuit Court jurisdiction. COA held, because no action was pending between parties, plaintiff was required to file complaint to initiate civil action under MAA. Since plaintiff timely filed award with court clerk, matter was remanded so plaintiff could file complaint in Circuit Court.

How many correction motions allowed?

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. COA affirmed Circuit Court's denial because defendant's motion to vacate was not timely filed. On March 28, 2008, defendant, MCL 600.509(2), filed motion to vacate "arbitration awards" of November 13, and December 7, 2007. Party has 21 days to file motion to vacate in DRAA case. MCR 3.602 (J)(2). Lesson is to think carefully before filing second round of reconsideration motions rather than notice of appeal. *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; 771 MW2d 843 (2009). There is no statute or court rule providing limitations period for actions seeking to vacate public labor arbitration awards. Actions to vacate awards are more akin to actions to enforce awards than to actions for unfair representation. Action to vacate labor arbitration award is subject to six-year limitations period. As long as Arbitrator is arguably construing or applying CBA and acting within scope of authority, court may not overturn award even if Arbitrator committed serious error. *Rowry v Univ of Mich*, 441 Mich 1(1992), held plaintiff ordinarily has six years to seek enforcement of labor arbitration award and recognized in certain cases this period may be substantially diminished if

award grants equitable relief and delay in 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 probate proceedings are not inherently unarbitrable.

C. Michigan Court of Appeals Unpublished Decisions

Arbitration involving non-signatories to arbitration agreement.

Scodeller v Compo, 332269 (June 27, 2017), affirmed Circuit Court's decision to compel arbitration, even against defendants who were not parties to arbitration agreement. Arbitration agreement was broad enough to encompass each of those claims and, for policy reasons, it was expeditious to resolve those disputes in single proceeding. Plaintiffs, who were parties to arbitration agreement, were estopped from avoiding arbitration against those defendants who did not sign agreement where claims are based on substantially interdependent and concerted conduct by all defendants. If parties cannot agree on arbitrator, Circuit Court shall appoint arbitrator.

COA approves DRAA award.

Holloway v Kelley, 331792 (June 27, 2017). COA agreed with Circuit Court that arbitrator did not exceed his authority, arbitrator followed the law and did as he was asked when he resolved the "division of each party's interest in retirement plans… ."

No issue for arbitrator to resolve, therefore no arbitration.

Amante v Amante, 331542 (June 20, 2017). Plaintiff argued that under plain language of judgment of divorce, dispute regarding provision barring spousal support should be decided by arbitrator. Under terms of judgment , "any disputes regarding the judgment language" should be submitted to arbitrator. Dispute concerned whether judgment should include provision barring spousal support. Judgment of divorce and settlement agreement were silent as to spousal support. This was not a dispute concerning meaning of language within judgment of divorce. Circuit Court did not abuse discretion in denying plaintiff's request that dispute be remanded for arbitration.

Party did not waive arbitration.

Universal Academy v Berkshire Development, Inc, 330707 (June 20, 2017). Party did not waive right to arbitration by filing cross-complaint. Uniform Arbitration Act (UAA), MCL 691.1681, *et seq*., at MCL 691.1684(1) provides, "Except as otherwise provided in subsections (2) and (3), a party to an agreement to arbitrate or to an arbitration proceeding may waive or the parties may vary the effect of the requirements of this act to the extent permitted by law."

Supplemental labor arbitration award.

Dept of Transportation v MSEA, 331951 (June 13, 2017). COA affirmed Circuit Court's confirmation of supplemental labor arbitration award. Arbitrator ordered reinstatement, make whole remedy, and retained jurisdiction. Arbitrator then had to decide post-award issue concerning some 401(k) issues. COA held this was appropriate.

Losing party uses panel dissent to attack award.

Estate of James P Thomas, Jr v City of Flint, 331173 (April 20, 2017). COA affirmed Circuit Court order denying motion to vacate award of arbitration panel. Arbitration panel, by 2-1 vote, ruled in favor of defendant. Plaintiff's first argument was that Circuit Court erred in denying plaintiff's motion to set aside award based upon lack of impartiality by neutral arbitrator or by allowing limited discovery on issue of lack of impartiality. COA stated mere fact that one arbitrator disagrees with another does not establish, nor even "fairly raise," the possibility that either lacks impartiality.

Labor arbitration award confirmed.

Village of Oxford v Lovely, 331002 (April 13, 2017). COA affirmed Circuit Court order granting defendant's motion to confirm arbitration award. Arbitration was conducted pursuant CBA between plaintiff employer and union and resulted in a decision that in part reinstated employee's employment with plaintiff.

Case ordered to arbitration.

Spence Bros v Kirby Steel, Inc, 329228 (March 14, 2017). Arbitration provision of parties' agreement mandated matter involving alleged breach of agreement be submitted to arbitration. Circuit Court erred by determining otherwise. Matter was remanded to Circuit Court for entry of order ordering matter to arbitration. $127,823.88

Case ordered to arbitration.

Rozanski v Findling, 330962 and 332085 (March 14, 2017). Plaintiffs appealed Circuit Court's order granting defendant's motion to compel arbitration and Circuit Court's confirmation of arbitration award. Plaintiffs argued Circuit Court erred in granting summary disposition in favor of defendant where attorney fee agreement that contained arbitration provision was invalid. COA disagreed. MCL 691.1703.

Lawsuit not barred by agreement to arbitrate between other entities.

Pepperco-USA, Inc v Fleis & Vandenbrink Engineering, Inc, 331709 (February 21, 2017). Summary disposition is proper when claim is barred because of agreement to arbitrate. MCR 2.116©(7). Whether claim is subject to arbitration is reviewed de novo. Pepperco, not being party to arbitration clause, is not subject to arbitration with respect to its claims, even

though related corporate entity, MP, would be subject to clause. Circuit Court erred in ruling that Pepperco's lawsuit was barred by agreement to arbitrate.

Two arbitrations.

AFSCME Local 1128 v City of Taylor, 328669 (January 19, 2017). Parties arbitrated grievance 2011-20. Arbitrator concluded grievance, which implicated articles 5.2, 24.2, and 45.2, was not timely under terms of CBA. Despite finding grievance was untimely, arbitrator stated "if the merits of such claims were to be decided, the decision would be that the ostensibly perpetual 100-employee guarantee was terminable at will and [the city] effectively did terminate it in June 2011" by laying off employees.2 In reaching this conclusion, the arbitrator relied heavily on the ALJ's examination of the CBA, concluding that the ALJ "carefully, persuasively and correctly analyz[ed] and answer[ed] the underlying question of the fundamental nature" of the parties' agreement with respect to the city's obligation to maintain staffing levels in perpetuity. Ultimately, to the extent the union's 2011-20 grievance implicated articles 5.2, 24.2, and 45.2, the grievance was denied.

Following arbitration of grievance 2011-20, union requested arbitration relating to grievances 2011-1 and 2011-6. City refused to submit to arbitration, informing union res judicata and collateral estoppel precluded "rematch" on issues that were litigated before in grievance 2011-20.

Circuit Court determined issue in grievance 2011-6 had not been decided preclusion issues involved "close question" which should be decided by arbitrator. COA affirmed. Unless otherwise specified in parties' contract, whether arbitration is precluded under res judicata and collateral estoppel poses question for arbitrator to decide. Because the CBA in this case contained no indication that res judicata and collateral estoppel should be addressed by court, rather than arbitrator, Circuit Court properly submitted matter to arbitration. In determining that preclusion issues should be decided by arbitrator, COA offered no opinion on merits of the city's preclusive arguments. City is free to assert during arbitration that res judicata and collateral estoppel bar arbitration of grievances 2011-1 and 2011-6. Should arbitrator reach merits of the case, submitting matter to arbitration will not prevent city from asserting, after arbitration, that there was impermissible conflict between MERC decision and arbitration decision.

Collateral estoppel from arbitration award?

Ric-Man Constr, Inc v Neyer, Tiseo & Hindo Ltd, 329159 (January 17, 2017), **app lv pdg**. NTH contended Ric-Man was collaterally estopped from seeking lost profits because in its arbitration against OMIDDD, arbitration panel declined to award same lost profits to Ric-Man. Collateral estoppel applies to factual determinations made during arbitration. Circuit Court found issue decided by arbitration panel was not identical to that at issue in this case and collateral estoppel did not apply. Basis for arbitration panel's ruling is not entirely clear. Collateral estoppel applies only when basis of prior judgment can be clearly, definitely, and unequivocally ascertained. COA affirmed Circuit Court that collateral estoppel not applicable.

Scope of arbitration provision.

Shaya v City of Hamtramck, 328588 (January 5, 2017). Circuit Court held plaintiff's claims for employment discrimination under Civil Rights Act (CRA), MCL 37.2101 et seq., and

retaliatory discharge under Whistleblowers' Protection Act (WPA), MCL 15.361 et seq., were subject to arbitration provision in parties' employment agreement and referred claims to arbitration. COA reversed. Arbitration clause provided, "Any controversy or claim arising out of or relating in any way to this agreement shall be settled exclusively by arbitration administered by the American Arbitration Association under its … National Rules for the Resolution of Employment Disputes … . This agreement to be submitted to binding arbitration specifically includes, but is not limited to, all claims that this agreement has been interpreted or enforced in a discriminatory manner. … ." COA stated arbitration clause, with respect to claims of discrimination under CRA or retaliatory discharge under WPA, to be valid only if (1) parties agreed to arbitrate such claims, (2) statutes in question do not prohibit agreement to arbitrate, and (3) agreement does not waive substantive rights and remedies of statute and the procedures are fair. COA agreed with plaintiff that arbitration clause did not provide clear notice to plaintiff that he was waiving right to adjudication of statutory discrimination claims under CRA, and plaintiff was not on notice that terms of employment contract constituted waiver of right to bring statutory discrimination claim in court.

Award confirmed after lap top cleansing.

Santamauro v Pultegroup, Inc, 328404 (December 20, 2016). Plaintiff agreed to arbitrate claims arising from his employment. He was discharged. He initiated arbitration alleging wrongful discharge. Arbitrator found plaintiff had deliberately spoiled evidence by removing hard drive of his Employer-owned laptop computer before returning it to company, and dismissed the action. COA affirmed Circuit Court's confirmation of award.

Custody DRAA award confirmed.

Waterman v Waterman, 332537 (December 20, 2016). Defendant appealed judgment of divorce that trial court entered after defendant and plaintiff submitted their dispute to arbitration. On appeal, defendant argued trial court and arbitrator both erred and errors warrant revisiting decisions concerning child custody, child support, and award of property. COA affirmed.

Parties stipulated to arbitration of all issues arising from divorce, including child custody and parenting time. MCL 600.5071. Although trial court has obligation to act in child's best interests and retains authority to vacate an award that does not comport with child's best interests, MCL 600.5080(1), trial court does not have obligation to conduct its own evidentiary hearing.

Back-pay calculation after arbitration.

Harrison v Blue Cross Blue Shield of Michigan, 328303 (November 29, 2016). Arbitrator found defendant violated CBA by terminating plaintiff's employment. Arbitrator ordered reinstatement with 90 day unpaid suspension. Employer reinstated employee but issue arose concerning back-pay calculation and employee providing requested information to employer. Employee sued *pro per* concerning back-pay. Circuit Court dismissed suit. COA affirmed. Issue was whether Circuit Court had subject-matter jurisdiction to hear plaintiff's case seeking confirmation and enforcement of award. Only arbitrator can make determination that plaintiff seeks. Award did not contain dollar amount of back pay or method in which to calculate the same. Under Uniform Arbitration Act, "arbitration in this state confers exclusive jurisdiction on the court to enter judgment on an award." MCL 691.1706. There is dispute concerning whether defendant is justified in not paying back pay without receiving what it deems necessary documentation and Circuit Court is in no position to resolve that factual dispute, or in calculating back pay. Circuit Court properly determined it lacked subject-matter jurisdiction.

Waiver.

Phillips v State Farm Ins Co, 329740 (November 17, 2016). COA was not definitely and firmly convinced Circuit Court made mistake when it found DeShano did not engage in litigation in a way inconsistent with its rights to arbitration. Circuit Court properly determined DeShano had not waived its right to arbitration.

Labor arbitration award vacated.

County of Berrien v Police Officers Labor Council, 328794 (November 15, 2016), affirmed vacatur of award. Union argued age discrimination claim was arbitrable because County had agreed it would not exercise its management rights "in violation of any specific provision" in CBA. A specific provision of CBA was nondiscrimination clause. Thus, County agreed in CBA not to exercise its management right to transfer and assign employees in violation of nondiscrimination clause. However, this agreement by County did not render discrimination claim arbitrable. Claim should not go to arbitration if there is express provision excluding matter from arbitration. Although County agreed it would not exercise management right to transfer and assign employees in violation of nondiscrimination clause, parties also agreed matters which were exclusively reserved to management were not subject to grievance procedure. Because CBA expressly provided matters exclusively reserved to management were excluded from grievance procedure, and because Union did not dispute right to transfer and assign employees was matter exclusively reserved to management, Circuit Court did not err in holding Union's claim of age discrimination, which was based on a failure to transfer, was not arbitrable.

Arbitrators' awards confirmed.

Karmanos v Compuware Corp, 327476 and 327712 (October 20, 2016), **app lv pdg**, affirmed Circuit Court's confirmation of unreasoned award of $16,500,000. COA said lack of reasoned award rendered it impossible to discern mental path leading to award; court may not review arbitrator's factual findings or decision on merits; court may not invade province of arbitrator to construe contracts between parties; it is outside province of courts to engage in fact-intensive review of how arbitrator calculated values, or whether evidence arbitrator relied on was most reliable or credible evidence presented.

No COA appeal provision enforced.

Ruben v Badgett, 326717 (October 11, 2016), lv dn ___ Mich ___ (2017).. COA enforced no appellate appeal provision in arbitration agreement. Accord ***Kay Bee Kay Holding Co, LLC v PNC Bank, NA***, 327077 (November 8, 2016).

Asking for too much in confirmation motion.

Davis v State Farm Mutual Automobile Ins Co, 326126 (June 21, 2016), lv den, ___ Mich ___ (2017). Plaintiff filed motion to confirm award and for entry of judgment and for interest, costs, fees, and case evaluation costs and sanctions. UAA, MCL 691.1702. COA held Circuit Court properly denied plaintiff's request for entry of judgment that was not in amount of award and properly denied plaintiff's request for case evaluation sanctions.

MUAA does not apply.

Lansing Community College Chapter of Mich Ass'n for Higher Education v Lansing Community College Bd of Trustees, 323902 (January 21, 2016). Because of date of arbitration demand, MUAA did not apply.

Res judicata.

Jackson-Phelps v Dipiero, 323132 (December 17, 2015). Prior arbitration award on related issues was res judicata.

Review of employer's termination decision.

Taylor v Spectrum Health Primary Care Partners, 323155 (December 10, 2015), lv dn ___ Mich ___ (2016). Employer reserved for itself sole discretion to determine existence of "unethical behavior" justifying summary termination. Provided employer follows procedures in contract, plaintiff has no basis to dispute determination and possibility of review by arbitrator, like possibility of judicial review, is foreclosed. Since arbitrators derive authority from contract and arbitration agreement, they are bound to act within those terms. Employer's termination decision did not give rise to "dispute" and plaintiff cannot seek review of decision by arbitrator.

Court appointment of DRAA substitute arbitrator reversed.

Zelasko v Zelasko, 324514 (2015), lv dn ___ Mich ___ (2016). Defendant appealed order appointing substitute arbitrator after agreed-upon arbitrator died. Same order denied defendant's request that interim arbitration orders be vacated. Indicating nothing in DRAA, MCL 600.5070 et seq., permits Circuit Court to appoint substitute arbitrator absent agreement of parties, COA reversed appointing of substitute arbitrator. COA agreed with Circuit Court there was no reason to disturb interim orders, which were either not contested or were affirmed by Circuit Court, and affirmed that portion of order.

COA affirms arbitrator fee.

In ***Plante & Moran, PLLC v Berris***, 323562 (November 17, 2015), arbitrator fee collection case, COA affirmed fee because prior award confirming award was collateral estoppel and arbitrator was protected by doctrine of arbitral immunity.

COA approves informal method of conducting DRAA arbitration.

Fadel v El-Akkari, 321931 (October 15, 2015). (DRAA). COA held Circuit Court acted within its discretion in revisiting its initial decision to vacate arbitration award. DRAA does not require arbitrator to hear live rebuttal testimony.

Race to the courthouse.

New River Construction, LLC v Nat'l Mgt & Preservation Svs, LLC, 324465 (July 21, 2015). COA held Circuit Court abused 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 timely award. Cases where award was vacated due to *ex parte* communication involved violation of arbitration agreement prohibiting such conduct. Binding mediation agreement did not contain clause prohibiting *ex parte* communication, so there is no indication mediator exceeded 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 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), lv dn ___ Mich ___ (2015). In AAA employment arbitration case, plaintiff appealed Circuit Court order denying plaintiff's motion to vacate. COA affirmed. Prior to arbitration, employer retained investigator who created report. Employee requested copy of report before arbitration hearing. Employer declined, indicating it would provide report only if employee realized this would make report subject to public disclosure under Public Records Act. Employee asked authorization to interview potential employee witnesses. Employee did not request depositions. At arbitration hearing, employer used investigator as witness. Arbitrator issued award in favor of employer. Circuit Court refused to vacate. COA agreed with Circuit Court that (1) employer did not refuse to produce report but rather correctly conditioned production on realization of Public Records Act implications, and (2) employee could have used depositions 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. Order stated 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 stated it resolved last pending claim and closed case. Defendant appealed challenging Circuit Court's orders granting partial summary disposition in favor of plaintiff. COA held stipulated order of dismissal entered by Circuit Court pursuant to agreement to submit claim and counterclaim to arbitration was not appealable by right, and COA lacked jurisdiction over appeal. COA noted, after entry of judgment on award, defendant could challenge in appeal by right Circuit Court's orders granting partial summary disposition in favor of plaintiff.

Successors have to comply with arbitration clause.

Marjorie Brown Trust v Morgan Stanley Smith Barney, LLC, 317993 (February 5, 2015), lv dn ___ Mich ____ (2015). Main issue was whether dispute over investment account is subject to arbitration, as specified in account agreement, or whether dispute can proceed in court. Plaintiff admitted her account with Smith Barney Shearson was subject to arbitration agreement, but asserted 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 consolidations. COA agreed with Circuit Court that defendants were successors and agreement to arbitrate was binding on plaintiff.

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

Heffelfinger v Bad Axe Public Schools, 318347 (December 2, 2014), lv dn ___ Mich ___ (2015). Teacher 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 LCA violated Teachers' Tenure Act, MCL 38.71 *et seq*. COA held award was *res judicata* and precluded teacher's court case. ***Thomas v Miller Canfield Paddock & Stone***, 314374 (October 21, 2014), held collateral estoppel applies to positions taken in prior arbitration.

Past practice issues go to arbitration.

Wayne Co v AFSCME, 312708 (October 9, 2014). COA held, if CBA covers term or condition in dispute, enforceability of provision is left to arbitration. CBA grievance and arbitration procedures were bypassed. Scope of MERC's authority in reviewing claim of refusal-to-bargain when parties have grievance or arbitration process is limited to whether CBA covers subject of claim. When there is evidence that past practice has modified CBA, it is for arbitrator to make determination on issue, 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 husband was entitled to USAF pension. Arbitrator's initial award 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. 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 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 court may not hunt for errors in award, and facially valid damage award should not be disturbed.

Arbitrator failed to comply with arbitration agreement.

Visser v Visser, 314185 (July 15, 2014). Parties agreed to DRAA arbitration to resolve issues relating to custody, parenting time, child support, and property. Parties agreed, pursuant to MCL 600.5077(2), if custody, child support, or parenting time were at issue, court reporter would be hired to transcribe portion of arbitration proceedings affecting those issues. They agreed 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 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 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 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 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." 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.

Concurrence said, if plaintiff wished to challenge impartiality of neutral arbitrator, he was required to wait until after award was issued.

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 reported situation to Michigan Department of Community Health's Bureau of Health Systems (BHS). Without interviewing employee, BHS concluded "resident verbal

abuse was substantiated to have occurred." 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 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.

Rogensues v Weldmation, Inc, 310389 and 311211 (February 11, 2014), lv dn ___ Mich ___ (2014). Defendant appealed Circuit Court judgment confirming award. COA held Circuit Court erred in confirming award and defendant did not enter into arbitration agreement with plaintiff and was not bound by employment agreement plaintiff had with defendant. Defendant not required to file motion to vacate award under MCR 3.602(J) in order to defend against confirmation of award. Circuit Court erroneously failed to consider defendant's defense that no arbitration agreement existed before confirming award. Defendant not required to arbitrate dispute plaintiff had with defendant. Arbitrator exceeded authority when she concluded 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 in event that either party fails to answer or appeal within time limits, grievance will be considered decided in favor of 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 timely respond to grievance triggered default provision.

Cannot compel arbitration by non-signatory.

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

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 employment termination claim. Arbitrator ruled in favor of employee. Award was based on default of employer, who failed to provide discovery during arbitration proceeding. Arbitrator did not conduct hearing, hear testimony, or take proofs. Employee moved to confirm award and defendants moved to vacate. Circuit Court was concerned 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. COA said arbitrator can hear testimony, take evidence, and issue award in absence of one of parties if that party, although on notice, has defaulted or failed to appear. Arbitrator may not issue award solely on basis of default, but must take sufficient evidence from non-defaulting party to justify award. 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), state:

> 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 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), state:

> 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 customer against brokerage firm case, issue was whether agreement to arbitrate customer had signed with non-party prior brokerage firm inured to benefit of defendant brokerage firm. COA found no evidence which definitively explained relationship, if any, between defendants and Smith Barney Inc. or Smith Barney Shearson Inc. According to COA, brokerage firm was not entitled to order compelling arbitration. This case shows, if a party argues 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 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 be arbitrated or that dismissal was contingent on arbitration occurring. Nothing in stipulation precluded union and employer from reaching settlement agreement to avoid arbitration. Employee failed to show 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) (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 arbitration demand 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 three years did not start until insurer communicated it was denying the claim. According to COA, policy requires 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 vested right to PTO. COA found nothing that supported notion of express contract or agreement concerning compensation for PTO; and there was no basis for finding there was contract or agreement that entitled employee to PTO. Judge Jansen dissented, stating 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), lv dn ___ Mich ___ (2012). Plaintiffs appealed Circuit Court's ruling that all of plaintiffs' claims were subject to arbitration agreement. COA held 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 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 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 DRAA agreement, arbitrator was to decide property division and support. After arbitration, Circuit Court entered judgment pursuant to award. Judgment provided it resolved all pending claims and closed case. Subsequently, plaintiff filed assault and battery complaint against defendant for events that preceded arbitration. According to COA, 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 convoluted and complicated opinion affirmed Circuit Court ruling 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). Party is prejudiced by inconsistent acts of other party when it has expended resources to litigate merits of case. Plaintiff argued it expended resources due to defendants' discovery requests. Defendants argued plaintiff's burden was minimal. COA said party must expend more than just some time and resources to constitute sufficient prejudice. While plaintiff expended some effort responding to discovery requests, it had not exerted 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 releases in modification agreement with promissory note, COA held Circuit Court erred in holding that note was subject to arbitration. Engrafting arbitration clause onto note would contravene parties' intent to settle matter with a payment obligation that was not subject to defenses or counterclaims. Because 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. Arbitrator issued award in favor of POAM holding there had been no violation of POAM's CBA, and 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.

***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 authorized by law and arbitrator was entitled to assess fees. Despite authority to grant attorney fees, arbitrator held parties were to bear their own fees. COA said defendants should have submitted 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 filed motion to modify award. Circuit Court granted motion. COA vacated Circuit Court's order indicating it was impermissible for non-party to file motion in 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 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 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), Federal Arbitration Act, 9 USC 1 *et seq*, case, held 9 USC 16(a)(1)(B) does not create right to appeal state court order denying arbitration to state appellate court. It 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 United States District Court.

Individual supervisor not covered by arbitration agreement.

In ***Riley v Ennis***, 290510 (February 25, 2010), lv dn ___ Mich ___ (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. COA reversed, indicating that although defendant signed employment contract, contract specified 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 Deputy. Arbitrator required fitness for duty examination; and retained jurisdiction to resolve issues concerning implementation of award. Circuit Court refused to vacate reinstatement order, but held arbitrator exceeded 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 & 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 & Elkouri, p 1219, states: "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.

Labor arbitration award involving lay-off return vacated.

City of Frankfort v Police Officers Ass'n of Mich, 286523 (September 15, 2009). City hired new employee rather than recall employee from layoff. Issue was whether laid off employee had recall rights in light of new CBA language. In split decision, COA vacated award and

remanded matter to arbitrator. Dissent said, if arbitrator erred in analysis, arbitrator, in making 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* is Sixth Circuit case on standard for reviewing labor arbitration awards. In *Mich*, Union appealed District Court's decision vacating award. Sixth Circuit reversed because arbitrator was acting within scope of authority, company had not accused arbitrator with fraud or dishonesty, arbitrator was arguably construing CBA when he awarded employees cost of living increase, and company had shown no more than arbitrator made error, perhaps serious error, in interpreting CBA. *Mich* said following should be looked at in deciding whether to vacate labor arbitration award. Did arbitrator act outside authority by resolving dispute not committed to arbitration? Did arbitrator commit fraud, have conflict of interest or act dishonestly in issuing award? And in resolving legal or factual disputes, was arbitrator arguably construing or applying CBA? 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. Arbitrator exceeds authority only when CBA does not commit dispute to arbitration. Lesson from *City of Frankfort* is on occasion Michigan appellate court might give less deference to labor arbitration award than Federal court would under *Mich*.

Evaluation notification labor arbitration award vacated.

Northville Education Ass'n v Northville Public Schools, 287076 (August 20, 2009), vacated labor arbitration award and remanded case to arbitrator. CBA required teacher be given prior notification of eligibility for evaluation. Because teacher was on maternity leave at time notification would have been given, District did not give notification. Teacher was subsequently given less favorable evaluation method and improvement plan. Teacher grieved arguing she should have received notification of more favorable evaluation. Arbitrator denied grievance. According to arbitrator, teacher knew about evaluation option because of her prior participation in it. By not requesting it again, she was "estopped" from complaining about non-notification. Circuit Court said arbitrator had added term to CBA and exceeded authority. Estoppel was inapplicable because CBA did not permit equitable considerations of "estoppel."

COA rejects arbitration of post-CBA term grievance.

Grand Rapids Employees Ind Union v Grand Rapids, 280360 (October 16, 2008), lv dn ___ Mich ___ (2009). Union cannot arbitrate grievances where CBA excludes arbitration 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. ***Kay Bee Kay Holding Co, LLC v PNC Bank, NA***, 327077 (November 8, 2016); ***CNJ Financial Group, LLC v McKenney***, 327547 (October 19, 2016); ***McCarthy v Pallisco***, 327647 (October 6, 2016), lv dn ___ Mich ___ (2017); ***Compatible Laser Products, Inc v Main Street Financial Supplies***, 323122 (September 20, 2016); ***William Beaumont Hosp v West Bloomfield MOB, LLC***, 327238 (July 26, 2016); ***Francis v Kayal***, 325576 (May 3, 2016); ***LaSalle Bank Midwest, NA v Jar Investment Group, LLC***, 324849 (April 28, 2016); ***Ingham Co v Mich Ass'n of Police***, 325633 (April 19, 2016); ***Gordon v Cornerstone PG, LLC***, 324909 (March 8, 2016); ***O'Neil v O'Neil***, 324290 (February 11, 2016); ***Fadel v El-Akkari***, 321931 (October 15, 2015); ***Hartigan v The Gold Refinery, LLC***, 321506

(October 1, 2015); ***Ellis v Ellis***, 321972 (August 6, 2015); ***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); ***Lowry v Lauren Bienenstock & Associates Inc*** , 317516 (December 23, 2014); ***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); ***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); ***Yacisen v Woolery***, 308310 (May 30, 2013); ***Platt v Berris***, 297292 and 298872 (April 23, 2013); ***Derwoed v Wyandotte***, 308051 (April 16, 2013); ***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); ***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); ***Reynolds v Parklane Investments, Inc***, 298777 (September 20, 2011); ***Police Officers Ass'n of Mich v Lake Co***, 298055 (August 11, 2011); ***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); ***Roosevelt Park v Police Officers Labor Council***, 295588 (May 12, 2011) , lv den___ Mich ___ (2011); ***Schroeder v Muller Weingarten Corp***, 296420 (April 26, 2011); ***WHRJ, LLC v Taylor***, 295299 (March 29, 2011); ***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); ***Nordlund & Assoc, Inc v Village of Hesperia***, 288 Mich App 222; 792 NW2d 59 (2010); ***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); ***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); ***Central Mich Univ Faculty Ass'n v Central Mich Univ***, 293003 (February 10, 2010); ***Center Line v Police Officers Ass'n***, 289248 (February 9, 2010); ***Considine v Considine***, 283298 (December 15, 2009); ***Healey v Spoelstra***, 281686, 288223 (October 22, 2009); ***Washington v Washington***, 283 Mich App 667; 770 NW2d 908 (2009); ***Harleysville Lake States Insurance Co v Kangas***, 282500 (April 21, 2009); ***Mich Ass'n of Police v Pontiac***, 281353 (March 26, 2009); ***Pontiac v Mich Ass'n of Police***, 280919 (February 19, 2009); and ***Mehl v Fifth Third Bank***, 278977 (December 11, 2008).

III. MEDIATION

A. Michigan Supreme Court Decisions

Supreme Court orders mediation.

City of Huntington Woods v Oak Park, 500 Mich 1224; 886 NW2d 635 (November 2, 2016). Supreme Court directed parties to participate in settlement proceedings and appointed COA Chief Judge Michael J. Talbot as mediator. Additional information or comments made during these proceedings will be confidential and will not become part of record, except on motion by one of parties. MCR 7.213(A)(2)(f); MCR 2.412(C). Mediator shall file status report with Supreme Court. MCR 7.318. Eventually Supreme Court vacated 311 Mich App 96; 874 NW2d 214, 321414 (2015), and remanded case to Circuit Court. ___ Mich ___, 152035 (May 3, 2017). MCR 7.316(A)(9).

MSA concerning parental rights.

In re Wangler, 498 Mich 911; 870 NW2d 923, 149537 (2015)[Justice Markman dissenting], reversed 305 Mich App 438; 853 NW2d 402 (2014). Circuit Court violated MCR 3.971(C)(1) by failing to satisfy itself that mother's plea was knowingly and voluntarily made; and manner in which Circuit Court assumed jurisdiction violated mother's due process rights. ***In re Alston***, 328667 (March 17, 2016).

In 305 Mich App 438 (2014) (Hoestra and Sawyer [majority]; Gleicher [dissent]), parties entered into MSA. Respondent failed to comply with MSA ordered services. Pursuant to MSA, Circuit Court accepted her plea and took jurisdiction over minor children. Respondent's attorney agreed MSA authorized court to take jurisdiction. Court said it was taking formal jurisdiction and authorized petitioner to file supplemental petition asking for termination of parental rights. On appeal, respondent argued her written plea that was incorporated into MSA was invalid and could not form basis for court to take jurisdiction. Court ordered parties to engage in mediation immediately after preliminary hearing wherein it found probable cause to authorize petition and ordered temporary placement of children. Parties negotiated MSA signed by all participants. MSA set forth consequences of court's acceptance of admission plea.

Judge Gleicher's dissent said before court may exercise jurisdiction based on plea it must satisfy itself that parent knowingly, understandingly, and voluntarily waived rights. MCR 3.971(C)(1). No dialogue between court and parent occurred. Mediation employed as substitute for adjudicative trial improperly bypassed due process MCR protections. 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), dn lv 297 Mich App 391; 824 NW2d 591 (2012). COA affirmed Circuit Court's holding that audio recorded MSA at mediation was binding and "certain amount of pressure to settle is fundamentally inherent in the mediation process." COA affirmed Circuit Court that plaintiff was liable for sanctions because plaintiff's motions were filed for frivolous reasons and Circuit Court did not abuse discretion in awarding costs and attorney fees.

Confidentiality in mediation.

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

B. Michigan Court of Appeals Published Decisions

Other than Supreme Court leave to appeal cases that are cited as Supreme Court cases, there do not appear to have been any Michigan Court of Appeals published decisions concerning mediation during the review period.

C. Michigan Court of Appeals Unpublished Decisions

Mediation and domestic violence.

Kenzie v Kenzie, 335873 (August 8, 2017). Attorney fees granted, in part, because husband initiated altercation with wife following mediation at which he called police and accused wife of domestic violence; and he obstructed mediation process that would have allowed case to reach settlement posture.

Spousal support language not in MSA.

Amante v Amante, 331542 (June 20, 2017). Plaintiff argued both counsel and mediator forgot to include provision barring spousal support in settlement agreement. Plaintiff argued under plain language of judgment of divorce, dispute regarding provision barring spousal support should have been decided by arbitrator. Under terms of judgment of divorce, "any disputes regarding the judgment language" should be submitted to arbitrator. Circuit Court did not abuse its discretion in following settlement agreement and entering judgment of divorce and denying plaintiff's motion for relief from judgment.

Binding settlement agreement.

Roth v Cronin, 329018 (April 25, 2017), **lv app pdg**. "[S]he understood (1) the terms of the settlement, (2) she would be bound by the terms of the settlement if she accepted it, and (3) she had the absolute right to go to trial, where she could get a better or worse result. She testified she understood the terms and would be bound by the settlement, and had the right to go to trial.

Plaintiff further testified that it was her own choice and decision to settle pursuant to the terms that were placed on the record."

Circuit Court Judge not disqualified.

Ashen v Assink, 331811 (April 20, 2017), **app lv pdg**. Plaintiff argued Circuit Court judge should have been disqualified because, as a mediator over the case he would have had "personal knowledge of disputed evidentiary facts concerning the proceeding." Mediation scheduled for June 11, 2015, was cancelled on June 2, 2015. Judge never actually mediated case. Plaintiff failed to show what personal knowledge, if any, judge had of disputed evidentiary facts concerning proceeding. MCR 2.003(C)(1)(c).

Can Circuit Court appoint a Discovery Master?

Barry A Seifman, PC v Raymond Guzell, III, 328643 (January 17, 2017), lv dn ___ Mich ___ (2017). Defendant contended Circuit Court lacked authority to appoint Discovery Master and to require parties to pay Master's fees. Defendant also contended Circuit Court should have made determination regarding reasonableness of Master's fees. COA held once parties accepted case evaluation award, defendant lost ability to appeal earlier Discovery Master order. Any claims arising from appointment of Discovery Master were disposed of by acceptance of case evaluation award. Can Circuit Court appoint a Discovery Master?

CCA trumps custody MSA.

Vial v Flowers, 332549 (September 22, 2016). COA rejected wife's contention parties had not entered into MSA concerning custody. December 2015 mediation resulted in MSA. COA held Circuit Court failed to adequately consider child's best interests before it entered custody judgment in April 2016. COA said party is bound by signature on custody MSA as long as Circuit Court agrees MSA is in best interests of child. MSA signed by parties was binding on parties subject to Circuit Court doing best interests analysis. When parties enter into otherwise binding custody agreement, Circuit Court is not relieved of obligation to examine best interest factors. By entering judgment of custody, court implicitly acknowledges it has (1) examined best interest factors, (2) engaged in profound deliberation as to its discretionary custody ruling, and (3) is satisfied custody order is in child's best interests. Evidentiary hearing not necessarily required given custody MSA. COA indicated Circuit Court also erred by not considering whether established custodial environment existed. Does this mean, if established custodial environment exits, parents cannot agree to enforceable MSA that changes parenting time, "unless there is presented clear and convincing evidence that [the changes are] in the best interest of the child[?]" MCL 722.27(1)(c). If so, does this arguably mean MSA that changes parenting time is prelude to litigation rather than end of litigation?

Attendance and authority at mediation session.

Howard v Glen Haven Shores Ass'n, 325812 (July 7, 2016). Circuit Court properly refused to enforce purported MSA where defendant did not violate order by not having entire Board of Directors at mediation; and it was known settlement was subject to approval by full Board.

MSA not enforced.

Coloma Emergency Ambulance, Inc v Timothy E Onderline, Ears, Inc, 325616 (2016) lv dn ___ Mich ___ 153839 (November 30, 2016). Parties participated in mediation which

resulted in all counsel signing "Proposed Settlement" document, which referenced future signing of additional documents. Circuit Court held document was not binding contract. COA affirmed. If preliminary agreement includes all essential terms, it can be enforceable agreement. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354; 320 NW2d 836 (1982); *Heritage Broadcasting Co v Wilson Communications, Inc*, 170 Mich App 812; 428 NW2d 784 (1988).

DR MSA enforced.

Kleinjan v Carlton, 328772 (January 19, 2016), enforced DR MSA. Circuit Court did not err by entering order based on parties' signed, handwritten MSA, despite defendant's attempt to disavow MSA. Defendant bound by terms of signed, written MSA. MCR 3.216(H)(7). She cannot dispute MSA based on change in heart.

Custody MSA not enforced.

Bono v Bono, 325331 (November 19, 2015). Circuit Court abused discretion by entering MSA judgment of divorce, which included custody, without first considering best interest factors. Child Custody Act requires Circuit Court to determine what custodial placement is in best interests of children, even if parties utilize ADR to reach agreement regarding custody.

MSA not binding contract.

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

Dissent said MSA was sufficiently definite to be enforceable contract. MSA incorporated 50 page plus document which provided essential terms for agreement.

Repeated challenges to MSA sanctionable.

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

Unsigned MSA not enforced.

Central Warehouse Operations, Inc v Riffell, 319183 (March 24, 2015). Parties negotiated oral non-written settlement agreement with aid of facilitator. Attorneys were not present. COA said, while parties acknowledged some form of agreement was made, agreement was nothing more than agreement to agree and not enforceable agreement.

COA sets aside property MSA.

Heiden v Heiden, 318245 (February 26, 2015), vacated MSA. Parties signed antenuptial agreement describing husband's premarital personal injury settlement as his separate property. Twenty-four years later, wife filed for divorce. COA said Circuit Court incorrectly ruled antenuptial agreement applied only in event of death. Matter proceeded to mediation after this conclusion. Parties failed to consider during mediation whether disputed property belonged to

husband alone or became part of marital estate. Parties reached MSA predicated on inaccurate description of separate and marital property. Property division and spousal support award disparately favored wife. Judgment entered reflecting MSA. COA vacated property division and spousal support award and remanded to Circuit Court to set aside MSA. Circuit Court must accept that antenuptial agreement applies to divorce proceeding.

Undisclosed pregnancy at mediation.

Cieslinski v Cieslinski, 319609 (November 13, 2014). Circuit Court should have set aside consent judgment when husband alleged (1) wife withheld information 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 discretion when it failed to hold evidentiary hearing after husband in essence alleged wife fraudulently obtained consent judgment.

Incomplete MSA not enforced.

Kendzierski v Macomb Co, 316508 (September 23, 2014). Signed MSA that resolved only damages issue but left unresolved other issues not enforceable. Court cannot force parties to settle lawsuits and cannot make contract for parties where there is no contract. Mere discussions and negotiation, including unaccepted offers, cannot be substituted for contract requirements. Even if valid oral contract to settle resulted during facilitation, it was not enforceable because agreement was not made in open court and written evidence of agreement, subscribed by defendant or its attorney, did not exist. MCR 2.507(G).

MSA enforced.

Faustina v Town Center, 311385 (August 7, 2014). Plaintiff failed to comply with MSA. Plaintiff testified she signed MSA, but her medical bills, which she had tried to show attorneys, were not taken into account. Circuit Court held MSA was binding, ordered plaintiff to sign release, and ordered defendants were not required to turn over settlement checks until plaintiff signed release, and dismissed case with prejudice. COA affirmed Circuit Court's order.

MSA set aside by COA.

Hayes v Morris, 315586 (July 29, 2014). MSA 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 arbitration. After filing of award but before entry of judgment, husband died. *Tokar* held trial court correctly denied motion to enforce award because trial court retains ultimate control over divorce action. Award, standing alone, does not have full force and effect until trial court enters judgment of divorce based on 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 entry of judgment would not have been "ministerial" because there were issues remaining and, before judgment of divorce was entered, parties had option to reconcile or stipulate to agreement different from award. Court found no reliance by decedent. To show reliance, proof of conduct indicating parties in good faith believed they were divorced is required.

Mediation in parental rights case.

In re Vanalstine, Minors, 312858 (April 11, 2013). Court ordered mediation resulted in MSA concerning parental rights. Mother did not comply with MSA and Court terminated parental rights. COA said Circuit Court did not terminate rights solely for failure to comply with MSA. Circuit Court's decision was based on mother's conduct, which included but was not limited to failure to comply, and led to Circuit Court's assessment of statutory termination factors.

Post arbitration-mediation conduct of arbitrator-mediator.

Hartman v Hartman, 304026 (August 7, 2012), concerned same individual being arbitrator and mediator and post-arbitration/mediation conduct of arbitrator-mediator and defense counsel. Circuit Court ordered mediation. When mediation failed, parties agreed to arbitrate using mediator as arbitrator. Arbitrator issued 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 said he had concerns about arbitrator acting as neutral. He did not ask to have agreement set aside. Hearing was continued. Plaintiff's counsel contacted arbitrator to inform arbitrator. Arbitrator told plaintiff's counsel arbitrator was going to be in Florida and staying at home of defense counsel while defense counsel would be present. Plaintiff's counsel contacted defense counsel to request new arbitrator to handle remaining issues. Defense counsel refused request.

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

COA affirmed Circuit Court. COA stated:

> The totality of the circumstances … rises to a level that would have required the arbitrator to be removed from arbitrating or mediating the remaining matters. [T]he 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. … .

SCAO Mediator Standards of Conduct Standards (February 1, 2013) indicates:

> **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.

Model Standards of Conduct for Mediators (September 2005) of AAA, ABA's Section of Dispute Resolution, and ACR 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.

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

> 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**, … 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.

To degree there was relationship between plaintiff's negotiating positions and arbitration decisions and mediation process, issue exists whether plaintiff was entitled to make settlement decisions in environment without prior arbitration decisions and mediator comments that came from neutral whose post arb-med conduct raised alleged apparent standards of conduct issues.

Circuit court can enter judgment on property MSA.

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.

Property MSA evidenced parties' mutual intent.

Roe v Roe, 297855 (July 19, 2011). MSA 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.

MSA does not deprive court of its authority and obligations.

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

Court rejects custody MSA.

Roguska v Roguska, 291352 (September 29, 2009). Circuit Court did not err in rejecting custody MSA, finding no custodial environment existed, and applied proper custody standard. Parties negotiated MSA signed by mediator, parties, and attorneys. Parties said consent judgment was consistent with MSA. Plaintiff testified defendant "lied" during mediation. Circuit Court rejected MSA. COA held Child Custody Act required Circuit Court to determine custody that is in best interests of children.

Public body mediation and Open Meetings Act.

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

MSA binding.

Miller v Miller, 282997 (March 24, 2009). Plaintiff moved to set aside signed MSA arguing she was tricked by her attorney, she misunderstood MSA, and MSA gave other party unconscionable advantage. Circuit Court denied motion. COA affirmed.

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