MICHIGAN ARBITRATION AND MEDIATION CASE LAW UPDATE
ADR SECTION, STATE BAR OF MICHIGAN
2018 ANNUAL MEETING AND ADR CONFERENCE
TRAVERSE CITY, MICHIGAN
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LEE HORNBERGER
ARBITRATOR AND MEDIATOR

I. INTRODUCTION

This update reviews significant Michigan cases issued since 2017 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 For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions. Some interesting pre-2016 cases are also in this review.

II. MEDIATION

A. Michigan Supreme Court Decisions

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

Vittiglio v Vittiglio, 493 Mich 936; 825 NW2d 584 (2013), lv dn 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.

B. Michigan Court of Appeals Published Decisions

Mediation fee is taxable cost.

Patel v Patel, ___ Mich App ___, 339878 (June 19, 2018). COA affirmed Circuit Court's award of defendants' **mediation expense as a taxable cost** under MCR 2.625(A)(1). "[M]ediator's fee is deemed a cost of the action, and the court may make an appropriate order to enforce the payment of the fee." MCR 2.411(D)(4).

COA affirms enforcement of custody MSA.

Rettig v Rettig, 322 Mich App 750, 338614 (January 23, 2018). Parties signed MSA concerning custody. Over objection of one parent that Circuit Court should have hearing concerning CCA best interests factors and whether there was established custodial environment, Circuit Court entered judgment incorporating MSA. COA affirmed. COA said although Circuit Court is not necessarily required to accept parties' stipulations or agreements verbatim, Circuit Court is permitted to accept them and presume at face value that parties meant what they signed. **Circuit Court remains**

obligated to come to independent conclusion that parties' agreement is in child's best interests, but Circuit Court is permitted to accept that agreement where dispute was resolved by parents. Circuit Court was not required to make finding of established custodial environment.

"This memorandum of understanding spells out the agreement that we have reached in mediation. This resolves all disputes between the parties and the parties agree to be bound by this agreement."

What effect does *Rettig* have on *Vial v Flowers*, 332549 (September 22, 2016)?

Was it appropriate for *Rettig* to refer to established custodial environment holding of *Vial* as "nonsensical?"

If *Rettig* resulted in death of *Vial*, did *Vial* deserve better death?

If *Vial* had never existed, would *Rettig* have been a published decision?

B. Michigan Court of Appeals Unpublished Decisions

To settle or not to settle?

Smith v Hertz Schram, PC, 337826 (July 26, 2018). Two to one COA decision. Legal malpractice action arising out of post judgment divorce proceeding. Matter went to mediation. Mediator, also served as the "discovery master." Plaintiff did not go to the Family Court to challenge discovery roadblock. Plaintiff decided to settle.

Jansen dissent said attorney should have advised plaintiff to walk away from $65,000 figure offered in mediation and to return to Family Court to pursue discovery matter further. Settlement should never have been serious consideration. With respect to language in settlement agreement that acknowledged that neither party had relied on any "representation, inducement, or condition not set forth in this agreement," attorney should never have allowed it. The fact that attorney essentially released Leider from future liability for any material misrepresentations made in connection with settlement agreement was negligent. Attorney should have had plaintiff sign a release, indicating it was her intention to enter into settlement agreement despite her counsel's advice to contrary.

Post-MSA surveillance is okay.

Hernandez v State Automobile Mutual Ins Co, 338242 (April 19, 2018). COA reversed Circuit Court's granting of plaintiff's motion to enforce MSA. MSA was signed by plaintiff; however, claims representative for defendant indicated he would need approval from his superiors and Michigan Catastrophic Claims Association (MCCA) before signing agreement. MSA stated **"[t]his settlement is contingent on the approval of MCCA**." MCCA did not approve MSA. Circuit Court did not err in concluding there was meeting of minds on essential terms of MSA. MSA was properly subscribed as required by MCR 2.507(G). MCCA approval of MSA was condition precedent to

performance of MSA. Defendant did not waive this condition by conducting surveillance on plaintiff and **submitting reports of surveillance to MCCA**.

Probate MSA not approved.

Peterson v Kolinske, 338327 (April 17, 2018). Probate MSA not approved. MSA indicated only that persons who signed it had agreed to its terms. It did not indicate Theresa agreed to its terms, agreed that the will was valid, or otherwise agreed to release claims against the estate or its personal representative. If contract's language is clear and unambiguous, must construe it according to its plain sense and meaning, without reference to extrinsic evidence. Lessons: **Get everyone's signature**. **Be careful when necessary people are absent.**

A signature is a signature.

Krake v Auto Club Ins Assoc, 333541 (February 22, 2018), lv dn ___ Mich ___ (2018). "Facilitation Agreement." Plaintiff was present at mediation. She initially denied she had signed MSA. She admitted she did "pen" her signature on MSA. She explained she had signed "fake initials," and she had done so because her attorney told her MSA was not legally binding document. Plaintiff explained she did not believe MSA to be final resolution of case. She believed amount of settlement was too low. Circuit Court enforced MSA. COA affirmed. Lessons: **People are unpredictable. Prepare for the worst. The word "mediation" does not appear in this opinion.**

Party dies after signed MSA but before judgment.

Estate of James E Rader, Jr, 335980 (February 13, 2018), lv dn ___ Mich ___ (2018). After signed MSA in domestic relations case, one of parties **died before entry of judgment**. Because settlement agreement was to be incorporated into judgment of divorce, agreement has no effect, since decedent died before judgment of divorce could be entered. Entry of judgment of divorce served as condition precedent to enforcement of settlement agreement. Because entry of judgment of divorce became impossible following decedent's death, settlement agreement could not be incorporated or given effect as intended. Lesson: **Act quickly.**

Mediation confidentiality.

Hanley v Seymour, 334400 (October 26, 2017). Defendant ex-wife sent to an attorney suing her ex-husband's current wife financial information about current wife and defendant's ex-husband, who happened to be the attorney representing current wife. Plaintiff ex-husband sued defendant for contempt, claiming violation of protective order in their divorce that prohibited parties from disclosing financial information learned during discovery. Defendant argued an unclean hands defense, claiming plaintiff had learned about the contemptuous materials during mediation session and so could not use those materials in contempt proceedings. COA found communications received by attorney from defendant ex-wife were not part of mediation proceedings. Plaintiff ex-husband was made aware of communications at conclusion of mediation in which plaintiff participated with opposing attorney. Opposing attorney had received documents

from defendant before mediation was conducted. There was no violation of MCR 2.412(C) regarding confidentiality of mediation communications.

MSA enforced.

Jaroh v Jaroh, 334216 (October 17, 2017). Defendant moved to set aside MSA, contending she signed MSA under duress because she had no food during nine-hour mediation and was pressured by her attorney and mediator to sign MSA. Circuit Court enforced MSA. Defendant argued MSA was obtained by fraud and Circuit Court abused its discretion by failing to set it aside and by failing to hold evidentiary hearing when defendant asserted plaintiff had procured MSA by fraud. COA, affirming Circuit Court, said finding of Circuit Court concerning validity of parties' consent to settlement agreement will not be overturned absent finding of abuse of discretion. *Vittiglio v Vittiglio*, 297 Mich App 391, 400; 824 NW2d 591 (2012), lv dn 493 Mich 936; 825 NW2d 584 (2013). According to COA, defendant's allegation that she did not eat during nine-hour mediation and was pressured to accept terms of MSA by her attorney and mediator did not demonstrate coercion necessary to sustain claim of duress. **Mediator provided parties with snacks.** There was no evidence defendant was refused request to get something to eat or was not allowed to bring in her own snacks or food during mediation. Mediation was conducted as **shuttle mediation** where parties were separated. Lessons. **Refreshments can be important. Separate sessions can sometimes be helpful.**

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, "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 and denying plaintiff's motion for relief from judgment.

Binding settlement agreement.

Roth v Cronin, 329018 (April 25, 2017), lv dn 501 Mich 910 (2017**). "[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), lv dn 501 Mich 952 (2018). Plaintiff argued Circuit Court judge should have been disqualified because, as mediator over case, he would have had personal knowledge of disputed evidence concerning 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 500 Mich 1060 (2017). Defendant contended Circuit Court lacked authority to appoint independent attorney as Discovery Master and to require parties to pay Master's fees; and 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.

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. *Vial* is seriously impacted upon by ***Rettig v Rettig***, 322 Mich App 750, 338614 (January 23, 2018).

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. Hearing was continued. Plaintiff's counsel contacted arbitrator. Arbitrator told plaintiff's counsel arbitrator was going to 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 was hospitality and numerous attorneys, including judges, had stayed at his Florida home. Circuit Court denied motions, stating there was no appearance of impropriety, parties reached settlement, and trip to Florida occurred 30 days after mediation. Circuit Court held there was no evidence of clear or actual bias 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. … .
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> SCAO Mediator Standards of Conduct Standards (February 1, 2013):
> **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.
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> Code of Ethics for Arbitrators in Commercial Disputes (March 1, 2004):
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> 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.

Hartman is discussed at "Michigan-Arbitrator Conduct After Arbitration and Mediation," *The Michigan Dispute Resolution Journal* (Fall 2017), p 4. http://www.leehornberger.com/files/Med-Arb-TMDRJ-Fall2017.pdf

III. ARBITRATION

A. Michigan Supreme Court Decisions

Arbitration in UIM no fault case.

Nickola v MIC General Ins Co, 500 Mich 115; 894 NW2d 552 (2017), reversed portion of 312 Mich App 374; 878 NW2d 480 (2015), denying plaintiff penalty interest under Uniform Trade Practices Act, MCL 500.2001 *et seq*. COA discussed attorney fee and interest issues arising from uninsured motorist case that included an arbitration.

Waiver of right to arbitration.

Nexteer Automotive Corp v Mando Am Corp, ___ Mich ___ , 153413 (2017), denied leave from 314 Mich App 391; 886 NW2d 906 (2016). Party waived right to arbitration when it stipulated arbitration provision did not apply. In dissent, 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 because he believed COA erred by holding defendant expressly waived right to arbitration by signing 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 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 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 dispute between firm and former principal that fell within scope of arbitration clause and was subject to arbitration. Supreme Court reversed those portions of 307 Mich App 612; 816 NW2d 913 (2014), which held matter was not subject to arbitration.

C. Michigan Court of Appeals Published Decisions

COA rules two documents means one document

Galea v FCA US LLC, ___ Mich App ___, 334576 (March 13, 2018). Plaintiff alleged her new vehicle was a lemon. She sued seller and bank that financed deal, asserting warranty claims. Defendants countered with signed arbitration agreement. Plaintiff argued Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*., prohibits binding arbitration of warranty disputes. This argument collided with *Abela v Gen Motors Corp*, 469 Mich 603; 677 NW2d 325 (2004), in which Supreme Court held to contrary. Plaintiff also argued that by failing to mention arbitration, warranty violated single document rule in 16 CFR 701.3, a Federal Trade Commission (FTC) regulation implementing MMWA. According to Plaintiff, this omission foreclosed arbitration. Majority (Gadola and O'Brien) interpreted *Abela* to mean binding arbitration provision need not be included in warranty. Gleicher's dissent stated arbitration agreements outside warranty are not enforceable.

DRAA award partially vacated.

Eppel v Eppel, 322 Mich App 562, 335653, 335775 (January 9, 2018). COA held arbitrator deviated from plain language of Uniform Spousal Support Attachment by including profit from ASV shares. This deviation was substantial error that resulted in substantially different outcome. *Cipriano v Cipriano*, 289 Mich App 361; 808 NW2d 230 (2010), lv dn ___ Mich ___ (2012). Deviation was readily apparent on face of award. *Washington v Washington*, 283 Mich App 667; 770 NW2d 908 (2009).

Offer of judgment and subsequent award confirmation.

Simcor Constr, Inc v Trupp, 322 Mich App 508, 333383 (January 9, 2018). MCR 2.405, offer of entry of judgment, applied to District Court's confirmation of arbitration award, and **offer of judgment costs were merited**. *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338; 852 NW2d 22 (2014) (case evaluation sanctions).

D. Michigan Court of Appeals Unpublished Decisions

COA affirms Circuit Court confirmation of award.

Oliver v Kresch, 338296 (July 19, 2018). COA confirmed Circuit Court's confirmation of award. Attorney referral fee case. COA stated:

> Judicial review of arbitration awards is limited." *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). "A court may not review an arbitrator's factual findings or decision on the merits[,]" may not second guess the arbitrator's interpretation of the parties' contract, and may not "substitute its judgment for that of the arbitrator." *City of Ann Arbor v American Federation of State, Co & Muni Employees (AFSCME) Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009). Instead, "[t]he inquiry for the reviewing court is merely whether the award was beyond the contractual authority of the arbitrator." *Id*. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court may not overturn the decision even if convinced that the arbitrator committed serious error." *Id*.

COA affirms Circuit Court confirmation of award.

Mumith v Mumith, 337845 (June 14, 2018). COA affirmed Circuit Court's confirmation of award. **Two to one arbitration panel award**. Ownership of car wash and burden of proof issues. COA stated:

> … judicial review of an arbitration award … is extremely limited." *Fette v Peters Const Co*, 310 Mich App 535, 541; 871 NW2d 877 (2015). "… '[a] court's review of an arbitration award "is one of the narrowest standards of judicial review in all of American jurisprudence." ' " *Washington*, 283 Mich App at 671 n 4, quoting *Way Bakery v Truck Drivers Local No 164*, 363 F3d 590, 593 (CA 6, 2004), quoting *Tennessee Valley Auth v Tennessee Valley Trades & Labor Council*, 184 F3d 510, 514 (CA 6, 1999). … An arbitrator may exceed his or her powers by making a material error of law that substantially affects the outcome of the arbitration.

Demand for labor arbitration concerning prohibited subject of bargaining.

Ionia Co Intermediate Ed Assn v Ionia Co Intermediate Sch Dist, 334573 (February 22, 2018). COA affirmed Michigan Employment Relations Commission (MERC) order granting summary disposition, on basis that Association had engaged in ULP by demanding to arbitrate grievance concerning prohibited subject of bargaining under Public Employment Relations Act, MCL 423.201 *et seq.* MERC ordered Association to withdraw its demand for arbitration and to cease and desist from

demanding to arbitrate grievances concerning prohibited subjects of bargaining. MCL 423.215(3)(m). See ***Mich Ed Ass'n v Vassar Public Schs***, 337899 (May 22, 2018).

COA affirms Circuit Court confirmation of award.

Galasso, PC v. Gruda, 335659 (February 8, 2018). Court of Appeals affirmed confirmation of award because there was no clear error of law on the face of the award. Uniform Arbitration Act, MCL 691.1681 *et seq.* MCL 691.1703(1)(d). **It was good that "arbitrator's reasons for declaring the promissory note, mortgage, and service agreement void and unenforceable are not apparent on the face of the award."**

If parties agree, arbitrator can decide arbitrability.

Elluru v. Great Lakes Plastic, Reconstructive & Hand Surgery, PC, 333661 and 334050 (February 6, 2018). Parties may agree to delegate to arbitrator question of arbitrability, provided arbitration agreement clearly so provides. Uniform Arbitration Act, MCL 691.1681 *et seq*. MCL 691.1684(1). MCL 691.1684(1) provides "parties may vary the effect of the requirements of this act to the extent permitted by law."

COA considers waiver of arbitration agreement.

Miller v Duchene, 334731 (December 21, 2017). COA reversed Circuit Court's decision rejecting plaintiffs' contentions that defendants waived defense predicated on arbitration agreement and arbitration agreement did not encompass some defendants. With respect to initial defendants, issue was whether their waiver can be forgiven or set aside on the basis that plaintiffs subsequently filed amended complaint. COA concluded waiver survived amended complaint and amended complaint did not revive initial defendants' ability to raise arbitration agreement as defense. Amended complaint did not significantly alter scope or thrust of plaintiffs' allegations or general nature of case. Same conclusion cannot be made with respect to subsequent defendants. They were not and could not be bound by waiver made by other parties. Defense of agreement to arbitrate was raised in timely fashion by subsequent defendants, where they raised it in motion for summary disposition that was filed before their first responsive pleading.

COA reverses vacatur of DRAA award.

Roetken v Roetken, 333029 (December 19, 2017), **app lv pdg**. COA reversed Circuit Court partial vacatur of DRAA award concerning spousal support. MCL 600.5081.

Amended award confirmed.

Ciotti v Harris, 332792 (December 12, 2017). In this case arising from an automobile accident, COA affirmed Circuit Court's confirmation of reasoned award rendered after motion to arbitrator concerning nonreasoned award.

COA reverses vacatur of award.

Cook v Hermann, 335989 (November 21, 2017). In this breach of contract case, COA held Circuit Court erred by vacating award. Circuit Court substituted its judgment for that of the arbitrator.

Claims subject to arbitration.

Administration Sys Research Corp Int'l v Davita Healthcare Partners, Inc, 334902 (November 16, 2017). Circuit Court properly held defendants' claims were subject to arbitration and were not preempted by ERISA

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"May" does not mean mandatory.

Skalnek v Skalnek, 333085 (October 26, 2017), lv dn ___ Mich ___ (2018). In this employment case, COA agreed with Circuit Court, that parties' agreement did not provide for mandatory arbitration because of the use of the word "may."

Arbitration, frozen embryos, and sua sponte analysis.

Karungi v Ejali, 337152 (September 26, 2017), lv dn ___ Mich ___ (2018). This COA split decision arose from frozen embryos. The never married parties disputed what should be done with the embryos. The Circuit Court ruled for technical reasons that it did not have jurisdiction over the embryo issue. On appeal, COA said both parties and Circuit Court ignored fact that parties entered into contract that governed parties' interest in contested embryos and that there was a mandatory arbitration provision in the previously non-cited contract. In light of this the per curiam (O'Brien) and concurrence (Murray) remanded to Circuit Court to determine whether it has subject-matter jurisdiction. The dissent (Jansen) would not have altered entire procedural posture, sua sponte, to remand matter and allow parties to re-litigate theories they failed to properly raise.

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 of divorce, "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 Dev, 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. 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 held grievance, which implicated articles 5.2, 24.2, and 45.2, was not timely CBA terms. 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. In reaching this conclusion, arbitrator relied heavily on ALJ's examination of CBA, concluding that ALJ

"carefully, persuasively and correctly analyz[ed] and answer[ed] the underlying question of the fundamental nature" of parties' agreement with respect to city's obligation to maintain staffing levels in perpetuity. Ultimately, to the extent union's 2011-20 grievance implicated articles 5.2, 24.2, and 45.2, grievance was denied.

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

Circuit Court determined issue in grievance 6 had not been decided. Preclusion issues was "close question" to be decided by arbitrator. COA affirmed. Unless otherwise specified in parties' contract, whether arbitration is precluded under res judicata and collateral estoppel is for arbitrator to decide. Because CBA contained no indication res judicata and collateral estoppel should be addressed by court, rather than arbitrator, Circuit Court properly submitted matter to arbitration. In determining preclusion issues should be decided by arbitrator, COA offered no opinion on merits of city's preclusive arguments. City is free to assert during arbitration that res judicata and collateral estoppel bar arbitration of grievances 1 and 6. Should arbitrator reach merits of 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), dn lv ___ Mich ___ (2017). 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.

COA affirms Circuit Court orders favoring arbitration.

In the following cases, COA affirmed orders ordering arbitration, confirming awards, or declining to vacate awards. ***Young v Burton***, 334231 (December 19, 2017); ***Shea v FCA US LLC***, 333588 (October 17, 2017); ***Santamauro v Pultegroup, Inc***, 328404 (December 20, 2016); ***Waterman v Waterman***, 332537 (December 20, 2016); ***Phillips v State Farm Ins Co***, 329740 (November 17, 2016); ***Karmanos v Compuware Corp***, 327476 and 327712 (October 20, 2016), lv dn ___ Mich ___ (2017); ***Ruben v Badgett***, 326717 (October 11, 2016), lv dn ___ Mich ___ (2017).

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Lee Hornberger is Immediate Past Chair of the Alternative Dispute Resolution Section of the State Bar of Michigan, former Editor of *The Michigan Dispute Resolution Journal*, former Chair of the ADR Committee of the Grand Traverse-Leelanau-Antrim Bar Association, former member of the State Bar’s Representative Assembly, former President of the Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan’s top mediators.

He has received the George N. Bashara, Jr. Award from the State Bar’s ADR Section in recognition of exemplary service and the Albert Nelson Marquis Lifetime Achievement Award. He is a member of The National Academy of Distinguished Neutrals, included in The Best Lawyers of America 2018 and 2019 for his work in arbitration, and on the 2016, 2017, and 2018 Michigan Super Lawyers lists for alternative dispute resolution.

He is an arbitrator with the American Arbitration Association, Federal Mediation and Conciliation Service, Financial Industry Regulatory Authority, Forum, Michigan Employment Relations Commission, National Futures Association, and National Mediation Board.

While serving with the U.S. Army in Vietnam, he was awarded the Bronze Star Medal and Army Commendation Medals. The unit he was in was awarded the

Meritorious Unit Commendation and the Republic of Vietnam Gallantry Cross Unit Citation with Palm.

He holds his B.A. and J.D. *cum laude* from The University of Michigan and his LL.M. in Labor Law from Wayne State University.

He can be reached at 231-941-0746 and leehornberger@leehornberger.com

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