

connected mediation, including mediator selection and protections against coercive process (including emotional and physical intimidation by other parties), even where the temptation is ever greater to capitalize on the benefits of mediation to achieve court administration goals?

√ *Since 2011, has our ADR System adequately addressed racism and sexism in its own administration and within ADR processes?*

And these questions may be the easiest to tackle. They don't begin to touch on more nuanced areas for action raised by the Task Force around the cultural competence of our processes, their accessibility, and touching on varied cultural approaches to conflict. I'd encourage you to reflect on the brief summary of action steps included herein from the report. Some are readily do-able; others require more study; and many by now beg for the next new ideas, some 11 years after the report's publication. Judging by the news around us, the ADR Section would have plenty of good company in prioritizing this work for the benefit of the public and the courts. ❄️

About the Author

Dale Ann Iverson, J.D. served as ADR Section Chair in 2001/2002. Together with Toni Raheem, Section Chair in 2013/2014, she co-facilitated the work of the Task Force. Dale simultaneously served on the Equal Access Initiative of the State Bar, a Task Force collaborator. Dale provides services in conflict engagement including court-connected mediation. She trains mediators and teaches negotiation and mediation in higher education settings. She has been named a Super Lawyer in mediation annually since 2015, and a Best Lawyer in mediation and arbitration annually since 2012.

Endnotes:

The term "ADR system" was used in all the work of the Task Force. I use it here with the same meaning. The Task Force did not intend to limit its discussion to court-connected dispute resolution, and intended to include community dispute resolution, private arbitration, among other pieces of the universe of conflict resolution mechanisms in Michigan.



Lee Hornberger

Michigan Arbitration and Mediation Case Law Update

By Lee Hornberger, Arbitrator and Mediator

I. INTRODUCTION

This update reviews appellate decisions issued since December 2021 concerning arbitration and mediation. This update uses short citation style rather than official style for COA unpublished decisions.

YouTube of author's 2020-2021 update presentation at:

<https://www.youtube.com/watch?v=9Q7deVlExDI>

YouTube of author's 2019-2020 update presentation at:

<https://www.youtube.com/watch?v=I0TkP8zs-A8>

II. ARBITRATION

A. Michigan Supreme Court Decisions

There were no Supreme Court decisions concerning arbitration during review period.

B. Michigan COA Published Decisions

There were no COA published decisions concerning arbitration during review period.

C. Michigan COA Unpublished Decisions

COA affirms denial of motion to vacate DRAA award.

Pascoe v Pascoe, 356477 (April 14, 2022). COA affirmed denial of motion to vacate DRAA award. COA indicated review of awards extremely limited. Review of award is one of narrowest standards of judicial review. Award may be vacated by court in when arbitrator exceeded its powers. MCL 600.5081(2)(c) and MCR 3.602(J)(2)(c). Party seeking to prove domestic relations arbitrator exceeded authority must show arbitrator acted beyond material terms of arbitration agreement or acted contrary to controlling law. Court may not review arbitrator's findings of fact, and error of law must be discernible on face of award. Court not permitted to review arbitrator's factual findings or arbitrator's decision on merits. Arbitrator's "evidentiary findings and credibility assessments by the arbitrator were simply not subject to challenge in court." The opinion in this case includes a powerful outline of law concerning deference to awards.

https://www.courts.michigan.gov/4974b1/siteassets/case-documents/uploads/opinions/final/coa/20220414_c356477_51_356477.opn.pdf

COA affirms consent judgement enforcing award.

Hans v Hans, 355468, 356936 (March 31, 2022). In March 2019, Circuit Court entered judgment, consistent with arbitrator's award. Judgment approved by plaintiff and defendant. In July 2019, defendant filed motion for clarification of judgment as applied to proceeds from sale of real property. Circuit Court issued post-judgment order explaining how sale proceeds to be distributed. Plaintiff appealed. COA affirmed. According to COA, divorce judgment entered in accordance with award and parties agreed to terms of judgment which was appropriately characterized as a consent judgment.

Judge Shapiro dissent would remand case for Circuit Court to review whether distributions made and credits provided were consistent with intent of parties and arbitrator.

https://www.courts.michigan.gov/495814/siteassets/case-documents/uploads/opinions/final/coa/20220331_c355468_78_355468.opn.pdf

https://www.courts.michigan.gov/496659/siteassets/case-documents/uploads/opinions/final/coa/20220331_c355468_79_355468d.opn.pdf

COA affirms Circuit Court ordering arbitration.

Tariq v Tenet Healthcare Corp, 356904 (March 24, 2022). Plaintiff appealed Circuit Court granting summary disposition. Plaintiff alleged defendants engaged in retaliation and discrimination. Defendants moved for summary disposition, asserting plaintiff's claims subject to arbitration agreement. Circuit Court agreed. COA affirmed. Where arbitration provision is distinct and is executed separately, arbitration provision may be binding even if rest of handbook is not binding. COA must resolve all doubts in favor of arbitration and avoid bifurcating parties' claims between court and arbitrator.

https://www.courts.michigan.gov/495bee/siteassets/case-documents/uploads/opinions/final/coa/20220324_c356904_33_356904.opn.pdf

COA affirms confirmation of award.

TBI Solutions, Inc v Gall, 356747 (February 24, 2022). COA affirmed confirmation of award. Existence of arbitration agreement and enforceability of its terms are questions for court to determine rather than for arbitrators. MCL 691.1686. If court determines dispute arbitrable, merits of dispute are for arbitrator.

https://www.courts.michigan.gov/493d0a/siteassets/case-documents/uploads/opinions/final/coa/20220224_c356747_30_356747.opn.pdf

COA affirms non-granting of attorney fees.

Atlas Indus Contractors v Ross, 356179 (February 17, 2022). COA agreed with Circuit Court that arbitrator not empowered to award defendants attorney fees and costs after final award because defendants requested award of fees and costs under arbitration provision in contract, and arbitrator had already addressed merits of plaintiff's breach of contract claims. AAA Rules for Commercial Litigation, Rule 47(d)(ii), precluded award of fees after entry of final award.

https://www.courts.michigan.gov/493977/siteassets/case-documents/uploads/opinions/final/coa/20220217_c356179_36_356179.opn.pdf

COA reverses confirmation of award against non-signatory.

Domestic Uniform Rental v AZ Auto Ctr, 355780 (February 17, 2022). COA affirmed confirmation of award as to arbitration agreement signatories over objections arbitrator used expedited procedures without agreement of defendants.

https://www.courts.michigan.gov/49398e/siteassets/case-documents/uploads/opinions/final/coa/20220217_c355780_26_355780.opn.pdf

COA affirms confirmation of DRAA award.

Zalewski v Homant, 354218, 354561 (February 1, 2022). COA affirmed denial of motion to vacate DRAA award. Zalewski is discussed at O'Neil, The Scope of Arbitration, Michigan Family Law Journal (March 2022), p. 3.

<https://higherlogicdownload.s3.amazonaws.com/MICHBAR/29647f32-d7bf-4b3b-97a7-a9359ef92056/UploadedImages/pdf/newsletter/March2022.pdf>

https://www.courts.michigan.gov/493a2c/siteassets/case-documents/uploads/opinions/final/coa/20220201_c354218_34_354218.opn.pdf

COA affirms confirmation of award.

Jenkins v Suburban Mobility Auth for Reg'l Transp, 355452 (January 13, 2022). Plaintiff appealed confirmation of award. Plaintiff challenged order granting defendant's motion to strike and exclude claims at arbitration. Plaintiff argued Circuit Court erred when it decided whether she could arbitrate claims that she assigned to her medical providers because those claims were governed by parties' arbitration agreement. COA affirmed.

https://www.courts.michigan.gov/4939cd/siteassets/case-documents/uploads/opinions/final/coa/20220113_c355452_44_355452.opn.pdf

https://www.courts.michigan.gov/4939cd/siteassets/case-documents/uploads/opinions/final/coa/20220113_c355452_45_355452c.opn.pdf

COA affirms confirmation of DRAA award.

Hoffman v Hoffman, 356681 (December 16, 2021). If agreement leaves doubts about arbitrability, doubts should be resolved in favor of arbitration. COA affirmed confirmation of DRAA award.

https://www.courts.michigan.gov/49391f/siteassets/case-documents/uploads/opinions/final/coa/20211216_c356681_44_356681.opn.pdf

III. MEDIATION

A. Michigan Supreme Court Decisions

There were no Supreme Court decisions concerning mediation during review period.

D. Michigan COA Published Decisions

There were no Court of Appeals published decisions concerning mediation during review period.

E. Michigan COA Unpublished Decisions

COA reverses rejection of consent judgment

Stacy v Stacy, 353757 (March 17, 2022). Plaintiff submitted proposed consent judgment that would transfer defendant's pensions to plaintiff. Referee recommended case be dismissed because division of assets in proposed consent judgment was not fair or equitable to defendant. Referee stated it did not appear parties wanted to be separated but only wanted to qualify defendant for Medicaid. Circuit Court effectuated referee's recommended order. COA reversed Circuit Court. Without making finding that consent judgment was entered into through fraud, mistake, illegality, or unconscionability, Circuit Court not permitted to modify, and deny, proposed consent judgment in order to obtain equitable result.

https://www.courts.michigan.gov/494b6d/siteassets/case-documents/uploads/opinions/final/coa/20220317_c353757_29_353757.opn.pdf

COA reverses rejection of marriage settlement agreement.

Rudzinski v Rudzinski, 355312 (March 10, 2022). COA reversed denial of motion to enforce marriage settlement agreement. In October 2015, parties began discussions about ending marriage. Parties had meetings about dissolving marriage and dividing assets. These conversations resulted in settlement agreement which parties signed in June 2016. In January 2019, Thomas filed for divorce. Dolores then moved to enforce settlement agreement. Circuit Court denied Dolores's motion to enforce agreement. In absence of fraud, duress, mutual mistake, or severe stress, Circuit Court erred by refusing to enforce agreement.

https://www.courts.michigan.gov/493d25/siteassets/case-documents/uploads/opinions/final/coa/20220310_c355312_29_355312.opn.pdf

COA affirms entry of JOD signed by attorneys.

Turner v Turner, 354495 (February 10, 2022). COA stated negotiation and settlement are part of civil lawsuits. For negotiations to work, parties must be able to take other side at their word. Agreements subscribed to in writing and signed by party or party's attorney are binding. Parties negotiated consent JOD in person and through emails. Wife's attorney drafted documents and signed them, along with Husband and his attorney. JOD contract binding on both parties, despite wife's later disagreement. Circuit Court properly entered JOD.

https://www.courts.michigan.gov/493af3/siteassets/case-documents/uploads/opinions/final/coa/20220210_c354495_27_354495.opn.pdf

Post final order motion for mediation.

Jones v Peake, 356436 (January 20, 2022). Post final order motion for mediation in Paternity Act, MCL 722.711 et seq., case was frivolous. MCR 3.216(C)(1) and MCR 3.224(C)(1) and (2). MCL 600.2591 and MCR 1.109(E).

https://www.courts.michigan.gov/49394d/siteassets/case-documents/uploads/opinions/final/coa/20220120_c356436_32_356436.opn.pdf

COA affirms Circuit Court interpretation of MSA.

Moriah Inc v Am Auto Ins Co, 355837 (January 6, 2022). MSA encompassed plaintiff's claims for penalty interest and attorney fees. Parties' intent was to release defendant from liability from "any and all claims ... or causes of action" for no-fault benefits. Plaintiff's claims premised on payment of no-fault benefits, specifically benefits having been paid untimely, and were included in MSA. MSA identified claims "for all services provided to ... through September 30, 2019" intended to be released. This language covered period up until October 1, 2019, mediation and agreement to settle.

https://www.courts.michigan.gov/4939ae/siteassets/case-documents/uploads/opinions/final/coa/20220106_c355837_28_355837.opn.pdf ❄️

About the Author

Lee Hornberger is a former Chair of the SBM Alternative Dispute Resolution Section, Editor Emeritus of *The Michigan Dispute Resolution Journal*, former member of the SBM 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, and a Diplomate Member of The National Academy of Distinguished Neutrals. He is a Fellow of the American Bar Foundation. He has received the George Bashara Award from the ADR Section in recognition of exemplary service. He has received Hero of ADR Awards from the ADR Section. He is in *The Best Lawyers of America* 2018 and 2019 for arbitration, and 2020 to 2021 for arbitration and mediation. He is on the 2016 to 2021 Michigan Super Lawyers lists for alternative dispute resolution. He received a First Tier ranking in Northern Michigan for Mediation by U.S. News – Best Lawyers® Best Law Firms in 2022; and received a Second Tier ranking in Northern Michigan for Arbitration by U.S. News – Best Lawyers® Best Law Firms in 2022. He received a Second Tier ranking in Northern Michigan for Mediation by U.S. News – Best Lawyers® Best Law Firms in 2020. He received a First Tier ranking in Northern Michigan for Arbitration by U.S. News – Best Lawyers® Best Law Firms in 2019.