MICHIGAN ARBITRATION AND MEDIATION CASE LAW UPDATE
ALTERNATIVE DISPUTE RESOLUTION SECTION
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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 For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

The YouTube video of the author's 2019-2020 update presentation is at

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

II. ARBITRATION

A. Michigan Supreme Court Decisions

Supreme Court vacates COA and remands cases to Circuit Courts for reconsideration of whether plaintiffs' claims are subject to arbitration.

Lichon v Morse, ___Mich ___, MSC 159492 and 159493 (July 20, 2021), vacated and remanded 327 Mich App 375; 933 NW2d 506 (2019), to Circuit Courts. Supreme Court majority decision (Cavanagh, McCormack, Bernstein, and Clement) reviewed whether plaintiffs' claims fell within scope of arbitration agreements limited to matters that are "relative to" plaintiffs' employment. Whether plaintiffs' allegations of sexual assault, and claims stemming from those allegations, are relative to plaintiffs' employment is resolved by asking whether claims can be maintained without reference to contract or relationship at issue. *Doe v. Princess Cruise Lines, Ltd*, 657 F.3d 1204, 1218-1219 (11th Cir., 2011) ("If the cruise line had wanted a broader arbitration provision, it should have left the scope of it at 'any and all disputes, claims, or controversies whatsoever' instead of including the limitation that narrowed the scope to only those disputes, claims, or controversies 'relating to or in any way arising out of or connected with the Crew Agreement, these terms, or services performed for the Company.' "). Because Circuit Courts did not have benefit of this framing, Supreme Court vacated decision of COA and remanded cases to Circuit Courts for reconsideration of whether plaintiffs' claims are subject to arbitration. Because plaintiffs also did not have benefit of this framing when filing their claims, plaintiffs may seek to amend their complaints before Circuit Courts make this determination.

Supreme Court dissent (Viviano and Zahra) said Court must interpret contractual language to determine whether parties meant to assign plaintiffs' present claims to arbitration. According to dissent, majority plucks a standard from out-of-state caselaw and imposes it upon parties. A proper interpretation of contract's language shows that

plaintiffs' claims against defendant law firm are arbitrable under contract. Dissent would reverse COA decision to contrary. Claims against defendant Morse individually are also arbitrable under contract if he can invoke arbitration clause. Because COA did not determine whether Morse has authority to enforce agreement, which he did not sign, dissent would remand on that issue.

Justice Welch did not participate because Court considered disposition before she assumed office.

Previously, in now vacated ***Lichon v Morse***, 327 Mich App 375; 933 NW2d 506, 339972 (2019), COA split decision, COA held sexual harassment claim was not covered by arbitration provision in employee handbook. Because arbitration provision limited scope of arbitration only to claims related to plaintiffs' employment, and because sexual assault by employer or supervisor cannot be related to employment, arbitration provision was inapplicable to claims against Morse and law firm. "[C]entral to our conclusion … is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault." O'Brien COA dissent said parties agreed to arbitrate "any claim against another employee" for "discriminatory conduct" and claims that arguably fell within scope of arbitration agreement.

Hornberger, "Due Process Protocol Influence on Statutory Claims Employment Arbitration in Michigan," *The General Practitioner* (January/February 2017).

https://www.leehornberger.com/media/Protocol-GP--JanFeb2017.pdf

Hornberger, "Overview of a Pre-Dispute Employment Resolution Process," *ADR Newsletter* (February 2005).

https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Feb05.pdf

Arbitration in UIM no fault case.

Nickola v MIC Gen 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 Auto Corp v Mando Am Corp, 500 Mich 955; 891 NW2d 474, 153413 (2017), lv den 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. Markman said 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. **LESSON: Be careful when checking boxes.**

Does arbitrator decide attorney fee in lien case?

Ronnisch Constr 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 breach of contract claim but not 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 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 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 defendants performed as agents carrying out firm business. Supreme Court said this was dispute between firm and former principal that fell within arbitration clause and subject to arbitration. Supreme Court reversed those portions of 307 Mich App 612; 816 NW2d 913 (2014), which held matter 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 prior purchases when invoices for prior 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) 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 not covered under policy, if there are theories that fall within policy.

Is arbitration award "verdict" for case evaluation purposes?

Acorn Investment Co v Mich Basic Prop 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 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) reversed COA, for reasons in COA dissent, and reinstated Circuit Court denying defendants' motion to vacate award and confirming award. Dissent in 303619 (May 31, 2012), said stipulated order intended arbitration include claims beyond those pending because it allowed further discovery, gave arbitrator Circuit Court powers, and award would represent full and final resolution. Claims not pending at time order 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 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, 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 unenforceable under common law because, absent special circumstances, parent does not have authority to contractually bind his or her child. *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 Medical Malpractice Arbitration Act, MCL 600.5046(2) (repealed 1993 PA 78), which said minor bound by written agreement to arbitrate disputes upon execution of agreement on his behalf by parent or guardian. *McKinstry* held statute required arbitration agreement signed by mother bound her child. Justice Young said *McKinstry* said 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. 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 POLC, 483 Mich 1116; 766 NW2d 869 (2009), affirmed COA reversal of Circuit Court vacatur of labor arbitration award. Arbitrator held grievant was to be assigned take-home vehicle because of past practice of assigning vehicles and burden on employer to prove it had repudiated practice without objection by union. Arbitrator held past practice was binding working condition that could not be altered without mutual consent where CBA is silent on vehicle assignment. Arbitrator held manual provision was only valid to extent it was consistent with CBA, including established practices and that decision not to assign vehicle was inconsistent with past practice. Justice Markman dissented, with Justice Corrigan joining, indicating he would reinstate Circuit Court order vacating award because CBA does not refer to 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.

DFFA 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 Compulsory Arbitration of Labor Disputes for Police and Fire Departments Act, MCL 423.231 *et seq*, by jeopardizing firefighters' safety. Circuit Court must conclude plan is so inextricably intertwined with safety that its implementation would alter *status quo* by altering this condition. Circuit Court found issues of fact whether layoffs would impact on 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 safety requires scrutiny of plan and finding that plan is inextricably intertwined with safety such that it would have significant impact on safety. 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. 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.

PFFU v Pontiac, 482 Mich 1; 753 NW2d 595 (2008). Circuit Court abused 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 elements for injunctive relief. COA upheld preliminary injunction. 271497 (November 30, 2006). Supreme Court said Union failed to meet burden of establishing irreparable harm would result. Supreme Court reversed COA and vacated Circuit Court order granting preliminary injunction.

Failure to tape record DRAA hearing.

Kirby v Vance, 481 Mich 889; 749 NW2d 741 (2008), in lieu of granting leave, reversed COA (278731) and held arbitrator exceeded DRAA authority under 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 for entry of order vacating award and ordering another arbitration before same arbitrator. **LESSON: Make sure audio recorder is working.**

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, vacated, in part, COA and remanded case for entry of order granting summary disposition. COA correctly held Circuit Court lacked jurisdiction to grant relief because unions were not parties to 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.

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. 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

Pre-dispute arbitration agreement in legal malpractice case.

Tinsley v Yatooma, 333 Mich App 257, 349354 (August 13, 2020), lv den ___ Mich ___ (2021), involved a pre-dispute arbitration provision in a legal malpractice case. COA held that under the plain language of MRPC 1.8(h)(1) and EO R-23 the arbitration provision was enforceable because the client consulted with independent counsel. COA indicated, "**We suggest contemplation by the State Bar of Michigan and our Supreme Court of an addition to or amendment of MRPC 1.8 to specifically address arbitration clauses in attorney-client agreements**."

Confirmation of award partially reversed in construction lien case.

TSP Servs, Inc v Nat'l-Std, LLC, 329 Mich App 615, 342530 (September 10, 2019). Michigan law limits construction lien to amount of contract less payment already made. Although party suing for breach of contract might recover consequential damages beyond monetary value of contract, those consequential damages cannot be subject to construction lien. Arbitrator concluded otherwise. This clear legal error had substantial impact on award. COA reversed with respect to confirmation of that portion of award.

COA affirms order to arbitrate labor case.

Registered Nurses Union v Hurley Med Ctr, 328 Mich App 528, 343473 (April 18, 2019). Grievants terminated for allegedly striking in violation of CBA. Although defendant may present to arbitrator undisputed evidence plaintiffs engaged in strike, question of fact is for arbitrator to decide. Any doubt regarding whether question is arbitrable must be resolved in favor of arbitration. Circuit Court correct in ruling CBA required arbitration.

Denial of motion to vacate affirmed.

Radwan v Ameriprise Ins Co, 327 Mich App 159, 341500 (December 20, 2018), lv den ___ Mich ___ (2019). First-party no-fault case. COA held Uniform Arbitration Act, MCL 691.1681 *et seq*., not MCR, applied; and Circuit Court did not err when it denied motion to vacate arbitration award on basis of collateral estoppel.

COA reverses Circuit Court order that denied motion to require arbitration.

Lebenbom v UBS, 326 Mich App 200, 340973 (October 23, 2018). COA held parties' arbitration clause provided for FINRA arbitration encompassed plaintiff's claims alleging conversion against defendant.

Arbitration agreement does not have to be in warranty document.

Galea v FCA US LLC, 323 Mich App 360, 334576 (March 13, 2018). Plaintiff alleged new vehicle was a lemon. She asserted warranty claims. Defendants said signed arbitration agreement. Plaintiff argued Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*., prohibits binding arbitration of warranty disputes. This was inconsistent with *Abela v Gen Motors Corp*, 469 Mich 603; 677 NW2d 325 (2004). Plaintiff argued by failing to mention arbitration, warranty violated single document rule in 16 CFR 701.3, 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 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. Deviation substantial error that resulted in substantially different outcome. *Cipriano v Cipriano*, 289 Mich App 361; 808 NW2d 230 (2010), lv den ___ Mich ___ (2012). Deviation readily apparent on face of award.

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).

Consolidated of arbitration cases under FAA.

Lauren Bienenstock & Assoc, 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 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 Pub Schs, 309 Mich App 507; 872 NW2d 837 (2015), lv den ___ Mich ___ (2015). Legislature exercised constitutional authority concerning teacher layoffs. Legislature made merit, not seniority, controlling factor in layoffs by removing layoffs as 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 is more important than selecting arbitrator. Elkouri & Elkouri, *How Arbitration Works* (8th ed), p 4-39; and Abrams, *Inside Arbitration* (2013), p 37. AAA did not appoint panel member who had specialized qualifications required in agreement to arbitrate. Plaintiff sued to enforce requirements. Circuit Court ruled in favor of defendant and AAA. COA in split decision reversed. Issue was whether plaintiff could bring pre-award lawsuit concerning arbitrator selection. Majority said courts usually will not entertain pre-award objections to selection. But, when suit is brought to enforce essential provisions of agreement concerning selection, courts will enforce mandates. When such provision is central, 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, § 4 of FAA, requiring arbitration proceedings conform to arbitration agreement. Majority awarded plaintiff Circuit Court and COA costs and attorney fees.

Judge Jansen dissent said party cannot obtain judicial review of qualifications of arbitrators pre-award. No claim selection involved fraud or other infirmity that would invalidate arbitration agreement, or any claim appointee had inappropriate relationship with party. 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 Circuit Court's judges have exclusive authority to determine assignment of court clerk to serve in courtroom. Promulgation of 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, MCL 600.5001 *et seq*, by filing complaint, plaintiff not entitled to confirmation. 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 pending, plaintiff required to file complaint. Since plaintiff timely filed award with court clerk, matter 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 denying motion to vacate DRAA award concerning tort damages. COA affirmed because motion to vacate was not timely filed. On March 28, 2008, defendant, MCL 600.509(2), filed motion to vacate "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: Think before filing second reconsideration motion 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 NW2d 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 like actions to enforce awards than to DFR actions. Action to vacate labor award is subject to six-year period. As long as arbitrator is arguably construing CBA and acting within scope of authority, court may not vacate award even if arbitrator committed serious error. *Rowry v Univ of Mich*, 441 Mich 1 (1992), held plaintiff has six years to seek enforcement of labor award and recognized this period may be diminished if award grants equitable relief and delay in enforcement would 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 not inherently unarbitrable.

C. Michigan Court of Appeals Unpublished Decisions

COA reverses Circuit Court order denying arbitration

Saidizand v GoJet Airlines, LLC, 355063 (September 23, 2021). Arbitration agreement unambiguously provided that only arbitrator has authority to "resolve any dispute relating to the interpretation" or "applicability" of agreement. Because the parties "clearly and unmistakably" agreed that only arbitrator has authority to determine whether plaintiff's claims are subject to arbitration under agreement, COA held Circuit Court erred by interpreting agreement and deciding whether the ELCRA claims were subject to arbitration.

COA holds that court, not arbitrator, decides arbitrability issue

Bay County Road Comm v John E Green Company, 347439, 347712 (September 16, 2021). Parties to agreement to arbitrate may not vary the effect of MCL 691.1686 or MCL 691.1687, which grant court authority to decide existence of arbitration agreement or whether issue is arbitrable, summarily decide issue, and order parties to arbitrate. MCL 691.1684(2)(a) and (3). AAA Construction Industry Arbitration Rules do not deprive court of subject matter jurisdiction because they are Rules, not statutes as required under MCL 600.605. MUAA did not deprive court of subject matter jurisdiction and allow delegation of determination of jurisdiction to arbitrator.

COA affirms Circuit Court not to order arbitration.

Milford Hills Properties, Inc v Charter Twp of Milford, 353249, 353489 (September 2, 2021). COA affirmed Circuit Court determination defendant did not show arbitration agreement should be enforced, but reversed denial of summary disposition in connection with all of plaintiffs' claims. Defendant alternatively argued, if any claims are not dismissed on their merits, matter should be referred to arbitration to resolve dispute over amount of excess capacity. COA agreed with Circuit Court that defendant had failed to show arbitration was in order.

COA said conclusion plaintiffs' claims were without merit as matter of law rendered issue of extent to which wastewater treatment plant has excess capacity moot in connection with those claims. Question of arbitration remains premature until and unless plaintiffs on remand persuade Circuit Court to allow them to amend their complaint to attempt to revive their tort claims by adding individual parties and new theories in avoidance of governmental immunity. COA affirmed Circuit Court that defendant has not shown arbitration agreement should be enforced at this time.

COA reverses not ordering arbitration.

Barkai v VHS of Michigan, Inc, 354587, 355607 (August 12, 2021). Defendants argued Circuit Court erred by holding there was no binding arbitration agreement between parties. Defendants argued that encompassed plaintiffs' WPA claims and non-statutory claims of wrongful discharge, intentional or reckless infliction of emotional distress, and conspiracy to intentionally or recklessly inflict emotion distress. COA agreed with defendants and remanded the case for entry of order compelling arbitration.

COA affirms confirmation of DRAA award.

Dixon v Dixon, 355445 (August 12, 2021). Plaintiff appeals Circuit Court denying plaintiff's motion to vacate award which granted parties equal interest in their former marital home and granting defendant's motion to confirm award. COA affirmed.

COA affirms order to arbitrate.

Webb v Fidelity Brokerage Services, 354691 (July 29, 2021). COA affirmed Circuit Court that parties' brokerage contract contained enforceable agreement to arbitrate.

COA affirms confirmation of clarified award.

Advanced Integration Technology, Inc v Rekab Industries Excluded Assets, LLC, 354302 (July 15, 2021). Arbitrator granted motion for summary disposition. In response to motion to vacate award, Circuit Court remanded award to arbitrator for clarification. Arbitrator issued clarified award. Circuit Court confirmed clarified award. COA confirmed Circuit Court's confirmation of clarified award. Plaintiffs argued Circuit Court should not have remanded case to arbitrator for clarification, but rather, Circuit Court should have vacated award. COA held MCL 691.1700(4) allows Circuit Court to remand to arbitrator "[t]o clarify the award." Circuit Court was not required to vacate award on basis that it was unclear or appeared arbitrator may have erred.

COA affirms confirmation of award.

Sean D Gardella & Assoc v Sieber, 354556 (June 17, 2021). Darcy did not sign contract. Darcy, along with Jonathan, owned property on which plaintiff did improvements pursuant to contract. Agreement identified both defendants as contracting parties. Written agreement could be considered an offer. Although Darcy did not sign contract, this was not dispositive. Darcy could be said to have accepted plaintiff's offer and assented to terms of contract by accepting plaintiff's performance of contract; specifically, improvements to her home, which plaintiff completed in accordance with agreement. Arbitrator said Darcy "was familiar with the terms and conditions of the work to be performed, the cost of the work[,] and . . . participated in decisions regarding the work." It was not improper for arbitrator to find Darcy jointly and severally liable for damages resulting from defendants' breach of contract and award attorney fees, as authorized by contract. COA affirmed confirmation of award.

COA affirms confirmation of award.

Centennial Home Group, LLC v Smith, 353854 (April 15, 2021). COA affirmed confirmation of award concerning retaining wall construction.

COA reverses not ordering arbitration.

Wieland Corp v New Genetics, LLC, 353484 (April 15, 2021), **app lv pdg**. This case concerned whether defendants can compel arbitration of Wieland's claims and claims of subcontractors related to construction project. Wieland is a construction company and New Genetics cultivates medical cannabis. Circuit Court erred by not ordering arbitration of contractor claim. Sub-contractor claims were not subject to arbitration. Circuit Court was not required to keep all claims in one forum.

COA affirms Probate Court asking arbitrator for clarification.

Dina Mascarin Living Trust v Adkinson, 352816 (April 15, 2021). COA held Probate Court did not err when it referred matter back to arbitrator for correction or clarification. MCL 691.1700(4)(c).

COA affirms confirmation of no-fault award.

Lewis v IDS Property Casualty Ins Co, 351108 (March 25, 2021), **app lv pdg**. Arbitrator issued award for $50,000. Defendant issued pay-off check for $40,000. $40,000 or $50,000? Med-arb. Defendant did not file motion to amend or correct arbitration award. COA affirmed confirmation of award.

COA affirms confirmation of award.

Prospect Funding Holdings v Reifman Law Firm, PLLC, 352808 (March 11, 2021), **app lv pdg**. Arbitrator declined to consider defendant's arguments because defendant failed to pay associated filing fees. COA affirmed confirmation of award.

COA affirms refusal to reopen attack on old award.

Asmar Constr Co v AFR Enterprises, Inc, 350488 (March 11, 2021) **app lv pdg**. In this unusual business dispute, which involved two arbitration hearings which took place ten years ago regarding a project from more than twenty years ago, and allegations that arbitrator was bribed, plaintiffs appealed Circuit Court denial of motion for relief from judgment. MCR 2.612(C)(1)(f). Judgment was entered in February 2011 as a result of arbitration between plaintiffs and defendants which confirmed second award. Circuit Court held plaintiffs' motion for relief from judgment was untimely. COA affirmed.

COA remands case to labor arbitrator.

AFSCME Council 25 Local 1690 v Wayne Co Airport Auth, 352500 (March 11, 2021). Arbitrator followed one section of CBA in granting grievance but completely ignored arguably applicable CBA Art 34.07. Circuit Court confirmed award, recognizing limited scope of its review of labor awards. COA reversed, vacated award and remanded case to same arbitrator for further review. According to COA, because arbitrator never considered Art 34.07, his award was not final or complete, nor was award rendered on merits of case, and remand to same arbitrator is appropriate.

COA affirms Circuit Court in complicated benefits case.

Michigan Spine & Brain Surgeons v Citizens Ins Co of the Midwest, 350498 (March 4, 2021). Ford and Citizens agreed to dismiss with prejudice litigation between them regarding PIP benefits, including an action filed by Ford, and to submit case to arbitration. Parties agreed award would represent resolution of all claims for PIP benefits and for all monies owing to Ford related to accident. Agreement provided, with exception of Provider Plaintiffs that have either intervened, settled privately or filed independent causes of action at time of agreement, arbitration shall include all medical billings known to either party. When Ford assigned to MSBS his right to payment by Citizens for his surgery, he had already agreed to submit all claims for PIP benefits that stemmed from accident to an arbitrator and had stipulated to dismissal of his lawsuit against Citizens with prejudice. At time Ford assigned his right to payment of PIP benefits to MSBS, he had no right to assert legal action against Citizens for these claims, He could not assign to MSBS more rights than he possessed. Circuit Court did not err by holding MSBS did not have standing to assert claim against Citizens for payment of PIP benefits for medical care rendered to Ford.

COA affirms confirmation of DRAA award.

Davidson v Davidson, 348788, 348808 (January 28, 2021), lv den ___ Mich ___ (2021). Plaintiff argued arbitration was void for lack of authority. Arbitrator derives authority from arbitration agreement. Arbitration agreement, entered into while there was an active case, was not affected by dismissal of divorce action. Plaintiff failed to show arbitration was void or without authority. Plaintiff did not show from face of award how arbitrator exceeded its authority or committed an error of law. COA affirms confirmation of award.

COA affirms that arbitration agreement forecloses court case.

Gray v Yatooma, 351360 (December 17, 2020). Plaintiff had compensation agreement and non-compete with broad arbitration agreement. COA affirmed Circuit Court order that arbitration agreement prevented a court suit.

COA affirms denial of vacatur of award.

Rahaman v Ameriprise Ins Co, 349463 (November 24, 2020). Appellant argued award should be vacated because attorney, not party, signed agreement to arbitrate. COA held that attorney can enter into binding arbitration agreement on behalf of client. MCR 2.507(G).

COA affirms denial of vacatur in disclosure case.

Wilson v Louis D. Builders, 351560 (November 19, 2020). Plaintiffs moved to vacate award because of arbitrator's alleged bias toward a party and party's attorney. Plaintiffs also alleged arbitrator and opposing counsel held municipal positions together, worked on township matters, and interacted socially. Plaintiffs asserted these interactions were substantial and material relationships. Circuit Court denied motion to vacate and COA affirmed. MCL 691.1962.

COA affirms confirmation of award.

Kada v Nouri, 351402 (November 19, 2020). Plaintiffs appealed Circuit Court confirmation of award, and Circuit Court denial of attorney fees and costs. COA held Circuit Court did not abuse its discretion in confirming award and denying attorney fees.

COA affirms confirmation of award.

Soulliere v Berger, 349428 (October 29, 2020). COA affirmed confirmation of an award because defendants' disagreement with award implicates arbitrator's resolution of evidence and defendants did not demonstrate error of law apparent from face of award.

Waiver of arbitration.

Wells Fargo Bank, NA, v Walsh, 350960 (October 29, 2020). COA affirmed the Circuit Court order finding defendant waived his right to compel arbitration. Defending action without seeking to invoke arbitration, constituted waiver of right to arbitration.

Settling case with help of arbitrator.

Estate of O'Connor v O'Connor, 349750 (October 15, 2020). In this dispute over enforcement of settlement agreement, defendant appealed Circuit Court order granting plaintiff's motion for entry of judgment. Defendant argued parties agreed to arbitration and arbitrator lacked authority to broker a settlement agreement. COA held defendant contributed to alleged error by seeking settlement, participating in settlement negotiations, and signing settlement agreement. COA affirmed Circuit Court.

COA affirms Circuit Court ordering arbitration in insurance case.

Fisk Ins Agency v Meemic Ins, 350832 (September 10, 2020). COA held Circuit Court properly concluded, in accordance with terms of Agreement, matter must be returned to arbitrator and arbitrator must address 90-day limitation in Agreement.

COA reverses vacatur of DRAA award.

Moore v Glynn, 349505 (August 27, 2020), lv den ___ Mich ___ (2021). COA held Circuit Court erred by determining arbitrator exceeded scope of authority by looking beyond four corners of parties' settlement agreement. Circuit Court erroneously determined agreement was not ambiguous. Circuit Court only had power to determine whether arbitrator acted within scope of authority and did not have power to interpret parties' contract. Because arbitrator did not exceed scope of authority, Circuit Court review should have ended and court should have confirmed award.

COA affirms Circuit Court order denying arbitration in condominium case.

Copperfield Villas Ass'n v Tuer, 348518 (May 21, 2020). MCL 559.154(8) and (9) require condominium bylaws to include provision for arbitration at "election and written consent of the parties." Plural noun "parties" demonstrates all parties to dispute must elect and consent to arbitration in lieu of litigation. Word "consent" supports this interpretation. It takes two to consent to participate in arbitration. Circuit Court correctly determined Tuers not permitted to unilaterally demand arbitration.

COA affirms Circuit Court order confirming award.

Altobelli v Hartmann, 348953 and 348954 (May 21, 2020), lv den ___ Mich ___ (2020). Plaintiff appealed Circuit Court confirmation of award. Award held plaintiff not entitled to relief because he voluntarily withdrew from membership with defendant firm and had not sufficiently proved proximate cause or amount of damages. Because Circuit Court properly determined award rested in part on issues of proximate cause and damages, which were beyond scope of judicial review, COA affirmed. See generally *Altobelli v Hartmann*, 499 Mich 284; 884 NW2d 537 (2016).

COA affirms Circuit Court order denying arbitration.

Andrus v Dunn, 345824, 346897, and 348305 (April 9, 2020), lv den ___ Mich ___ (2021). Award, adopted in JOD, required arbitration of disputes that arose regarding **St. Martin property**. August 2015 order said Andrus waived claims she had relating to St. Martin, including pursuant to prior awards and JOD, and Circuit Court had jurisdiction to enforce terms and conditions of settlement agreement regarding St. Martin property issue. Because JOD and August 2015 order covered same subject matter but contain inconsistent provisions regarding forum for resolving disputes on St. Martin property, August 2015 order reflects later agreement and supersedes JOD on that issue. Circuit Court properly denied Andrus's request to compel arbitration.

COA affirms confirmation of DRAA award.

Shannon v Ralston, 350094, 350110 (March 12, 2020), lv den ___ Mich ___ (2020). COA affirmed confirmation of DRAA award that granted motion to change primary physical custody of minor child in this domestic relations action. Because plaintiff's refusal to provide required financial information and proposed FOF and COL led to delay, plaintiff barred from claiming she was entitled to relief on basis of this delay.

COA affirms granting of motion to compel arbitration.

Century Plastics, LLC v Frimo, Inc, 347535 (January 30, 2020). COA affirmed Circuit Court holding that parties validly incorporated General Terms and its arbitration agreement by reference. General Terms applied to parties' agreement even though defendant not specifically listed entity.

COA affirms confirmation of DRAA award.

Daoud v Daoud, 347176 (December 19, 2019). COA affirmed Circuit Court confirmation of DRAA award. **Past domestic violence and PPO.** Where arbitrator provided parties equal opportunity to present evidence and testimony on all marital issues, recognized and applied Michigan law, and explained uneven distribution of property, there was no basis for concluding arbitrator exceeded authority.

COA reverses Circuit Court denial of motion to compel arbitration.

Lesniak v Archon Builders, Inc, 345228 (December 19, 2019). COA reversed Circuit Court denying defendants' motion for arbitration because arbitration terms in construction agreements sufficiently related to plaintiffs' claims to require arbitration, and defendants had not waived their right to arbitration. Any doubts about arbitrability should be resolved in favor of arbitration. Purpose of arbitration is to preserve time and resources of courts in interests of judicial economy.

Refusal to adjourn arbitration hearing approved.

Domestic Uniform Rental v Riversbend Rehab, 344669 (November 19, 2019). After overruling R's motion to adjourn arbitration hearing, arbitrator entered award against R. COA affirmed CC's confirmation of award. MCL 691.1703(1)(c). **Mentioning arbitrator's name to COA during oral argument.**

Incorporation of AAA rules.

MBK Constructors, Inc v Lipcaman, 344079 (October 29, 2019), lv den ___ Mich ___ (2020). Incorporation of AAA's rules in arbitration agreement clear and unmistakable evidence of parties' intent to have arbitrator decide arbitrability.

COA affirms Circuit Court confirmation of award.

2727 Russell St, LLC v Dearing, 344175 (September 26, 2019), lv den ___ Mich ___ (2020). COA affirmed confirmation of award. Arbitrator's factual findings are not reviewable. **COA referenced "facilitation" and "statutory arbitration."** Med-arb.

COA affirms Circuit Court denial of sanctions.

Clark v Garratt & Bachand, PC, 344676 (August 20, 2019). COA affirmed Circuit Court denying G's sanctions motion. Language of award foreclosed G's ability to request sanctions because sanctions issue was either not raised during arbitration or, having been raised, resulted in arbitrator declining to award sanctions. Language of judgment confirming award also foreclosed G's ability to subsequently request sanctions.

Circuit Court order to arbitrate confirmed.

Roseman v Weiger, 344677 (June 27, 2019), lv den ___ Mich ___ (2019). To extent plaintiff argues arbitration agreement is unenforceable on ground that purchase agreement was invalid, these are matters for arbitrator. MCL 691.1686(3). Circuit Court did not err by concluding claims against sellers to be resolved in arbitration.

DRAA award confirmation confirmed.

Zelasko v Zelasko, 342854 (June 13, 2019), lv den ___ Mich ___ (2020), concerned whether husband's winning of $80 million jackpot was part of marital estate. Arbitrator ruled jackpot was marital property. Circuit Court confirmed award. COA affirmed confirmation. COA stated "we may not review the arbitrator's findings of fact and are extremely limited in reviewing alleged errors of law." Delay, death, and alleged bias of arbitrator issues. *Zelasko v Zelasko*, 324514 (2015), lv den ___ Mich ___ (2016).

DRAA custody dispute award confirmed.

Shannon v Ralston, 339944 (May 23, 2019), lv den ___ Mich ___ (2019). Agreement to arbitrate "all issues in the pending matter." COA affirmed confirmation of DRAA award that decided change in domicile. Arbitrator acted as mediator and arbitrator. At time of ex parte communication, arbitrator was acting as mediator, and prohibition against ex parte communications did not apply. Late raising of alleged disparaging

remarks by neutral. Arbitrator's alleged financial interest in arbitration process. Plaintiff ordered to pay fees associated with GAL. Issue of arbitrator's alleged financial bias was one of plaintiff's own making by stopping payment in violation of parties' agreement to split cost of arbitration and in violation of arbitrator's instructions.

DRAA award confirmed.

Hyman v Hyman, 346222 (April 18, 2019). COA held Circuit Court modification of DRAA award to include Monday overnights was error because Circuit Court lacked authority to review arbitrator's factual findings and alter parenting-time schedule without finding award adverse to children's best interests.

COA affirms order to arbitrate labor case.

Sr Accountants, Analysts and Appraisers Ass'n v City of Detroit Water and Sewerage Dep't, 343498 (April 18, 2019). Issue of whether union complied with CBA procedural requirements to arbitrate is procedural issue for arbitrator.

Selection of replacement arbitrator foreclosed in DRAA case.

Sicher v Sicher, 341411 (March 21, 2019). JOD arbitration clause named A as arbitrator and did not provide for alternate, substitute, or successor arbitrators. A became disqualified due to conflict of interest. MCL 600.5075. Because no evidence parties agreed upon new arbitrator to be appointed, Circuit Court permitted to void arbitration agreement and proceed as if arbitration had not been ordered.

COA reverses confirmation of employment arbitration award.

Checkpoint Consulting, LLC v Hamm, 342441 (February 26, 2019). COA held there was no valid arbitration agreement because independent contractor agreement voided all prior agreements, including arbitration clause within employment agreement.

COA affirms confirmation of employment arbitration award.

Wolf Creek Productions, Inc v Gruber, 342146 (January 24, 2019). COA affirmed confirmation of employment arbitration award. COA stated nothing on face of award demonstrated arbitrators precluded from deciding issue of whether just cause existed to terminate employment. Courts precluded from engaging in contract interpretation, which is question for arbitrator.

COA affirms confirmation of exemplary damages award.

Grewal v Grewal, 341079 (January 22, 2019). COA affirmed judgment confirming arbitrator's award of $4,969,463.94 exemplary damages and correcting arbitrator's award by striking portion that ordered plaintiffs to provide accounting of assets in India.

COA affirms confirmation of award.

Hunter v DTE Services, LLC, 339138 (January 3, 2019). In employment discrimination case, COA affirmed confirmation of award. Arbitrator did not exceed authority by failing to provide citations to case law.

COA affirms confirmation of award.

Walton & Adams, LLC v Service Station Installation Bldg & Car Wash Equip, Inc, 340758 (December 18, 2018), lv den ___ Mich ___ (2019). COA affirmed confirmation of award. Arbitrator not required to make FOF or COL. Once court recognized arbitrator utilized controlling law, it cannot review legal soundness of arbitrator's application of law. Courts may not engage in fact-intensive review of how arbitrator calculated values, and whether evidence relied on was most reliable or credible evidence presented. Even if award against great weight of evidence or not supported by substantial evidence, court precluded from vacating award.

Case evaluation sanctions after arbitration.

Len & Jerry's Modular Components 1, LLC v Scott, 341037 (December 13, 2018). In light of referral to arbitration order, Circuit Court empowered to award case evaluation sanctions.

Scope of submission to arbitrator.

Pietila v Pietila, 339939 (December 13, 2018). COA affirms Circuit Court confirmation of award. Circuit Court may not disturb arbitrator's discretionary finding of fact that neither party prevailed in full and its decision not to award attorney fees.

COA affirms Probate Court confirmation of award.

Gordon v Gordon-Beatty, 339296 (November 8, 2018), lv den ___ Mich ___ (2019). COA affirmed Probate Court's confirmation of award. Because parties agreed to arbitrate their disputes and because, arbitrator acted within scope of his authority the challenges to administration of the trusts lacked merit.

DRAA award confirmed.

Thomas-Perry v Perry, 340662 (October 16, 2018). Parties given opportunity to present evidence on all issues during arbitration. Because reviewing court is limited to examining face of arbitration ruling, there is no basis for concluding arbitrator exceeded authority in issuing award.

Length of FOF in award.

Schultz v DTE, 337964 (September 30, 2018). COA affirmed confirmation of nine page employment arbitration award. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118 (1999). FOF and COL.

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. 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).

Demand for labor arbitration concerning prohibited subject of bargaining.

Ionia Co Intermediate Ed Assn v Ionia Co Intermediate Sch Dist, 334573 (February 22, 2018), lv den ___ Mich ___ (2018). COA affirmed Michigan Employment Relations Commission (MERC) order granting summary disposition, where Association 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 demand for arbitration and to cease and desist from demanding to arbitrate grievances concerning prohibited subjects of bargaining. See ***Mich Ed Ass'n v Vassar Pub 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 face of award. Uniform Arbitration Act, MCL 691.1681 *et seq.* MCL 691.1703(1)(d). **Arbitrator's reasons for declaring promissory note, mortgage, and service agreement void and unenforceable not apparent on face of 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. "[P]arties may vary the effect of the requirements of this act to the extent permitted by law." MCL 691.1684(1).

COA considers waiver of arbitration agreement.

Miller v Duchene, 334731 (December 21, 2017). COA reversed Circuit Court 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 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 could not be bound by waiver made by other parties. Defense of agreement to arbitrate raised in timely fashion by subsequent defendants, where they raised it in motion for summary disposition filed before their first responsive pleading.

Amended award confirmed.

Ciotti v Harris, 332792 (December 12, 2017). COA affirmed Circuit Court confirmation of reasoned award rendered after motion to arbitrator concerning nonreasoned award.

COA reverses vacatur of award.

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

Claims subject to arbitration.

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

"May" does not mean mandatory.

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

Arbitration, frozen embryos, and sua sponte analysis.

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

Arbitration involving non-signatories to arbitration agreement.

Scodeller v Compo, 332269 (June 27, 2017), affirmed Circuit Court decision to compel arbitration, even against defendants who were not parties to arbitration agreement. Arbitration agreement was broad enough to encompass 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 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 its authority, arbitrator followed law and did as it was asked when it resolved "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 JOD, dispute regarding provision barring spousal support should be decided by arbitrator. Under terms of JOD, "any disputes regarding the judgment language" should be submitted to arbitrator. Dispute concerned whether judgment should include provision barring spousal support. JOD and settlement agreement silent as to spousal support. This was not dispute concerning meaning of language within JOD. Circuit Court did not abuse discretion in denying plaintiff's request that dispute be arbitrated.

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. "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." UAA, MCL 691.1684(1).

Supplemental labor arbitration award.

Dep't of Trans v MSEA, 331951 (June 13, 2017). COA affirmed Circuit Court 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 denying motion to vacate award of arbitration panel. Arbitration panel, by 2-1 vote, ruled in favor of defendant. Plaintiff's first argument was 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 granting defendant's motion to confirm award. Arbitration was conducted pursuant CBA between plaintiff employer and union and resulted in decision that in part reinstated employee's employment with plaintiff.

Case ordered to arbitration.

Rozanski v Findling, 330962 and 332085 (March 14, 2017). Plaintiffs appealed Circuit Court granting defendant's motion to compel arbitration and Circuit Court confirmation of 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 20. Arbitrator held grievance, which implicated 5, 24, and 45, not timely. Despite finding grievance untimely, arbitrator stated "if the merits of such claims were to be decided, the decision would be that ostensibly perpetual 100-employee guarantee was terminable at will and [the city] effectively did terminate it in June 2011" by laying off employees. Arbitrator relied on ALJ's examination of CBA, concluding ALJ correctly analyzed question of nature of parties' agreement with respect to City's obligation to maintain staffing levels in perpetuity. To extent union's 20 grievance implicated 5, 24, and 45, 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 issue was question to be decided by arbitrator. COA affirmed. Unless otherwise specified in CBA, 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. COA offered no opinion on merits of city's preclusive arguments. City 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), lv den ___ 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 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., subject to arbitration provision in parties' employment agreement. COA reversed. Arbitration clause said, "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 CRA discrimination or WPA retaliatory discharge, 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 held arbitration clause did not provide clear notice to plaintiff he was waiving right to adjudication of CRA statutory discrimination claims, and plaintiff 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 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 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 entered after defendant and plaintiff submitted 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, 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 award that does not comport with 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 Mich, 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. COA held Circuit Court did not have 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. 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 held DeShano had not waived its right to arbitration.

Labor arbitration award vacated.

Berrien Co v POLC, 328794 (November 15, 2016), affirmed vacatur of award. Union argued age discrimination claim 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 failure to transfer, was not arbitrable.

Arbitrators' awards confirmed.

Karmanos v Compuware Corp, 327476 and 327712 (October 20, 2016), lv den ___ Mich ___ (2017), affirmed Circuit Court 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; 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 den ___ 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 Mut Auto Ins Co, 326126 (June 21, 2016), lv den ___ Mich ___ (2017). Plaintiff filed motion to confirm award and for entry of judgment and for

case evaluation 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 Ed 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 den ___ 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 den ___ 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.

COA affirms arbitrator fee.

Plante & Moran, PLLC v Berris, 323562 (November 17, 2015). 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 award. DRAA does not require arbitrator to hear live rebuttal testimony.

Race to the courthouse.

New River Constr, 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.

Cummings v Cummings, 318724 (May 19, 2015). Plaintiff appealed Circuit Court denying plaintiff's motion to vacate "binding mediation award." COA affirmed. COA held binding mediation is equivalent to arbitration and subject to same judicial review. 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 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. 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 … is inappropriate, it does not show a concrete bias." COA said hearings were often hostile or aggressive. Although there were times where mediator's behavior was not indicative of "a good mediator" or professional, mediator did the best it could to control the situation it was presented with and keep calm when hearings became aggressive.

COA confirms award despite discovery and witness interview issues.

Perry v Portage Pub Sch Bd of Ed, 319170 (March 12, 2015), lv den ___ Mich ___ (2015). Plaintiff appealed Circuit Court 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 den _Mich __(2015). Main issue was whether dispute over investment account subject to arbitration, as specified in account agreement, or whether dispute can proceed in court. Plaintiff admitted account with Smith Barney was subject to arbitration agreement, but asserted defendants Morgan Stanley and Citigroup Global were not successors to Smith Barney, and were not parties to arbitration agreement. Defendants produced evidence that Morgan Stanley and Citigroup Global were successors of Smith Barney, through consolidations. COA agreed with Circuit Court that defendants were successors and agreement to arbitrate binding on plaintiff.

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

Heffelfinger v Bad Axe Pub Schs, 318347 (December 2, 2014), lv den ___ 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 den ___ 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 Fin Group, Inc v Elevator Concepts Ltd, 315971 (July 29, 2014); and ***Elevator Concepts Ltd v Blue River Fin 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. 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 said 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 said 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 den ___ Mich ___ (2015). Attorney-fee dispute resulted in arbitration, where parties negotiated payment plan. Plaintiff returned to Circuit Court seeking sanctions against defendant's counsel, contending counsel's defense was frivolous. Circuit Court denied sanctions, 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. Given brief time Circuit Court conducted underlying action, COA declined to disturb Circuit Court conclusion it could not reasonably assess sanction. Arbitration agreement gave arbitrator authority to resolve disagreement between 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 arbitration agreement, broad powers granted to arbitrators, and court rules. AAA Rules governing commercial arbitration do not prohibit sanctioning attorney for frivolous defense. AAA, Commercial Arbitration Rules, R-58(a). Regardless of arbitrator's power to sanction 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 Props, 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 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 said arbitrator should be disqualified if, based on objective and reasonable perceptions, arbitrator has serious risk of actual bias, 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 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 confirmation of award.

Rogensues v Weldmation, Inc, 310389 and 311211 (February 11, 2014), lv den ___ 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 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 concerned arbitrator never took 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 provides, even when arbitrator is entitled to proceed in absence of defaulting party, arbitrator required to "hear and decide the controversy on the evidence … ." MCL 691.1695(3).

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. Arbitration demand was untimely.

Arbitration PTO award vacated.

MSX Int'l Platform Servs, LLC v Hurley, 300569 (May 22, 2012) (Owens, Jansen [dissent], and Markey), lv den ___ 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 den ___ 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 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 den ___ 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 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 POAM, 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.

Dubuc v Dep't of Env Quality, 298712 (July 14, 2011). Non-party attorney filed motion to modify award. Circuit Court granted motion. COA vacated Circuit Court indicating it was impermissible for non-party to file motion in case in which it was not party.

Arbitration issue submission language 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 POLC, 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 matter covered by CBA arbitration provisions. COA vacated MERC 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.

Riley v Ennis, 290510 (February 25, 2010), lv den ___ Mich ___ (2010). Plaintiff brought employment discrimination case against only individual supervisor. Defendant moved to dismiss because of arbitration agreement between plaintiff and non-party corporate employer. Circuit Court granted motion to dismiss. COA reversed, indicating 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 applicable to corporate employer but not to individual supervisor.

Arbitration agreement may benefit non-signatory.

Lyddy v Dow Chemical Co, 290052 (January 19, 2010). 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, in certain instances, arbitration agreement may extend to persons who were not parties to agreement.

Labor arbitration retained jurisdiction supplemental award partially vacated.

In ***POAM v Leelanau Co***, 285132 (November 10, 2009), COA partially vacated and partially confirmed labor arbitration award. Arbitrator ruled 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. Article 6(E)(1)(a) of Code of Professional Responsibility for Arbitrators of Labor-Management Disputes: “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). Elkouri & Elkouri, p 1219: "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." 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 POAM, 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 to arbitrator. Dissent said, if arbitrator erred, arbitrator was interpreting CBA. Majority distinguished *Mich Family Res, Inc v SEIU*, 475 F3d 746 (6th Cir 2007)(en banc). *Mich* discusses standard for reviewing labor arbitration awards. In *Mich*, Union appealed District Court vacating award. Sixth Circuit reversed because arbitrato acting within scope of authority, company had not accused arbitrator with fraud or dishonesty, arbitrator was arguably construing CBA, and company had shown no more than arbitrator made 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? 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. On occasion Michigan appellate court might give less deference to labor arbitration award than Federal court would.

Evaluation notification labor arbitration award vacated.

Northville Ed Ass'n v Northville Pub Schs, 287076 (August 20, 2009), vacated labor arbitration award and remanded case to arbitrator. CBA required teacher be given notification of eligibility for evaluation. Because teacher was on maternity leave at time notification would have been given, Employer did not give notification. Teacher was given less favorable evaluation method. 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, and she was "estopped" from complaining about non-notification. Circuit Court said arbitrator added term to CBA and exceeded authority. Estoppel 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 den ___ 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. ***Lilley v GL Southfield***, 340784 (February 28, 2019); ***Newman v Suburban Mobility Auth***, 342678 (January 15, 2019); ***AFSCME v Wayne Co***, 337964 (September 30, 2018); ***Oliver v Kresch***, 338296 (July 19, 2018); ***Roetken v Roetken***, 333029 (December 19, 2017), lv den ___ Mich ___ (2018); ***Young v Burton***, 334231 (December 19, 2017); ***Shea v FCA US***, 333588 (October 17, 2017); ***Spence Bros v Kirby Steel, Inc***, 329228 (March 14, 2017); ***CNJ Financial Group v McKenney***, 327547 (October 19, 2016); ***McCarthy v Pallisco***, 327647 (October 6, 2016), lv den ___ Mich ___ (2017); ***Compatible Laser Products v Main Street Financial Supplies***, 323122 (September 20, 2016); ***William Beaumont Hosp v West Bloomfield MOB***, 327238 (July 26, 2016); ***Francis v Kayal***, 325576 (May 3, 2016); ***LaSalle Bank Midwest, NA v Jar Inv Group***, 324849 (April 28, 2016); ***Ingham Co v MAOP***, 325633 (April 19, 2016); ***Gordon v Cornerstone PG***, 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***, 321506 (October 1, 2015); ***Ellis v Ellis***, 321972 (August 6, 2015); ***Martinez v Degiulio***, 321616 (July 30, 2015) (DRAA); ***Fremont Comm Digester v Demoria Bldg Co***, 320336 (June 25, 2015); ***Bidasaria v CMU***, 319596 (May 14, 2015); ***Andary v Andary,*** 319299 (February 10, 2015); ***Warren v Flint Community Schs***, 318825 (January 15, 2015); ***Wyandotte v POAM***, 318563 (January 13, 2015); ***Lowry v Lauren Bienenstock & Associates***, 317516 (December 23, 2014); ***McAlpine v Donald A Bosco Bldg***, 316323 (December 18, 2014); ***Theater Group 3 v Secura Ins***, 317393 (November 13, 2014); ***Mastech v Bleichert***, 317467 (November 13, 2014); ***Israel v Putrus ,*** 316249 (November 4, 2014); ***Ross v Ross***, 319576 (September 24, 2014); ***C&L Ward Bros v Outsource Solutions***, 315794 (September 2, 2014); ***Roty v Quality Rental***, 313056 (August 12, 2014); ***Brown v Titan Ins***, 315119 (July 24, 2014); ***Kosiur v Kosiur***, 314841 (April 22, 2014); ***Emrick v Menard Builders***, 314038 (April 17, 2014); ***Pugh v Crowley***, 313471 (April 8, 2014); ***Hillsdale Co Medicare Care and Rehab Ctr v SEIU***, 310024 (April 22, 2014); ***Command Officers Ass'n of Sterling Heights v Sterling Heights***, 310977 (December 17, 2013); ***Taylor v Great Lakes Casualty Ins***, 308213 (September 19, 2013); ***Mager v Giarmarco, Mullins & Horton***, 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***, 306548 (February 21, 2013); ***Detroit v DPOA***, 306474 (February 12, 2013); ***Suchyta v Suchyta***, 306551 (December 11, 2012); ***James D Campo v Trevis***, 305112 (December 4, 2012); ***Wendy Sabo & Assoc's v Am Assoc's,*** 305575 (December 4, 2012); ***Rouleau v Orchard, Hiltz and McCliment***, 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,*** 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***, 300541 March 13, 2012); ***Suszek v Suszek***, 299167 (February 28, 2012); ***Armstrong v Rakecky***, 301423 (February 21, 2012)*;* ***Hantz Financial Services v Monroe***, 301924 (January 24, 2012); ***CCS v IWI Ventures***, 300940 (January 24, 2012); ***Frankfort v POAM***, 298307 (October 18, 2011), lv den ___ Mich ___ (2012); ***McDonald Ford 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***, 298777 (September 20, 2011); ***POAM v Lake Co***, 298055 (August 11, 2011); ***Oakland Co v Oakland Co Deputy Sheriffs***, 297022 (August 9, 2011)*;* ***J L Judge Constr Services v Trinity Electric***, 295783 (August 2, 2011); ***Cumberland Valley Ass'n v Antosz***, 294799 (May 26, 2011); ***Roosevelt Park v Police Officers***, 295588 (May 12, 2011) , lv den___ Mich ___ (2011); ***Schroeder v Muller Weingarten Corp***, 296420 (April 26, 2011); ***WHRJ v Taylor***, 295299 (March 29, 2011); ***Wilson Motors v Credit Acceptance***, 295409 (March 22, 2011); ***Smaza v ARS Investments***, 293933 (March 15, 2011); ***Sharonann v WHIC-USA***, 295800 (March 10, 2011); ***DPOA v Detroit***, 293510 (February 15, 2011); ***Nat'l Env Group v Landfill Avoidance Sys***, 292454 (January 20, 2011); ***Kulongowski v Brower***, 293996 (November 9, 2010); ***Select Constr v LaSalle Group***, 293143 (November 2, 2010); ***Merkel v Lincoln Cons Schs***, 292795 (October 19, 2010); ***Cipriano v Cipriano***, 289 Mich App 361; 808 NW2d 230 (2010), lv den ___ Mich ___ (2012); ***Nordlund & Assoc 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***, 290682 (July 29, 2010); lv gtd, 488 Mich 1052; 794 NW2d 615 (2011); ***Realty v MLP Enterprises***, 289598 (June 17, 2010); ***Joseph Chevrolet v Hunt***, 290882 (June 8, 2010); ***Gonzalez v Ecopro Recycling***, 285376 (April 22, 2010); ***Rubenfaer v PHC of Mich***, 289044 (April 20, 2010); ***Crowley v Crowley***, 288888 (April 15, 2010); ***Pontiac v Pontiac Firefighters***, 289866 (March 18, 2010); ***CMU Faculty v CMU***, 293003 (February 10, 2010); ***Center Line v Police Officers***, 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 Ins v Kangas***, 282500 (April 21, 2009); ***MAOP v Pontiac***, 281353 (March 26, 2009); ***Pontiac v MAOP***, 280919 (February 19, 2009); and ***Mehl v Fifth Third***, 278977 (December 11, 2008).

III. MEDIATION

A. Michigan Supreme Court Decisions

Supreme Court protects mediation confidentiality.

Tyler v Findling, ___ Mich ___, MSC 162016 (August 4, 2021), reversed COA 348231, 350126 (June 11, 2020). ***Tyler*** is a defamation case arising from statements

made by one attorney acting as receiver to another attorney before meeting in person with mediator at start of court ordered mediation. Supreme Court said COA erred when it held a cause of action for defamation existed based on these communications. Supreme Court held these statements were MCR 2.412(B)(2) "mediation communications" and therefore confidential under MCR 2.412(C). The phrase "mediation communications" is defined broadly to include statements that "occur during the mediation process" and statements that "are made for purposes of … preparing for … a mediation." MCR 2.412(B)(2). Conversation between two attorneys took place within "plaintiff's room" while parties to mediation were waiting for mediation session to start and were part of "mediation process." See ***Hanley v Seymour***, 334400 (October 26, 2017). **What if this were pre-suit mediation and arguably MCR 2.412 did not apply?** "The mediator should include a statement concerning the obligations of confidentiality in a written agreement to mediate." Standard V(A)(2), SCAO, Michigan Standards of Conduct for Mediators (effective February 1, 2013).

The SBM ADR Section filed an amicus brief.

Supreme Court remands case in no domestic violence protocol case.

Pohlman v Pohlman. 344121 (January 30, 2020), lv den ___ Mich ___ (2021). In split decision, COA affirmed Circuit Court's enforcement of domestic relations MSA **even though allegedly no domestic violence protocol was done**. Because plaintiff did not allege or show she was prejudiced by mediator's alleged failure to screen for domestic violence, any noncompliance with MCR 3.216(H)(2) was harmless. MCL 600.1035.

Judge Gleicher's **dissent** said Circuit Court was obligated to hold a hearing to determine whether wife was coerced into settlement. Only by evaluating proposed evidence in light of MCL 600.1035 and MCR 3.216(H)(2) could Circuit Court make informed decision regarding whether relief was warranted. When there is background of domestic violence, reasons for presumption against mediation when there is domestic violence do not go away because parties used "shuttle diplomacy." That may help diffuse immediate tensions, but it cannot undo years of manipulation and mistreatment.

On April 23, 2021, Supreme Court directed Circuit Court to do evidentiary hearing and submit findings concerning wife's allegation her signature on MSA was involuntary. Circuit Court found mediator complied with mediator's obligation to screen for domestic violence under MCR 3.216(H)(2) and MCL 600.1035(2). After Supreme Court received findings, application for leave to appeal was denied. **TIPS: Confirmation email did protocol. Provably share Mediation Summery with client. Food. Put bullet proof language in MSA.**

ADR Section and the Family Law Section filed amicus briefs.

Supreme Court orders mediation.

Huntington Woods v Oak Park, 500 Mich 1224; 886 NW2d 635 (2016). Parties directed to participate in settlement proceedings. COA Chief Judge appointed mediator. Information or comments made during mediation will be confidential, except on motion by one of parties. MCR 7.213(A)(2)(f); MCR 2.412(C). If mediation results in settlement, parties shall file stipulation to dismiss. MCR 7.318. Eventually Supreme Court vacated 311 Mich App 96; 874 NW2d 214, 321414 (2015), and remanded case to Circuit Court. ___ Mich ___; 894 NW2d 51 (2017).

MSA concerning parental rights.

In re Wangler, 498 Mich 911; 870 NW2d 923, 149537 (2015)[Justice Markman dissenting], rev'd 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 plea and took jurisdiction over minor children. Respondent's attorney agreed MSA authorized court to take jurisdiction. Court said it was taking 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 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), lv den 297 Mich App 391; 824 NW2d 591, 303724 and 304823 (2012). COA affirmed holding audio recorded MSA binding and "**certain amount of pressure to settle is fundamentally inherent in the mediation process**." COA affirmed plaintiff liable for sanctions because plaintiff's motions filed for frivolous reasons and Circuit Court did not abuse discretion in awarding costs and attorney fees. "**Shuttle diplomacy**."

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 concurrence 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

Mediation fee is taxable cost.

Patel v Patel, 324 Mich App 631, 339878 (2018). COA affirmed award of mediation expense as taxable cost. MCR 2.625(A)(1), MCR 2.411(D)(4), and MCL 600.2405(2).

COA affirms enforcement of custody MSA.

Rettig v Rettig, 322 Mich App 750; 912 NW2d 877, 338614 (2018). Parties signed MSA concerning custody. Over objection of one parent that Circuit Court should have hearing concerning CCA best interest factors and whether there was established custodial environment, Circuit Court entered JOD incorporating MSA. COA affirmed. Although Circuit Court is not constrained to accept parties' stipulations or agreements verbatim, Circuit Court permitted to accept them and presume parties meant what they signed. Circuit Court obligated to come to independent conclusion parties' agreement in best interests, but Circuit Court permitted to accept MSA where dispute resolved by parents. Circuit Court 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**."

D. Michigan Court of Appeals Unpublished Decisions

COA affirms nonenforcement of settlement agreement.

Jones Lang LaSalle Mi, LLC, v Trident Barrow Mgmt 22, LLC, 353367 (June 17, 2021). Although parties apparently agreed to some terms of settlement agreement, they did not reach agreement on scope of release clause. Because parties did not reach meeting of minds over essential terms, there was no enforceable settlement agreement. This was not an MSA or a "mediation term sheet." **LESSON: In MSA, provide for method to resolve post settlement technical issues.**

COA reverses Circuit Court refusal to accelerate.

CIGL Properties, LLC v CM Renovation Services, LLC, 353595 (May 27, 2021). MSA provided for payment plan with acceleration and attorney fees if payment were missed. Because of "undergoing surgery" party missed one payment. In light of the surgery, Circuit Court refused to order acceleration. COA reversed.

Waiver of right to appeal.

Zyble v Michael Fischer Builders, LLC, 352681 (May 27, 2021). Defendant appealed Circuit Court order denying an ex parte motion to stay enforcement of judgment in favor of plaintiffs. Plaintiffs cross-appealed portion of order concerning award of attorney fees. COA concluded repairs considered in inspection company's calculation of damages were within scope of settlement agreement, COA affirmed portion of order that denied defendant's motion to stay enforcement of judgment. COA remanded matter to reconsider plaintiffs' motion for attorney fees. Defendant waived appellate review of settlement agreement and judgment by signing provision in settlement agreement that stated: "In consideration of Dream Maker's agreement to the terms set forth above, Dream Makers [sic] hereby waives its right to appeal after entry of said Confession of Judgment."

COA affirms enforcement of settlement agreement.

Drake v Auto Club Ins Assoc, 353942 (May 13, 2021). In no fault case, facilitator issued written Facilitator's Recommendation. Plaintiff accepted Recommendation and then had change of heart. COA enforced accepted Recommendation and COA affirmed. Plaintiff admitted both parties accepted Recommendation. Plaintiff argued agreement was unenforceable because of illusory promises, mutual mistake, fraudulent misrepresentation by facilitator, and unconscionability.

COA partially affirms JOD entry incorporating MSA.

Kohl v Kohl, 353686 (May 13, 2021). Defendant argued Circuit Court erred in entering JOD because it did not conform to MSA concerning martial home. COA agreed, in part, and remanded for further proceedings. "**The parties have both faithfully and truthfully participated in mediation with their attorneys and have arrived at the following resolution meant to be full and final and binding. It will be incorporated into the [JOD].**"

COA reverses default judgment.

Nalcor, LLC v Condom Sense, Inc, 351764 (January 21, 2021). Kahn (**guarantor**) argued good cause to set aside default judgment existed because his failure

to appear at mediation and status conference was inadvertent. Kahn claimed his counsel was retained just before mediation and status conference and was not provided copy of scheduling order. Kahn and his counsel failed to appear at mediation and status conference because they were unaware mediation and status conference were scheduled. COA held it was not abuse of discretion for Circuit Court to conclude Kahn failed to establish good cause to set aside default judgment. Lesser showing of good cause is required if moving party can demonstrate strong meritorious defense.

COA affirms dismissal for failure to post bond.

Neff v Chapel Hill Condominium Ass'n, 349444, 349976 (January 14, 2021), lv den ___ Mich ___ (2021). The plaintiff argued Circuit Court, by ordering mediation, deprived her of her right to jury trial and wrongfully reopened discovery only as to Chapel Hill and Mixer. Plaintiff said Circuit Court order, which required her to post security bond and $4,426 in mediator fees deprived her of her right to jury trial. COA held plaintiff was wrong. Damages was not only issue to be decided. Circuit Court denied summary disposition on plaintiff's contract claim, leaving open question of liability. Discovery was not reopened only for Chapel Hill and Mixer; court made no discovery order and mediator sought inspection of property only for purposes of conducting mediation. Mediation is form of ADR that all civil cases in Michigan are subject to, unless otherwise directed by statute or court rule. MCR 2.410(A). If mediation fails, jury trial is available. Mediation failed and, on Chapel Hill and Mixer's motion to dismiss for refusal to participate in mediation, court entered security bond in lieu of dismissal. When plaintiff did not post bond, her case was dismissed. Court's decision to order mediation did not deprive her of her right to jury trial. Plaintiff's actions led to imposition of bond and plaintiff's failure to post security ultimately led to dismissal.

COA affirms enforcement of MSA concerning carpet.

Mauch v Lambert, 349443 (December 17, 2020). This is the carpet case. Plaintiffs appealed Circuit Court order partially granting and partially denying plaintiffs' motion to enforce MSA. Circuit Court held carpeting as installed was consistent with MSA. COA affirmed.

COA affirms enforcement of probate MSA.

Tewel v Stoll, 352730 (December 10, 2020), **app lv pdg**. In this estate-related dispute, plaintiff appealed Circuit Court order finding MSA valid, based on previous order denying plaintiff's motion to set aside MSA or for evidentiary hearing. Plaintiff argued Circuit Court abused its discretion when it refused to set aside MSA because it was entered into based on fraudulent or innocent misrepresentation, and Circuit Court should have conducted evidentiary hearing. COA disagreed with plaintiff and affirmed Circuit Court.

Apparent oral agreement to mediate not enforced.

Kuiper Orlebeke, PC v Crehan, 348315 (November 12, 2020). Defendant argued agreement to mediate precluded Circuit Court grant of summary disposition in favor of plaintiff. Defendant provided no case law in support of argument that option of mediation precluded summary disposition. Appellant may not merely announce its position and leave it to COA to discover and rationalize basis for its claims, nor may it give issues cursory treatment with little or no citation of supporting authority. **LESSON: Agreement to mediate should be in writing.** *In re Igloo Prods Corp*, 238 SW3d 574, 578 (Tex App - Houston [14th Dist] 2007, no pet) (mediation was condition precedent to arbitration when agreement provided that its "arbitration procedures . . . shall not be invoked unless the party seeking arbitration has first mediated the dispute with the other party"); *In re Pisces Foods, LLC*, 228 SW3d 349, 351, 353 (Tex App - Austin 2007, no pet.) (mediation was condition precedent to arbitration when agreement required employee and employer to follow multi-step dispute resolution program "in sequence" before requesting arbitration).

Attorney fee issue where party failed to mediate.

Daniels v Daniels, 348950 (Sep 17, 2020). Circuit Court said defendant walked out of mediation causing "lost expense" implicating MCR 3.206(D)(2)(b). This suggests defendant failed to comply with order to mediate. Circuit Court said awarding attorney fees because of disparity of income. COA affirmed, but vacated attorney fee award. If parties choose to further litigate attorney fee issue, Circuit Court must make findings required by statute. **LESSON: Comply with orders to mediate.**

COA affirms Circuit Court holding party in contempt.

Teachout v Teachout, 349692 (August 20, 2020), lv den ___ Mich ___ (2021). COA affirmed Circuit Court finding defendant in contempt for violating three orders: (1) order requiring defendant to pay temporary spousal support during pendency of divorce; (2) order regarding appraisals of property and required defendant to allow access to marital home for appraisal; and (3) scheduling order that set case for mediation. Circuit Court did not order MCR 3.216(I) evaluative mediation. **LESSON: Circuit Court can sua sponte order mediation. MCR 3.216(A)(1) and (C)(1).**

MCR 2.612 not applicable to outside of court case MSA.

Smith v Forrest, 349810 (July 30, 2020). In law firm partnership case, COA held that because MCR 2.612 regarding relief from judgment has no application to plaintiff's effort to challenge validity of MSA that was executed by parties outside of judicial or court proceeding, and because Circuit Court relied on MCR 2.612 in summarily dismissing plaintiff's lawsuit, COA reversed and remanded.

Violation of orders to mediate.

Lang v Lang, 347110 (May 14, 2020). COA affirmed granting of attorney fees. Circuit Court did not award plaintiff attorney fees because defendant exercised right to go to trial after failing, in good faith, to reach settlement agreement. Circuit Court awarded attorney fees because, in regard to mediation and sale of home, defendant attempted to find loopholes in Circuit Court order, rather than participating in good faith.

COA reverses enforcement of MSA.

Estate of Brown, 342485 and 342486 (April 9, 2020). Barbara argued MSA should be set aside because Barbara did not receive notice of or participate in mediation. COA agreed and reversed Circuit Court's enforcement of MSA. See ***Dolan v Cuppori***, 345310 (September 12, 2019), and ***Peterson v Kolinske***, 338327 (April 17, 2018). **LESSON: Make sure all required persons are at the mediation.**

COA affirms enforcement of recorded DR MSA.

Brooks v Brooks, 345168 (February 11, 2020). COA affirmed Circuit Court's enforcement of recorded MSA. Apparently mediator recited MSA in open court. Parties agreed it was their agreement. Parties were sitting in jury room and outlined MSA. MSA silent on pension issue. COA remanded case to Circuit Court to determine distribution, if any, of wife's pension. **LESSON: Putting MSA "on the record" can be helpful.**

COA affirms dismissal of case with prejudice.

Pearson v Morley Cos Inc, 345547 (November 26, 2019). COA affirmed Circuit Court dismissing with prejudice plaintiff's hostile work environment lawsuit as sanction for plaintiff's failure to comply with discovery and scheduling orders, including "**counsel's failure to adequately prepare for facilitation** … ."

COA holds MSA invalid.

Dolan v Cuppori, 345310 (September 12, 2019). D and N owned property as **tenants by entirety**. N was not party to lawsuit. It violated N's due process rights for settlement reached by D alone to effect N's property rights. COA held Circuit Court violated N's due process rights when it added her to Agreement without her consent.

COA reverses Circuit Court dismissal for failure to appear.

Corrales v Dunn, 343586 (May 30, 2019). Circuit Court ordered mediation. Because of communication glitch, plaintiff failed to appear at mediation. Circuit Court dismissed case. Issue was whether dismissal was proper sanction. COA reversed dismissal. Dismissal after over two years of litigation under circumstances was manifest

injustice. MCR 2.410(D)(3)(b)(i). **LESSON: Counsel should prepare client for mediation and tell client of logistics.**

Non-signed or recorded MSA placed on record and agreed to is binding.

Eubanks v Hendrix, 344102 (May 23, 2019). Plaintiff contended Circuit Court forced her to comply with unenforceable MSA. MSA not reduced to signed writing or recorded. MCR 3.216(H)(8). MSA could not, absent other valid proof of settlement, be basis for JOD. At hearing, one day after mediation, parties placed partial agreement on record. MCR 2.507(G). At hearing, relative to purported MSA, Circuit Court indicated its understanding as to "gist" of agreement was parties to continue with joint physical and legal custody and equal parenting time. Plaintiff agreed on record. Circuit Court found this to be in best interests of child. Agreement placed on record and agreed to by plaintiff was binding on her. **LESSON: Make sure MSA is signed.**

Custody MSA upheld

Brown v Brown, 343493 (November 27, 2018). COA said case indistinguishable from *Rettig*, 322 Mich App 750, in which COA rejected challenge to JOD that included custody and parenting-time provision from MSA.

Non-MSA DR prop settlement approved

Nowak v Nowak, 339541 (August 23, 2018). COA affirmed enforcement of non-MSA settlement agreement. Kidnapping, gun safe, alleged duress and coercion, unconscionable, credibility. Not MSA case. FOFs.

Attorney conduct at mediation

Smith v Hertz Schram, PC, 337826 (July 26, 2018), lv den ___ Mich ___ (April 29, 2020). Split COA decision. Legal malpractice action arising out of post-judgment divorce proceeding. Mediator also "discovery master." Plaintiff did not go to Family Court to challenge discovery roadblock. Plaintiff settled. FN 5.

Jansen dissent: wife's attorney should have advised wife to reject $65,000 in med and return to Family Court to pursue discovery. Settlement should not have been considered. Language saying neither party relied on "representation, inducement, or condition not set forth in agreement," attorney should not have allowed. Fact attorney released L from future liability for material misrepresentations in connection with agreement was negligent. Attorney should have had plaintiff sign release, indicating it was her intention to enter into agreement despite counsel's advice to contrary.

"… A lawyer shall abide by a client's decision whether to accept an offer of settlement or mediation evaluation of a matter. … ." MRPC 1.2 (a).

Post-MSA surveillance is okay.

Hernandez v State Auto Mut Ins Co, 338242 (April 19, 2018). COA reversed granting of motion to enforce MSA. Claims representative said he needed approval from his superiors and Michigan Catastrophic Claims Association (MCCA) before signing agreement. MSA stated **"settlement is contingent on 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. MCR 2.507(G). Defendant did not waive condition precedent by conducting surveillance and submitting surveillance reports to MCCA.

Probate MSA not approved.

Peterson v Kolinske, 338327 (April 17, 2018). Probate MSA not approved. MSA said only persons who signed agreed to its terms. It did not say Theresa agreed to terms, agreed will was valid, or agreed to release claims against estate or representative. If contract language is clear and unambiguous, must construe it according to plain sense and meaning, without reference to extrinsic evidence. Lesson: **Get everyone's signature**.

A signature is a signature.

Krake v Auto Club Ins Ass'n, 333541 (February 22, 2018), lv den 915 NW2d 356 (2018). "Facilitation Agreement." Plaintiff was at mediation. She initially denied she had signed MSA. She admitted she "penned" her signature on MSA. She said she signed "fake initials," she did so because her attorney told her MSA was not legally binding. Plaintiff said she did not believe MSA to be final resolution of case, settlement amount was too low, and case was worth $300,000. Circuit Court enforced MSA. COA affirmed. Lesson: **People unpredictable. Prepare for worst. Word "mediation" not in opinion.**

Party dies after signed MSA but before judgment.

Estate of James E Rader, Jr, 335980 (February 13, 2018), lv den 913 NW2d 326 (2018). After signed domestic relations MSA, one of parties died before entry of judgment. Because settlement agreement was to be incorporated into judgment, agreement has no effect. Entry of judgment was condition precedent to enforcement of settlement agreement. Because entry of judgment became impossible following death, settlement agreement could not be incorporated or given effect as intended. **Act quickly.**

Mediation confidentiality.

Hanley v Seymour, 334400 (October 26, 2017). Defendant ex-wife sent to attorney suing her ex-husband's current wife financial information about current wife and defendant's ex-husband, who was 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 unclean hands defense, claiming plaintiff had learned about contemptuous materials during mediation session and could not use those materials in contempt proceedings. COA found communications received by attorney from defendant ex-wife were not part of mediation. Plaintiff ex-husband made aware of communications at conclusion of mediation in which plaintiff participated with opposing attorney. Opposing attorney received documents from defendant before mediation. No violation of MCR 2.412(C) 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, had no food during 9-hour mediation, and was

pressured by her attorney and mediator to sign MSA. Circuit Court enforced MSA. Defendant said MSA obtained by fraud and Circuit Court abused discretion by failing to set it aside and not holding evidentiary hearing. COA said finding of Circuit Court concerning validity of parties' consent to MSA will not be overturned absent abuse of vittdiscretion. COA said defendant's allegation she did not eat during 9-hour mediation and was pressured to accept MSA by her attorney and mediator did not demonstrate coercion necessary to sustain claim of duress. **Mediator provided snacks.** There was no evidence defendant was refused request to get something to eat or was not allowed to bring her own snacks or food to mediation. **Shuttle mediation.**

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 said counsel and mediator forgot to include provision barring spousal support in MSA. Plaintiff said under language of JOD, dispute regarding provision barring spousal support should have been decided by arbitrator. Under JOD, "any disputes regarding the judgment language" should be submitted to arbitrator. Circuit Court did not abuse its discretion in following settlement agreement and entering JOD and denying plaintiff's motion for relief from JOD.

Binding settlement agreement.

Roth v Cronin, 329018 (April 25, 2017), lv den 501 Mich 910 (2017). Plaintiff understood (1) terms of settlement, (2) would be bound by settlement if she accepted it, and (3) had absolute right to go to trial, where she could get better or worse result. She further testified it was her own choice and decision to settle pursuant to terms that were placed on record." Contra ***Andrus v Dunn***, 345824, 346897, 348305 (April 9, 2020).

Circuit Court Judge not disqualified.

Ashen v Assink, 331811 (April 20, 2017), lv den 501 Mich 952 (2018). Plaintiff argued Circuit Court judge should have been disqualified because, as mediator, he would have had personal knowledge of disputed evidence. Mediation scheduled for June 11, 2015, cancelled on June 2, 2015. Judge never mediated case. Plaintiff failed to show what personal knowledge judge had of disputed evidentiary facts. MCR 2.003(C)(1)(c).

Can Circuit Court appoint Discovery Master?

Barry A Seifman, PC v Raymond Guzell, III, 328643 (January 17, 2017), lv den 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). December 2015 mediation resulted in custody MSA. COA held Circuit Court failed to adequately consider child's best interest before it entered custody JOD in April 2016. COA said party bound by signature on MSA as long as Circuit Court agrees MSA in best interests. MSA signed by parties binding on parties subject to Circuit Court best interest analysis. When parties enter into otherwise binding custody MSA, Circuit Court not relieved of obligation to examine best interest factors. By entering JOD, court implicitly acknowledges it (1) examined best interest factors, (2) engaged in profound deliberation as to discretionary custody ruling, and (3) is satisfied custody order is in best interests. Evidentiary hearing not required given MSA. Circuit Court erred by not considering whether established custodial environment existed. Cf *Rettig v Rettig*, 322 Mich App 750; 912 NW2d 877 (2018).

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 den 500 Mich 897 (2016). All counsel signed "Proposed Settlement" MSA, which referenced future signing of additional documents. Circuit Court held document not binding contract.

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 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 JOD, which included custody, without first considering best interest factors. CCA requires Circuit Court to determine what custodial placement is in best interest, even if parties utilize ADR to reach MSA regarding custody. Cf *Rettig v Rettig*, 322 Mich App 750; 912 NW2d 877 (2018).

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.

Majority said considering essential terms 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 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 settlement agreement with aid of facilitator. Attorneys 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 went to mediation. 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 marital property. Property division and spousal support award disparately favored wife. JOD entered reflecting MSA. COA vacated property division and remanded. Antenuptial agreement applied to divorce proceeding.

Undisclosed pregnancy at mediation.

Cieslinski v Cieslinski, 319609 (November 13, 2014). Circuit Court should have set aside consent JOD when husband alleged (1) wife withheld she was pregnant with another man's child before he signed JOD, and (2) knowledge of pregnancy would have affected his decision to sign JOD 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 JOD.

Incomplete MSA not enforced.

Kendzierski v Macomb Co, 316508 (September 23, 2014). Signed MSA that resolved only damages but left unresolved other issues not enforceable. Court cannot force parties to settle and cannot make contract for parties. Negotiation, including unaccepted offers, cannot be substitute for contract requirements. Even if valid oral contract to settle resulted during mediation, it was not enforceable because 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 Ctr, 311385 (August 7, 2014). Plaintiff failed to comply with MSA. Plaintiff testified she signed MSA, but her medical bills, which she tried to show attorneys, were not taken into account. Circuit Court held MSA binding, ordered plaintiff to sign release, and ordered defendants not required to turn over settlement checks until plaintiff signed release. COA affirmed.

MSA set aside by COA.

Hayes v Morris, 315586 (July 29, 2014). MSA provided for largely equal division of marital estate. No JOD entered. Then husband died. In *Tokar v Albery*, 258 Mich App 350; 671 NW2d 139 (2003), parties, during divorce proceedings, arbitrated property issues. After filing of award before JOD, 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 force and effect until court enters JOD based on award. Two exceptions under which award can be enforced: (1) if JOD entry would be ministerial and (2) if decedent acted in reliance on award. Court found JOD entry would not have been ministerial because there were issues remaining and, before JOD was entered, parties had option to reconcile or stipulate to agreement different from award. Court found no reliance by decedent.

Mediation in parental rights case.

In re Vanalstine, Minors, 312858 (April 11, 2013). Mother did not comply with court ordered mediation MSA and Court terminated parental rights. COA said Circuit Court did not terminate rights solely for failure to comply with MSA.

Post arbitration-mediation conduct of arbitrator-mediator.

Hartman v Hartman, 304026 (August 7, 2012), concerned same person being arbitrator and mediator and post-arb-med conduct of neutral and defense counsel. 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 JOD 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 moved to remove arbitrator and obtain relief from settlement. Defendant argued awards moot because settlement reached and what occurred was hospitality and many attorneys, including judges, had stayed at Florida

home. Circuit Court denied motions, stating there was no appearance of impropriety, parties settled, and Florida trip 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.
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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. … .

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 parties' mutual intent to value retirement assets and was enforceable. Property settlement provisions in JOD 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 subject to acceptance or rejection by parties. ADR utilization does not deprive court of CCA authority and obligations. Cf *Rettig v Rettig*, 322 Mich App 750; 912 NW2d 877 (2018).

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. MSA signed by mediator, parties, and attorneys. Parties said JOD was consistent with MSA. Plaintiff testified defendant "lied" during mediation. COA held CCA required Circuit Court to determine custody that is in best interests of children. Cf *Rettig v Rettig*, 322 Mich App 750; 912 NW2d 877 (2018).

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. COA held Township made good faith attempt by having some members present. Full attendance would have created Open Meetings Act meeting. Lack of submission did no harm because Township previously provided plaintiff with rational for its position.

MSA binding.

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

Lee Hornberger is a former Chair of the Alternative Dispute Resolution Section of the State Bar of Michigan, Editor Emeritus 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

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He has received the George N. Bashara, Jr. Award from the State Bar's ADR Section in recognition of exemplary service. He has also received Hero of ADR Awards from the ADR Section.

He is included in *The Best Lawyers of America* 2018-2019 for arbitration, and 2020-2022 for arbitration and mediation. He is on the 2016-2021 Michigan Super Lawyers lists for alternative dispute resolution. He has received a Second Tier ranking in Northern Michigan for Mediation by *U.S. News – Best Lawyers*® Best Law Firms in 2021. He has received a First Tier ranking in Northern Michigan for Arbitration by *U.S. News – Best Lawyers*® Best Law Firms in 2019 and 2020.

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

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