MICHIGAN DOMESTIC RELATIONS
MEDIATION AND ARBITRATION CASE LAW UPDATE
FAMILY LAW SECTION, STATE BAR OF MICHIGAN
JAMAICA INN, JAMAICA

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Arbitrator and Mediator

Introduction

This update reviews recent Michigan cases concerning mediation and arbitration. For the sake of brevity, a short citation style is used rather than the official style for Court of Appeals unpublished decisions.

Disclosures, *Hartman*, and Report of AGC Hearing Panel

Report of the Hearing Panel in Grievance Administrator, Attorney Grievance Commission, Case No 16-143-GA (August 8, 2019). This case arose under the SCAO former Standards of Conduct for Mediators (effective until January 31, 2013), not the SCAO's current Mediator Standards of Conduct (effective February 1, 2013). This is the latest in the *Hartman v Hartman*, unpublished per curiam opinion of the Court of Appeals, issued August 7, 2012 (Docket No 304026), saga. *Hartman* 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. … .

http://publicdocs.courts.mi.gov/opinions/final/coa/20120807_c304026_42_304026.opn.pdf

Hornberger, "Mediator-Arbitrator Conduct After Arbitration and Mediation," *The Michigan Dispute Resolution Journal* (Fall 2017), p 4.

https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Fall17.pdf

> The State Court Administrator shall develop and approve standards of conduct for domestic relations mediators designed to promote honesty, integrity, and impartiality in providing court-connected dispute resolution services. These standards shall be made a part of all training and educational requirements for court-connected programs, shall be provided to all mediators involved in court-connected programs, and shall be available to the public. MCR 3.216 (k).

The SCAO's former Standards (effective until January 31, 2013) indicated:

(4) Conflict of Interest.

(a) **A conflict of interest is a dealing or relationship that might create an impression of possible bias or could reasonably be seen as raising a question about impartiality.** A mediator **shall** promptly disclose all actual and **potential** conflicts of interest reasonably known to the mediator. ...

(b) The need to protect against conflicts of interest also governs conduct that occurs … **after** the mediation. **A mediator must avoid the appearance of conflict of interest … after the mediation.** Without the consent of all parties, a mediator **shall** not **subsequently** establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances that would raise legitimate questions about the integrity of the mediation process. A mediator **shall** not establish a personal or intimate relationship with any of the parties that would raise legitimate questions about the integrity of the mediation process. Emphasis supplied.

The SCAO's current Standards (effective February 1, 2013) provide:

Standard III. Conflicts of Interest

A. A mediator **should** avoid a conflict of interest or the appearance of a conflict of interest both during and **after** mediation. **A conflict of interest is a dealing or relationship that could reasonably be viewed as creating an impression of possible bias or as raising a question about the impartiality or self-interest on the part of the mediator**. …

G. **In considering whether establishing a personal or another professional relationship with any of the participants after the conclusion of the mediation process might create a perceived or actual conflict of interest, the mediator should consider factors such as time elapsed since the mediation, consent of the parties, the nature of the relationship established, and services offered**. Emphasis supplied.

https://courts.michigan.gov/Administration/SCAO/Resources/Documents/standards/odr/Mediator%20Standards%20of%20Conduct%202.1.13.pdf

Code of Ethics for Arbitrators in Commercial Disputes.

https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/Code_Annotated_Final_Jan_2014_update.pdf

Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

https://naarb.org/wp-content/uploads/2017/03/NAACODE07.pdf

Mediation

Michigan Supreme Court Decisions

MSA concerning parental rights.

In re Wangler, 498 Mich 911; 149537 (2015) [Justice Markman dissenting], rev'd 305 Mich App 438 (2014). Circuit Court violated **MCR 3.971(C)(1)** by failing to satisfy itself that mother's plea was knowingly and voluntarily made. Manner in which Circuit Court assumed jurisdiction violated mother's due process rights. In 305 Mich App 438, (Hoestra and Sawyer [majority]; Gleicher [dissent]), Circuit 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. 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. See generally ***In re Alston***, 328667 (March 17, 2016) (Because respondent's procedural due process rights were violated, her plea of admission, the subsequent adjudication, and the termination order were set aside).

COA 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. No dialogue between court and parent occurred. Mediation bypassed due process MCR protections. Circuit Court never obtained jurisdiction.

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

Vittiglio v Vittiglio, 297 Mich App 391; 303724 and 304823 (2012), lv den 493 Mich 936 (2013). COA affirmed holding audio recorded MSA binding. "**[C]ertain 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. "**Shuttle diplomacy**." **Domestic violence protocol**.

Michigan Court of Appeals Published Decisions

Mediation fee is taxable cost.

Patel v Patel, 324 Mich App 631; 339878 (June 19, 2018). COA affirmed Circuit Court's award of mediation expense as taxable cost. MCR 2.625(A)(1). "[M]ediator's fee is deemed a cost of the action, and the court may make an appropriate order to enforce the payment of the fee." MCR 2.411(D)(4).

COA affirmed enforcement of custody MSA.

Rettig v Rettig, 322 Mich App 750; 338614 (January 23, 2018). Parties signed MSA concerning custody. Over objection of one parent that Circuit Court should have hearing concerning best interest factors and whether there was established custodial environment, Circuit Court entered JOD incorporating MSA. COA affirmed. COA said although Circuit Court not necessarily required to accept parties' stipulations or agreements verbatim, Circuit Court permitted to accept them and presume at face value parties meant what they signed. Circuit Court remains obligated to come to independent conclusion parties' agreement is in child's best interests, but Circuit Court is permitted to accept agreement where dispute resolved by parents. Circuit Court not required to make finding of established custodial environment. "nonsensical." **This memorandum of understanding spells out agreement that we have reached in mediation. This resolves all disputes between parties and parties agree to be bound by this agreement. Judge Markey on both *Rettig* and *Vial* panels**.

Rettig *sub silentio* overruled ***Vial v Flowers***, 332549 (September 22, 2016). **COA reversed Circuit Court.** COA rejected contention parties had not entered into MSA concerning custody. December 2015 mediation resulted in MSA. COA held Circuit Court failed to adequately consider child's best interests before it entered custody JOD in April 2016. COA said party is bound by signature on custody MSA as long as Circuit Court agrees MSA in best interests of child. MSA signed by parties was binding on parties subject to Circuit Court best interests analysis. When parties enter into otherwise binding custody agreement, Circuit Court is not relieved of obligation to examine best interest factors. By entering JOD of custody, court implicitly acknowledges it has (1) examined best interest factors, (2) engaged in profound deliberation as to its discretionary custody ruling, and (3) is satisfied custody order is in child's best interests. Evidentiary hearing not necessarily required given custody MSA. COA indicated Circuit Court also erred by not considering whether established custodial environment existed.

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

Michigan Court of Appeals Unpublished Decisions

COA affirmed dismissal with prejudice.

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

COA held MSA invalid in quiet title action.

Dolan v Cuppori, 345310 (September 12, 2019). Spouses 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 non-party N's property rights. COA

held Circuit Court violated N’s due process rights when it added her to settlement agreement without N’s consent. Settlement agreement was invalid from outset.

COA reversed Circuit Court dismissal for failure to appear.

Corrales v Dunn**,** 343586 (May 30, 2019). After case evaluation, Circuit Court ordered mediation of no fault case at Dispute Resolution Center. Because of communication glitch, plaintiff failed to appear at mediation. Circuit Court dismissed case. Issue on appeal was whether dismissal was proper sanction under circumstances. COA reversed Circuit Court’s dismissal. Dismissal after over two years of litigation under circumstances was manifest injustice. MCR 2.410(D)(3)(b)(i). **LESSON: Counsel should personally 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). **COA reversed Circuit Court.** Plaintiff contended Circuit Court forced her to comply with unenforceable MSA. Terms of any MSA were never reduced to signed writing or recorded by audio or video. MCR 3.216(H)(8). Any purported MSA could not, absent other valid proof of settlement, be basis for JOD. At hearing, held one day after mediation, parties placed partial agreement on record. MCR 2.507(G). At that hearing, relative to purported MSA, Circuit Court indicated its understanding as to “gist” of agreement was that parties were to continue with joint physical and legal custody and equal parenting time. Plaintiff agreed on record with that statement. Circuit Court found that arrangement in best interests of child. **Agreement placed on record and agreed to by plaintiff was binding on her. LESSON: Sign 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. **Two-day evidentiary hearing. FOFs**.

To settle or not to settle?

Smith v Hertz Schram, PC, 337826 (July 26, 2018), **lv app pdg**. COA split decision. **Legal malpractice action arising out of post JOD proceeding**. Matter went to mediation. Mediator also served as “discovery master.” Plaintiff did not go to Family Court to challenge discovery roadblock. Plaintiff decided to settle.

Jansen dissent said attorney should have advised plaintiff to walk away from $65,000 offered in mediation and to return to Family Court to pursue discovery matter further. Settlement should never have been serious consideration. Concerning language in settlement agreement that acknowledged neither party had relied on any “representation, inducement, or condition not set forth in this agreement,” attorney should never have allowed it. Fact that attorney essentially released Leider from future liability for any material misrepresentations made in connection with settlement agreement was negligent.

Attorney should have had plaintiff sign a release, indicating it was her intention to enter into settlement agreement despite her counsel's advice to contrary. **FN 5.**

"… 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 okay.

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

Probate MSA not approved.

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

Signature is a signature.

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

Party died after signed MSA but before judgment.

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

Mediation confidentiality.

[Ex-H] Hanley v [ex-W] 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 so could not use those materials in contempt proceedings. COA found communications received by attorney from defendant ex-wife were not part of mediation proceedings. Plaintiff ex-husband made aware of communications at conclusion of mediation in which plaintiff participated with opposing attorney. Opposing attorney received documents from defendant before mediation was conducted. No violation of MCR 2.412(C) confidentiality of mediation communications. **COA affirmed Circuit Court.**

MSA enforced.

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

Mediation and domestic violence.

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

Spousal support language not in MSA.

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

Binding settlement agreement in legal malpractice case.

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

Circuit Court Judge not disqualified.

Ashen v Assink, 331811 (April 20, 2017), lv den 501 Mich 952 (2018). **Quiet title case**. Plaintiff argued Circuit Court judge should have been disqualified because, as mediator over case, he would have had personal knowledge of disputed evidence concerning proceeding. Mediation scheduled for June 11, 2015, was cancelled on June 2, 2015. Judge never actually mediated case. Plaintiff failed to show what personal knowledge, if any, judge had of disputed evidentiary facts. 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. Sadek, "Special Masters Under the Michigan Court Rules," *The ADR Quarterly* (May 2013), p 5.

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As of January 1, 2020, parties may stipulate to or court may order mediation of discovery disputes. Court may specify that discovery disputes must first be submitted to mediator before being filed as motion unless there is need for expedited attention by court. In cases involving complex ESI issues, court may appoint expert under MRE 706. MCR 2.411(H).

DR MSA enforced.

Kleinjan v Carlton, 328772 (January 19, 2016), enforced DR MSA. Circuit Court did not err by entering order based on parties' signed, handwritten MSA, despite defendant's attempt to disavow MSA. Defendant bound by terms of signed, written MSA. MCR 3.216(H)(7). She cannot dispute MSA based on change in heart. ***Vittiglio***, 297 Mich App 391.

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 interests of children, even if parties utilize ADR to reach MSA regarding custody. **Identical to *Vial* and contra to *Rettig*.**

Repeated challenges to MSA sanctionable.

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

COA set 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 then 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 separate and marital property. Property division and spousal support award disparately favored wife. JOD entered reflecting MSA. COA vacated property division and spousal support award and remanded to Circuit Court. 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 information she was pregnant with another man's child before he signed consent JOD, and (2) knowledge of her pregnancy would have affected his decision to sign consent 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 consent judgment.

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 (2003), parties, during divorce proceedings, arbitrated property issues. After filing of award but before JOD entry, husband died. *Tokar* held trial court correctly denied motion to enforce award because trial court retains ultimate control over divorce action. Award, standing alone, does not have full force and effect until court enters judgment based on award. Two possible exceptions under which award could 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. To show reliance, proof of conduct indicating parties in good faith believed they were divorced is required.

Mediation in parental rights case.

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

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. **Residential condo**.

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 did not deprive court of its authority and obligations.

In re BJ, 296273 (January 20, 2011). Domestic relations mediation is not binding but is subject to acceptance or rejection by parties. Utilization of ADR does not deprive court of CCA authority and obligations. Cf *Rettig*, 322 Mich App 750.

Custody MSA rejected.

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*, 322 Mich App 750.

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.

Arbitration

Michigan Supreme Court Decisions

Sexual assault and arbitration.

Lichon v Morse, 327 Mich App 375, 339972 (March 14, 2019), lv gtd 932 NW2d 785 (2019). In split decision, COA held sexual harassment claim was not covered by arbitration provision in employee handbook. Because arbitration provision limited scope of arbitration to only claims that are "related to" plaintiffs' employment, and because sexual assault by employer or supervisor cannot be related to their employment, arbitration provision was inapplicable to their claims against Morse and Morse firm. **"[C]entral to our conclusion in this matter is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault**."

Judge O'Brien's dissent said parties agreed to arbitrate "any claim against another employee" for "discriminatory conduct" and plaintiffs' claims arguably fell within scope of arbitration agreement.

Supreme Court granted leave to appeal. "The parties shall include among the issues to be briefed whether the claims … are subject to arbitration."

Radtke v Everett, 442 Mich 368 (1993). Hostile work environment.

Rembert v Ryan's Family Steak Houses, Inc, 235 Mich App 118 (1999).

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

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Waiver of right to arbitration.

Nexteer Automotive Corp v Mando Am Corp, 500 Mich 955 (2017), lv den 314 Mich App 391 (2016). Party waived right to arbitration when it stipulated arbitration provision did not apply. **Justice Markman dissent** agreed COA correctly held prejudice is not element of express waiver. Dissent said COA erred by holding defendant expressly waived right to arbitration by signing case management order that contained a 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.**

Arbitration in underinsured motorist no fault case.

Nickola v MIC General Ins Co, 500 Mich 115 (2017), reversed portion of 312 Mich App 374 (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.

Does arbitrator decide attorney fee in lien case?

Ronnisch Construction Group, Inc v Lofts on the Nine, LLC, 499 Mich 544 (2016) (Justices Viviano, Markman, McCormack, and Bernstein). Plaintiff can seek attorney fees under MCL 570.1118(2), of Construction Lien Act (CLA), where plaintiff received favorable award on related breach of contract claim but did not obtain judgment on construction lien claim. Arbitrator did not address attorney fee claim but reserved issue for Circuit Court. Circuit Court may award attorney fees to plaintiff because plaintiff was lien claimant who prevailed in action to enforce construction lien through foreclosure. 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 (2016). Plaintiff's tort claims against individual principals of law firm fell within scope of arbitration clause that required arbitration for any dispute between firm and former principal. Plaintiff, a former principal, challenged actions individual defendants performed in their capacities as agents carrying out business of firm. This was dispute between firm and former principal that fell within scope of arbitration clause and was subject to arbitration. Supreme Court reversed those portions of 307 Mich App 612 (2014), which held matter was not subject to arbitration.

Not all artwork invoice claims subject to arbitration.

Beck v Park West Galleries, Inc, 499 Mich 40 (2016), partially reversed COA 319463 (2015). Arbitration clause in invoices for artwork purchases did not apply to disputes arising from previous artwork purchases when invoices for previous purchases did not refer to arbitration. 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.

Parental pre-injury waivers and arbitration.

Woodman ex rel Woodman v Kera LLC, 486 Mich 228 (2010), five (Justices Young, Hathaway, Kelly, Weaver, and Cavanaugh) to two (Justices Markman and Corrigan) decision authored by Justice Young, held parental pre-injury waiver is unenforceable under 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 (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 provided minor bound by written agreement to arbitrate disputes upon execution of agreement on his behalf by parent or guardian. Minor may not subsequently disaffirm agreement. *McKinstry* held statute required arbitration agreement signed by mother bound her child. Justice Young said *McKinstry* acknowledged arbitration agreement would not have been binding under common law and *McKinstry's* interpretation of MCL 600.5046(2) was departure from common law that parent has no authority to release or compromise claims by or against child. He said common law can be modified or abrogated by statute. Child can be bound by parent's act when statute grants authority to parent. MCL 600.5046(2) changed common law to permit parent to bind child to arbitration agreement.

Failure to tape record DRAA hearing.

Kirby v Vance, 481 Mich 889 (2008), in lieu of granting leave, reversed COA (278731) and held arbitrator exceeded authority under DRAA when arbitrator failed to adequately tape record arbitration proceedings. Circuit Court erred when it failed to remedy arbitrator's error by conducting its own evidentiary hearing. Supreme Court remanded case for entry of order vacating award and ordering another arbitration before same arbitrator. **LESSON: Make sure audio recorder is working.**

Formal DRAA hearing format not required.

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

Michigan Court of Appeals Published Decisions

Confirmation of award partially reversed in construction lien case.

TSP Services, Inc v National-Standard, LLC, ___Mich App ___, 342530 (September 17, 2019). Michigan law limits construction lien to amount of contract less any 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 incorrectly concluded otherwise. This

clear legal error had substantial impact on award. COA reversed with respect to confirmation of that portion of award.

COA affirmed order to arbitrate labor case.

Registered Nurses, Registered Pharmacisys Union v Hurley Medical Center, ___ Mich App ___, 343473 (April 18, 2019). Although defendant may present to arbitrator undisputed evidence that plaintiffs engaged in a 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 did not err 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 503 Mich 1037 (2019). First-party no-fault case. COA held Uniform Arbitration Act, MCL 691.1681 *et seq*., not MCR, applied. Circuit Court did not err when it denied motion to vacate arbitration award on basis of collateral estoppel.

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

Lebenbom v UBS, 326 Mich App 2019, 340973 (October 23, 2018). COA held parties' arbitration clause providing for FINRA arbitration encompassed plaintiff's claims alleging conversion against defendant.

Arbitration agreement did 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 sued seller and bank, asserting warranty claims. Defendants countered with signed arbitration agreement. Plaintiff argued Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*, prohibits binding arbitration of warranty disputes. This argument collided with *Abela v Gen Motors Corp*, 469 Mich 603 (2004), which held to contrary. Plaintiff also argued by failing to mention arbitration, warranty violated single document rule in 16 CFR 701.3, a Federal Trade Commission (FTC) regulation implementing MMWA. According to Plaintiff, this omission foreclosed arbitration. Majority (Gadola and O'Brien) interpreted *Abela* to mean binding arbitration provision need not be included in warranty. **Judge 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 shares and stock options in employer. Deviation was substantial error that resulted in substantially different outcome. *Cipriano v Cipriano*, 289 Mich App 361 (2010). Deviation was 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 (2014) (case evaluation sanctions).

How many DRAA correction motions allowed?

Vyletel-Rivard v Rivard, 286 Mich App 13 (2009); lv gtd 486 Mich 938 (2010), stip dism ___ Mich ___ (2010). Defendant challenged Circuit Court order denying motion to vacate award concerning tort damages. COA affirmed denial because defendant's motion to vacate not timely filed. On March 28, 2008, defendant filed motion to vacate "arbitration awards" of November 13, and December 7, 2007. MCL 600.509(2). Party has 21 days to file motion to vacate in DRAA case. MCR 3.602 (J)(2). **Lesson: think carefully before filing second round of reconsideration motions rather than notice of appeal.** *Moody v Pepsi-Cola Metro Bottling Co*, 915 F2d 201 (6th Cir 1990).

Michigan Court of Appeals Unpublished Decisions

COA affirmed confirmation of DRAA award.

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

COA reversed Circuit Court's denial of motion to compel arbitration.

Lesniak v Archon Builders, Inc, 345228 (December 19, 2019). COA reversed Circuit Court's order denying defendants' motion for arbitration because arbitration terms of 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 Rehabilitation, 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.**

COA affirmed Circuit Court confirmation of award.

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

COA affirmed Circuit Court denial of sanctions.

Clark v Garratt & Bachand, PC, 344676 (August 20, 2019). COA affirmed Circuit Court order denying G's motion for sanctions. Language of arbitration award foreclosed G's ability to request sanctions because issue of sanctions 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 argued arbitration agreement was unenforceable on ground that purchase agreement was invalid, these were matters for arbitrator. MCL 691.1686(3). Circuit Court did not err by concluding plaintiff's claims were required to be resolved in arbitration.

DRAA "jackpot" award confirmation confirmed.

Zelasko v Zelasko, 342854 (June 13, 2019), **app lv pdg**. Was husband's winning of **$80 million Mega Millions jackpot** part of marital estate. Arbitrator ruled jackpot was marital property. **COA affirmed Circuit Court confirmation of award.** COA stated "we may not review the arbitrator's findings of fact and are extremely limited in reviewing alleged errors of law." Delay, arbitrator death, and alleged bias of arbitrator issues.

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, and affirmed that portion of order.

DRAA custody dispute award confirmed.

Shannon v Ralston, 339944 (May 23, 2019), lv den ___ Mich ___ (2019). **32 page COA decision.** Agreement to arbitrate **"all issues in the pending matter."** COA affirmed confirmation of DRAA award that decided change of domicile issue. Arbitrator

acted as mediator and arbitrator. Ex parte contact occurred while parties still mediating. At time of ex parte communication, arbitrator was acting as mediator, not as arbitrator, and prohibition against ex parte communications did not apply. Plaintiff belatedly alleged disparaging remarks (p to b) by neutral and neutral's financial interest in arbitration process. **Check cancelled.** Plaintiff ordered to pay fees associated with investigative GAL. Issue of arbitrator's alleged financial bias was 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). Circuit Court's modification of DRAA award to include Monday overnights was error. 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 affirmed order to arbitrate labor case.

Senior Accountants, Analysts and Appraisers Association v City of Detroit Water and Sewerage Department, 343498 (April 18, 2019). Issue of whether union complied with procedural requirements to arbitration in CBA arbitration clause is procedural question for arbitrator.

Selection of replacement arbitrator foreclosed in DRAA case.

Sicher v Sicher, 341411 (March 21, 2019). Arbitration clause in parties' consent JOD named only A as arbitrator and did not provide for alternate, substitute, or successor arbitrators in property division case. A became disqualified due to conflict of interest. MCL 600.5075(1). Because Circuit Court was presented with no evidence that parties had agreed upon new arbitrator to be appointed, Circuit Court was permitted to "void the arbitration agreement and proceed as if arbitration had not been ordered." MCL 600.5075(2). Because parties had agreed only for A to arbitrate property division disputes, Circuit Court's refusal to appoint different arbitrator was permitted by DRAA. Original arbitrator had conflict of interest.

COA reversed confirmation of employment arbitration award.

Checkpoint Consulting, LLC (employer) v Hamm (employee), 342441 (February 26, 2019). No valid arbitration agreement between parties because independent contractor agreement voided all prior agreements, including arbitration clause within employment agreement.

COA affirmed confirmation of employment arbitration award.

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

COA affirmed confirmation of exemplary damages award.

Grewal v Grewal, 341079 (January 22, 2019). **Family business dispute**. COA affirmed confirmation of award of exemplary damages in amount of $4,969,463.94 and correcting award by striking portion that ordered plaintiffs to provide accounting of assets in India. The stipulated order regarding arbitration specified that the Circuit Court, not arbitrator, had authority to adjudicate matters requiring equitable relief.

COA affirmed confirmation of award.

Hunter v DTE Services, LLC, 339138 (January 3, 2019). LCA. Four-day hearing. **Employment discrimination case**. COA affirmed confirmation of 11 page award. **Arbitrator did not exceed authority by failing to provide case citations.** *Rembert*, 235 Mich App 118.

COA affirmed 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 recognizes 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 can award case evaluation sanctions.

Scope of submission to the arbitrator in breach of contract case.

Pietila v Pietila, 339939 (December 13, 2018). Breach of contract case. COA affirmed Circuit Court confirmation of award concerning **insurance agency**. Court may not disturb arbitrator's discretionary finding of fact that neither party prevailed in full and decision not to award attorney fees. Issue of commissions was submitted as claim under grant of power to arbitrator to determine legal enforceability of Agreement.

COA affirmed Probate Court confirmation of award.

In Re Estate of Gordon*,* 339296 (November 8, 2018), lv den 503 Mich 1020 (2019). COA affirmed Probate Court's confirmation of award regarding administration of decedent's trust. Because parties agreed to arbitrate their disputes and because arbitrator acted within scope of authority, challenges to administration of trusts lacked merit.

DRAA award confirmed.

Thomas-Perry v Perry, 340662 (October 16, 2018). Parties given opportunity to present evidence and testimony on all issues during arbitration. Because 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, 338196 (September 20, 2018). COA affirmed Circuit Court's confirmation of **nine page employment arbitration award**. *Rembert*, 235 Mich App 118 (statutory employment arbitration awards in Michigan "must be in writing and contain findings of fact and conclusions of law").

COA affirmed awards and spoke to judicial review of awards.

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

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

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

> "Judicial review of an arbitration award … is extremely limited." *Fette v Peters Const Co*, 310 Mich App 535, 541 (2015). "… '[a] court's review of an arbitration award "is one of the narrowest standards of judicial review in all of American jurisprudence." ' " *Washington*, 283 Mich App at 671 n 4, quoting *Way Bakery v Truck Drivers Local No 164*, 363 F3d 590, 593 (CA 6, 2004), quoting *Tennessee Valley Auth v Tennessee Valley Trades & Labor Council*, 184 F3d 510, 514 (CA 6, 1999) … .
>
> An arbitrator may exceed powers by making material error of law that substantially affects outcome of arbitration. In order for court to vacate award because of error of law, error must have been so substantial that, but for error, award would have been substantially different. Any such error must be readily apparent on face of award without second-guessing arbitrator's thought processes, and arbitrator's findings of fact are immune to review altogether.

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 503 Mich 860 (2018). COA affirmed Michigan Employment Relations Commission (MERC) order granting summary disposition, where Association engaged in unfair labor practice 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 ***MEA v Vassar Public Schs***, 337899 (May 22, 2018).

COA affirmed Circuit Court confirmation of award.

Galasso, PC v Gruda, 335659 (February 8, 2018). Dispute over accounting and legal fees. COA affirmed confirmation of award because there was no clear error of law on face of award. UAA, 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. Award did not, out of necessity, stem from error of law. **LESSON: LESS IS SOMETIMES GOOD.**

If parties agree, arbitrator can decide arbitrability.

Elluru [MD] 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. UAA, MCL 691.1681 *et seq*. "[P]arties may vary the effect of the requirements of this act to the

extent permitted by law." MCL 691.1684(1). Parties' employment agreement incorporated AAA rules that called for arbitrating arbitrability.

COA considers waiver of arbitration agreement.

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

COA reversed partial vacatur of DRAA award.

Roetken v Roetken, 333029 (December 19, 2017), lv den 503 Mich 858 (2018). COA reversed Circuit Court's order vacating portion of DRAA award regarding spousal support. MCL 600.5081. *Washington v Washington*, 283 Mich App 667 (2009). Arbitrator considered applicable factors in fashioning award of support. **Powerful pro-award language.**

Amended award confirmed.

Ciotti v Harris, 332792 (December 12, 2017). In this case arising from an automobile accident, COA affirmed Circuit Court's confirmation of reasoned award rendered after motion to arbitration panel concerning nonreasoned award. **LESSON. Be careful what you ask for. Do not interfere with the other side while it is making a mistake.**

COA reversed vacatur of award.

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

Claims subject to arbitration.

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

"May" did not mean mandatory.

Skalnek v Skalnek, 333085 (October 26, 2017), lv den 502 Mich 902 (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" in phrase, "Either party may submit a dispute for resolution…" and because other wording in agreement was unclear as to whether arbitration was only means of resolution contemplated by parties.

Arbitration, frozen embryos, and sua sponte analysis.

Karungi v Ejalu, 337152 (September 26, 2017), lv den 501 Mich 1051 (2018). COA split decision arose from frozen embryos. Never married parties disputed what should be done with embryos. Circuit Court ruled for technical reasons it did not have jurisdiction over embryo issue. COA said parties and Circuit Court ignored that parties entered into contract that governed parties' interest in embryos and there was mandatory arbitration provision in previously non-cited contract. The per curiam (O'Brien) and concurrence (Murray) remanded to Circuit Court to determine whether it had 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 properly raise.

Arbitration involving non-signatories to arbitration agreement.

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

COA approved DRAA award.

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

No issue for DRAA 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. JOD said "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 were silent as to spousal support. **This was not a dispute concerning meaning of language within JOD**. Circuit Court did not abuse discretion in denying plaintiff's request that dispute be remanded for arbitration.

Party did not waive arbitration by filing cross-complaint.

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 691.1681, *et seq*., at MCL 691.1684(1).

Supplemental labor arbitration award confirmed.

Dept of Transportation 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 used panel dissent to attack award.

Estate of James P Thomas, Jr v City of Flint, 331173 (April 20, 2017). COA affirmed Circuit Court order denying motion to vacate award of arbitration panel. Arbitration panel, **by split vote**, ruled in favor of defendant. Plaintiff argued 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 one arbitrator disagreed with another does not establish, nor even "fairly raise," possibility that either arbitrator lacked impartiality.

Labor arbitration award confirmed.

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

Cases ordered to arbitration.

Spence Bros v Kirby Steel, Inc, 329228 and 332083 (March 14, 2017). Arbitration provision of parties' agreement mandated matter involving alleged breach of agreement be submitted to arbitration. Circuit Court erred by determining otherwise. Remanded to Circuit Court for entry of order ordering matter to arbitration.

Rozanski v Findling, 330962 and 332085 (March 14, 2017). Plaintiffs appealed Circuit Court order 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 affirmed. 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). 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. Michigan law respects separate corporate entities, "absent abuse of the corporate form." Circuit Court erred in ruling that Pepperco's lawsuit was barred by agreement to arbitrate.

Arbitrator may decide res judicata and estoppel as to grievances.

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

Following arbitration of first grievance, union requested arbitration of arguably related grievances. City refused to arbitrate, arguing res judicata and collateral estoppel precluded "rematch" on issues that were litigated before in first grievance. Circuit Court determined issue in one of the additional grievances had not been decided. Preclusion issue was "close 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. In determining preclusion issues should be decided by arbitrator, COA offered no opinion on merits of city's preclusion arguments.

City is free to assert during arbitration that res judicata and collateral estoppel bar arbitration of grievances. 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.

COA affirmed Circuit Court that collateral estoppel not applicable.

Ric-Man Constr, Inc v Neyer, Tiseo & Hindo Ltd, 329159 (January 17, 2017), lv den 501 Mich 942 (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 and unequivocally ascertained. COA affirmed Circuit Court that collateral estoppel not applicable.

COA reversed Circuit Court order to compel arbitration.

Shaya v City of Hamtramck, 328588 (January 5, 2017). Circuit Court held plaintiff's claims for employment discrimination under Civil Rights Act ("CRA"), MCL 37.2101 *et seq*., and retaliatory discharge under Whistleblowers' Protection Act ("WPA"), MCL 15.361 *et seq*., subject to arbitration provision in parties' employment agreement and referred claims to arbitration. **COA reversed**. Arbitration clause provided, "Any controversy or claim arising out of or relating in any way to this agreement shall be settled exclusively by arbitration administered by [AAA] … 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 discrimination claims under CRA or retaliatory discharge under WPA, to be valid only if (1) parties agreed to arbitrate such claims, (2) statutes in question do not prohibit agreement to arbitrate, and (3) agreement does not waive substantive rights and remedies of statute and the procedures are fair. COA said arbitration clause **did not provide clear notice to plaintiff** that he was waiving right to adjudication of statutory discrimination claims under CRA, and plaintiff was not on notice that terms of employment contract constituted waiver of right to bring statutory discrimination claim in court. *Rembert*, 235 Mich App 118.

About the Author

Lee Hornberger was Chair of the State Bar's ADR Section, Editor of *The Michigan Dispute Resolution Journal*, member of the State Bar's Representative Assembly, President of the Grand-Traverse-Leelanau-Antrim Bar Association, and Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan (PREMi) and a diplomate member of The National Academy of Distinguished Neutrals. He has received the ADR Section's George N. Bashara, Jr. Award.

He is in *The Best Lawyers of America* 2018 and 2019 for arbitration, and 2020 for arbitration and mediation. He is on the 2016, 2017, 2018, and 2019 Michigan Super Lawyers lists for ADR. He received a First Tier ranking in Northern Michigan for Arbitration by *U.S. News – Best Lawyers*® Best Law Firms in 2019 and 2020.

He has completed the ICLE Family Law Certificate Program, cosponsored by the Family Law Section.

While serving with the U.S. Army in Vietnam, he was awarded the Bronze Star Medal and Army Commendation Medals. The unit he was in was awarded the Meritorious Unit Commendation and the Republic of Vietnam Gallantry Cross Unit Citation with Palm.

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

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