MICHIGAN MEDIATION AND ARBITRATION CASE LAW UPDATE
ALTERNATIVE DISPUTE RESOLUTION SECTION
STATE BAR OF MICHIGAN
2020 VIRTUAL ANNUAL MEETING AND ADR CONFERENCE
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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 For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

II. ARBITRATION

A. Michigan Supreme Court Decisions

Supreme Court grants leave to appeal of COA reversal of Circuit Court order granting arbitration

Lichon v Morse, 327 Mich App 375; 933 NW2d 506, 339972 (March 14, 2019), lv gtd, ___ Mich ___) (September 18, 2019). In split decision, COA held sexual harassment claim was not covered by arbitration provision in employee handbook. Because arbitration provision limits 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 is inapplicable to their claims against Morse and Morse 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 dissent said parties agreed to arbitrate "any claim against another employee" for "discriminatory conduct" and plaintiffs' claims arguably fall within scope of arbitration agreement.

Supreme Court granted leave to appeal, stating, "The parties shall include among the issues to be briefed whether the claims set forth in the plaintiffs' complaints are subject to arbitration."

Radtke v Everett, 442 Mich 368; 501 NW2d 155 (1993).

Renny v Port Huron Hosp, 427 Mich 415; 398 NW2d 327 (1986).

Rembert v Ryan's Family Steak Houses, Inc, 235 Mich App 118; 596 NW2d 208, lv den 461 Mich 923 (1999).

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. Prejudice is not element of express waiver. He dissented because he believed COA erred by holding defendant expressly waived right to arbitration by signing case management order that contained checked box next to statement: "An agreement to arbitrate this controversy . . . exists . . . [and] is not applicable." He would have reversed COA on express waiver and remanded for consideration of whether defendant's conduct gave rise to implied waiver, waiver by estoppel, or no waiver. **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 related breach of contract claim but did not obtain judgment on construction lien claim. Arbitrator did not address attorney fee claim but reserved issue for Circuit Court. Circuit Court may award attorney fees to plaintiff because plaintiff was lien claimant who prevailed in action to enforce construction lien through foreclosure. This affirmed 306 Mich App 203 (2014).

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

Dispute with individuals within arbitration agreement.

Altobelli v Hartmann, 499 Mich 284; 884 NW2d 537 (2016). Plaintiff's tort claims against individual principals of law firm fell within scope of arbitration clause that required arbitration for any dispute between firm and former principal. Plaintiff, a former

principal, challenged actions individual defendants performed in their capacities as agents carrying out firm business. Supreme Court said this was dispute between firm and former principal that fell within scope of arbitration clause and was subject to arbitration. Supreme Court reversed those portions of 307 Mich App 612; 816 NW2d 913 (2014), which held matter was not subject to arbitration.

Not all artwork invoice claims subject to arbitration.

Beck v Park West Galleries, Inc, 499 Mich 40; 878 NW2d 804 (2016), partially reversed COA 319463 (2015), considered whether arbitration clause in invoices for. artwork purchases applied to disputes arising from previous artwork purchases when invoices for previous purchases did not refer to arbitration. Court held arbitration clause contained in later invoices cannot be applied to disputes arising from prior sales with invoices that did not contain clause. Court reversed part of COA judgment that extended arbitration clause to parties' prior transactions that did not refer to arbitration. Court recognized policy favoring arbitration of disputes arising under CBAs but said this does not mean arbitration agreement between parties outside collective bargaining context applies to any dispute arising out of any aspect of their relationship

Duty to defend in arbitration.

***Hastings Mut Ins Co v Mosher Dolan Cataldo & Kelly, Inc*,** 497 Mich 919; 856 NW2d 550 (2014), in lieu of granting leave, reversed COA (296791). COA erred in holding insurer did not have duty to defend insured in arbitration case. Insurer had duty to defend, despite theories of liability asserted against insured that are not covered under policy, if there are theories 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), in lieu of granting leave, reversed COA, for reasons in COA dissent, and reinstated Circuit Court order denying defendants' motion to vacate award and confirming award. Dissent in 303619 (May 31, 2012), said stipulated order intended arbitration included claims beyond those pending because it allowed further discovery, gave arbitrator powers of Circuit Court, and award would represent full and final resolution. Claims not pending at time order was entered were not outside scope of arbitrator's powers.

Shareholder arbitration agreement covers discrimination claims.

Hall v Stark Reagan, PC, 493 Mich 903; 823 NW2d 274 (2012) (Young, Markman, MB Kelly and Zahra [majority]; Hathaway, Cavanagh, and M Kelly [dissent]). Supreme Court reversed part of COA judgment, 294 Mich App 88; 818 NW2d 367 (2012), which held matter was not subject to arbitration. Supreme Court reinstated Circuit Court order ordering arbitration. Dispute concerned motives of defendant shareholders in invoking separation provisions of Shareholders' Agreement. According to majority, this, including allegations of violations of Civil Rights Act, MCL 37.2101 *et seq*, is a "dispute regarding interpretation or enforcement of . . . parties' rights or obligations" under Shareholders' Agreement, and was subject to arbitration pursuant to Agreement.

Dissents said Shareholders Agreement provided only for arbitration of violations of Agreement, not for allegations of discrimination under Civil Rights Act.

CBA just cause provision gives arbitrator authority.

36th Dist Ct v Mich Am Fed of State Co and Muni Employees, 493 Mich 879; 821 NW2d 786 (2012), in lieu of granting leave, reversed part of COA judgment that reversed award of reinstatement and back pay. Supreme Court said MCR 3.106 does not preclude such relief where CBA has just cause standard for termination. In 295 Mich App 502 (2012), COA ruled that because CBA did not abrogate Chief Judge's statutory or constitutional authority to appoint court officers, arbitrator exceeded jurisdiction by requiring Chief Judge to re-appoint grievants to their positions.

Parental pre-injury waivers and arbitration.

Woodman ex rel Woodman v Kera LLC, 486 Mich 228; 785 NW2d 1 (2010), five (Justices Young, Hathaway, Kelly, Weaver, and Cavanaugh) to two (Justices Markman and Corrigan) decision authored by Justice Young, held parental pre-injury waiver is unenforceable under 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 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.

Supreme Court upholds labor award concerning take-home vehicle.

Kentwood v Police Officers Labor Council, 483 Mich 1116; 766 NW2d 869 (2009), denied City's application for leave. This affirmed COA reversal of Circuit Court's vacatur of labor arbitration award. Arbitrator held grievant was to be assigned take-home vehicle because there was past practice of assigning vehicles and burden on employer to prove it had repudiated practice without objection by union. Arbitrator held past practice became binding working condition that could not be altered without mutual consent where CBA is silent on assignment of vehicles. Arbitrator held policy manual provision was only valid to extent it was consistent with CBA, including established practices. Arbitrator concluded decision not to assign vehicle was inconsistent with past practice. Justice Markman dissented, with Justice Corrigan joining, indicating he would reinstate Circuit Court's order vacating award. Dissent said CBA does not refer to 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.

Detroit Fire Fighters Ass'n v Detroit, 482 Mich 18; 753 NW2d 579 (2008). Issue was whether Circuit Court properly issued preliminary injunction to prevent implementation of City's layoff plan. Union contended plan violated "*status quo*" provision, MCL 423.243, of Michigan Compulsory Arbitration of Labor Disputes for Police and Fire Departments Act, MCL 423.231 *et seq*, by jeopardizing firefighters' safety. Circuit Court must conclude employer's plan is so "inextricably intertwined with safety" that its implementation would alter *status quo* by altering this employment condition. Circuit Court found 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.

Pontiac Fire Fighters Union v Pontiac, 482 Mich 1; 753 NW2d 595 (2008). Circuit Court abused its discretion in issuing preliminary injunction preventing City from implementing plan to lay off Union members. Union sought preliminary injunction against layoffs pending resolution of ULP charge, collective bargaining, or interest arbitration. Circuit Court granted preliminary injunction after ruling Union satisfied elements for injunctive relief. COA upheld preliminary injunction in split decision. 271497 (November 30, 2006). Supreme Court said Union failed to meet burden of establishing irreparable harm would result without injunction. Supreme Court reversed COA and vacated Circuit Court order granting preliminary injunction.

Failure to tape record DRAA hearing.

Kirby v Vance, 481 Mich 889; 749 NW2d 741 (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 to Circuit Court 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 to Circuit Court for entry of order granting summary disposition to defendants. COA correctly held Circuit Court lacked jurisdiction to grant relief requested by plaintiffs because unions were not parties to the arbitration. Section 10, MCL 423.240, of Michigan Compulsory Arbitration of Labor Disputes for Police and Fire Departments Act, MCL 423.231 *et seq*, provides that awards are final and binding.

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 in legal malpractice case.

Tinsley v Yatooma, ___ Mich App ___, 349354 (August 13, 2020). Pre-dispute arbitration provision in legal malpractice case. Under plain language of MRPC 1.8(h)(1) and EO R-23 arbitration provision enforceable because client consulted with independent counsel. "**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 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 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 Medical Center, 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 that plaintiffs were 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 that 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 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 inconsistent with *Abela v Gen Motors Corp*, 469 Mich 603; 677 NW2d 325 (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 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 was substantial error that resulted in substantially different outcome. *Cipriano v Cipriano*, 289 Mich App 361; 808 NW2d 230 (2010), lv den ___ Mich ___ (2012). 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; 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 prior to award. No claim selection involved fraud or other infirmity that would invalidate arbitration agreement, or any claim appointee had inappropriate relationship with party. Plaintiff required to wait until after award to raise issue in proceeding to vacate. 9 USC 10.

Offsetting decision-maker biases can arguably create neutral tribunal.

White v State Farm Fire and Cas Co, 293 Mich App 419; 809 NW2d 637 (2011), discussed whether MCL 500.2833(1)(m) appraiser who receives contingency fee for appraisal is sufficiently neutral. COA said courts have upheld agreements for arbitration conducted by party-chosen, non-neutral arbitrators, particularly when neutral arbitrator is also involved. These cases implicitly recognize it is not necessarily unfair or unconscionable to create effectively neutral tribunal by building in offsetting biases.

Michigan Constitution trumps CBA.

AFSCME v Wayne Co, 292 Mich App 68; 811 NW2d 4 (2011), held that under judicial branch's inherent constitutional authority 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 initiating civil action 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 to initiate civil action. 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's order denying motion to vacate award concerning tort damages in DRAA. COA affirmed denial because defendant's motion to vacate was not timely filed. On March 28, 2008, defendant, MCL 600.509(2), filed motion to vacate "arbitration awards" of November 13, and December 7, 2007. Party has 21 days to file motion to vacate in DRAA case. MCR 3.602 (J)(2). Lesson is to think carefully before filing second round of reconsideration motions rather than notice of appeal. *Moody v Pepsi-Cola Metro Bottling Co*, 915 F2d 201 (6th Cir 1990).

Six-year limitation period for action to vacate labor arbitration award.

Ann Arbor v AFSCME, 284 Mich App 126; 771 MW2d 843 (2009). There is no statute or court rule providing limitations period for actions seeking to vacate public labor arbitration awards. Actions to vacate awards are more akin to actions to enforce awards than to DFR actions. Action to vacate labor award is subject to six-year limitations period. As long as arbitrator is arguably construing or applying CBA and acting within scope of authority, court may not overturn award even if arbitrator committed serious error. *Rowry v Univ of Mich*, 441 Mich 1(1992), held plaintiff ordinarily has six years to seek enforcement of labor award and recognized in certain cases this period may be

substantially diminished if award grants equitable relief and delay in enforcement is shown to prejudice defendant in a way that evokes laches to bar plaintiff's claim.

COA approves probate arbitration.

In split decision, ***In re Nestorovski Estate***, 283 Mich App 177; 769 NW2d 720 (2009), held probate proceedings are not inherently unarbitrable.

C. Michigan Court of Appeals Unpublished Decisions

COA reverses vacatur of DRAA award.

Moore v Glynn, 349505 (August 27, 2020). 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 settlement 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's 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), **app lv pdg**. Plaintiff appealed Circuit Court confirmation of award. Award concluded 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). Award, which was adopted in JOD, required arbitration of disputes that arose regarding **St. Martin property**. August 2015 order provided Andrus waived any claims she had relating to St. Martin, including pursuant to any 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 of St. Martin dispute.

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 contentious 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 is 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). In this contract case, 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 was 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 current and controlling Michigan law, and explained his uneven distribution of property, there was no basis for concluding arbitrator exceeded authority in issuing award.

COA reverses Circuit Court denial of motion to compel arbitration.

Lesniak v Archon Builders, Inc, 345228 (December 19, 2019). COA reversed Circuit Court order 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), **app lv pdg.** 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 Street, 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 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. G had failed to prove that plaintiff's complaint was frivolous.

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 plaintiff's claims against sellers were required 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 Mega Millions 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. See generally *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 issue. Arbitrator acted as both mediator and arbitrator. At time of ex parte communication, arbitrator was acting as mediator, not as arbitrator and prohibition against ex parte communications did not apply. Belated raising of alleged disparaging remarks by neutral. Arbitrator's alleged financial interest in arbitration process. Plaintiff ordered to pay fees associated with investigative guardian ad litem. Issue of arbitrator's alleged financial bias was one of plaintiff's own making by

stopping payment in violation of the 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's 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.

Senior 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). Arbitration clause in JOD named only A as arbitrator and did not provide for alternate, substitute, or successor arbitrators. 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 permitted to void 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 permitted by DRAA.

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 were precluded from deciding issue of whether just cause existed to terminate defendant's 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 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 was 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 concerning insurance agency. Circuit Court may not disturb arbitrator's discretionary finding of fact that neither party prevailed in full and his 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 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 were given opportunity to present evidence and testimony on all issues during arbitration. Because reviewing court is limited to examining face of arbitration ruling, there is no basis for concluding that arbitrator exceeded his 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.

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

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

COA affirms Circuit Court confirmation of award.

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

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

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 were 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. Uniform Arbitration Act, MCL 691.1681 *et seq*. MCL 691.1684(1) provides "parties may vary the effect of the requirements of this act to the extent permitted by law."

COA considers waiver of arbitration agreement.

Miller v Duchene, 334731 (December 21, 2017). COA reversed Circuit Court's decision rejecting plaintiffs' contentions that defendants waived defense predicated on arbitration agreement and arbitration agreement did not encompass some defendants. With respect to initial defendants, issue was whether their waiver can be forgiven or set aside on 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.

Amended award confirmed.

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

COA reverses vacatur of award.

Cook v Hermann, 335989 (November 21, 2017). 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). This COA split decision arose from frozen embryos. Never married parties disputed what should be done with embryos. Circuit Court ruled for technical reasons that it did not have jurisdiction over embryo issue. On appeal, COA said both parties and Circuit Court ignored fact that parties entered into contract that governed parties' interest in contested embryos and that there was mandatory arbitration provision in previously non-cited contract. In light of this the per curiam (O'Brien) and concurrence (Murray) remanded to Circuit Court to determine whether it has subject-matter jurisdiction. Dissent (Jansen) would not have altered entire procedural posture, sua sponte, to remand matter and allow parties to re-litigate theories they failed to properly raise.

Arbitration involving non-signatories to arbitration agreement.

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

on substantially interdependent and concerted conduct by all defendants. If parties cannot agree on arbitrator, Circuit Court shall appoint arbitrator.

COA approves DRAA award.

Holloway v Kelley, 331792 (June 27, 2017). COA agreed with Circuit Court that arbitrator did not exceed his authority, arbitrator followed law and did as he was asked when he 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 judgment of divorce, dispute regarding provision barring spousal support should be decided by arbitrator. Under terms of judgment of divorce, "any disputes regarding the judgment language" should be submitted to arbitrator. Dispute concerned whether judgment should include provision barring spousal support. Judgment of divorce and settlement agreement were silent as to spousal support. This was not a dispute concerning meaning of language within judgment of divorce. Circuit Court did not abuse discretion in denying plaintiff's request that dispute be remanded for arbitration.

Party did not waive arbitration.

Universal Academy v Berkshire Dev, Inc, 330707 (June 20, 2017). Party did not waive right to arbitration by filing cross-complaint. "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." Uniform Arbitration Act, MCL 691.1681, *et seq*., at MCL 691.1684(1).

Supplemental labor arbitration award.

Dep't of Trans v MSEA, 331951 (June 13, 2017). COA affirmed Circuit Court's confirmation of supplemental labor arbitration award. Arbitrator ordered reinstatement, make whole remedy, and retained jurisdiction. Arbitrator then had to decide post-award issue concerning some 401(k) issues. COA held this was appropriate.

Losing party uses panel dissent to attack award.

Estate of James P Thomas, Jr v City of Flint, 331173 (April 20, 2017). COA affirmed Circuit Court order denying motion to vacate award of arbitration panel. Arbitration panel, by 2-1 vote, ruled in favor of defendant. Plaintiff's first argument was Circuit Court erred in denying plaintiff's motion to set aside award based upon lack of impartiality by neutral arbitrator or by allowing limited discovery on issue of lack of

impartiality. COA stated mere fact that one arbitrator disagrees with another does not establish, nor even "fairly raise," the possibility that either lacks impartiality.

Labor arbitration award confirmed.

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

Case ordered to arbitration.

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

Case ordered to arbitration.

Rozanski v Findling, 330962 and 332085 (March 14, 2017). Plaintiffs appealed Circuit Court 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 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 articles 5, 24, and 45, was not timely CBA terms. 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. In reaching this conclusion, arbitrator relied on ALJ's examination of CBA, concluding that ALJ "carefully, persuasively and correctly analyz[ed] and answer[ed] the underlying question of the fundamental nature"

of parties' agreement with respect to City's obligation to maintain staffing levels in perpetuity. Ultimately, to extent union's 20 grievance implicated articles 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 "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 preclusive arguments. City is free to assert during arbitration that res judicata and collateral estoppel bar arbitration of grievances 1 and 6. Should arbitrator reach merits of case, submitting matter to arbitration will not prevent city from asserting, after arbitration, that there was impermissible conflict between MERC decision and arbitration decision.

Collateral estoppel from arbitration award?

Ric-Man Constr, Inc v Neyer, Tiseo & Hindo Ltd, 329159 (January 17, 2017), 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 plaintiff's claims for employment discrimination under Civil Rights Act (CRA), MCL 37.2101 et seq., and retaliatory discharge under Whistleblowers' Protection Act (WPA), MCL 15.361 et seq., were subject to arbitration provision in parties' employment agreement. COA reversed. Arbitration clause provided, "Any controversy or claim arising out of or relating in any way to this agreement shall be settled exclusively by arbitration administered by the American Arbitration Association under its … National Rules for the Resolution of Employment Disputes … . This agreement to be submitted to binding arbitration specifically includes, but is not limited to, all claims that this agreement has been interpreted or enforced in a discriminatory manner. … ." COA stated arbitration clause, with respect to claims of discrimination under CRA or retaliatory discharge under

WPA, to be valid only if (1) parties agreed to arbitrate such claims, (2) statutes in question do not prohibit agreement to arbitrate, and (3) agreement does not waive substantive rights and remedies of statute and the procedures are fair. COA agreed with plaintiff that arbitration clause did not provide clear notice to plaintiff that he was waiving right to adjudication of statutory discrimination claims under CRA, and plaintiff was not on notice that terms of employment contract constituted waiver of right to bring statutory discrimination claim in court.

Award confirmed after lap top cleansing.

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

Custody DRAA award confirmed.

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

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

Arbitrators' awards confirmed.

Karmanos v Compuware Corp, 327476 and 327712 (October 20, 2016), lv den ___ Mich ___ (2017), affirmed Circuit Court's confirmation of unreasoned award of **$16,500,000**. COA said lack of reasoned award rendered it impossible to discern mental path leading to award; court may not review arbitrator's factual findings or decision on merits; court may not invade province of arbitrator to construe contracts; 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, and affirmed that portion of order.

COA affirms arbitrator fee.

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

COA approves informal method of conducting DRAA arbitration.

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

Race to the courthouse.

New River 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.

In ***Cummings v Cummings***, 318724 (May 19, 2015), plaintiff appealed Circuit Court order which denied plaintiff's motion to vacate "binding mediation award." COA affirmed. COA held binding mediation is equivalent to arbitration and subject to same judicial review. According to COA, parties agreed to binding mediation, which like arbitration, does not require a certain degree of formality. Relief from untimely award was not warranted where appellant failed to allege what substantial difference would have resulted from timely award. Cases where award was vacated due to *ex parte* communication involved violation of arbitration agreement prohibiting such conduct. Binding mediation agreement did not contain clause prohibiting *ex parte* communication, so there is no indication mediator exceeded powers by acting beyond material terms of parties' contract. COA said "Plaintiff also asserts that the mediator badgered witnesses, but the only example he gives is that the mediator poked a witness with a pencil. While poking a witness with a pencil, if that is exactly what occurred, is inappropriate, it does not show a concrete bias." COA pointed out hearings were often hostile or aggressive. Although there were times where mediator's behavior was not indicative of 'a good mediator' or necessarily professional, mediator did the best he could to control the situation he was presented with and keep calm when hearings became aggressive."

COA confirms award despite discovery and witness interview issues.

Perry v Portage Pub Sch Bd of Ed, 319170 (March 12, 2015), lv den ___ Mich ___ (2015). In AAA employment arbitration case, plaintiff appealed Circuit Court order denying plaintiff's motion to vacate. COA affirmed. Prior to arbitration, employer retained investigator who created report. Employee requested copy of report before arbitration hearing. Employer declined, indicating it would provide report only if employee realized this would make report subject to public disclosure under Public Records Act. Employee asked authorization to interview potential employee witnesses. Employee did not request depositions. At arbitration hearing, employer used investigator as witness. Arbitrator issued award in favor of employer. Circuit Court refused to vacate. COA agreed with Circuit Court that (1) employer did not refuse to produce report but rather correctly conditioned production on realization of Public Records Act implications, and (2) employee could have used depositions to interview witnesses but chose not to.

Dismissal order to permit arbitration is not final appealable order.

ITT Water & Wastewater USA Inc v L D'Agostini & Sons, Inc, 319148 (March 10, 2015). Circuit Court entered stipulation and order of dismissal without prejudice. Order stated parties entered into arbitration and tolling agreement concerning their claims. Circuit Court retained jurisdiction over case and case could be reopened under MCR 3.602(I) upon party's motion "for purposes of confirming any award rendered pursuant to the arbitration agreement of the parties." Order stated it resolved last pending claim and closed case. Defendant appealed challenging Circuit Court's orders granting partial summary disposition in favor of plaintiff. COA held stipulated order of dismissal entered by Circuit Court pursuant to agreement to submit claim and counterclaim to arbitration was not appealable by right, and COA lacked jurisdiction over appeal. COA noted, after entry of judgment on award, defendant could challenge in appeal by right Circuit Court's orders granting partial summary disposition in favor of plaintiff.

Successors have to comply with arbitration clause.

Marjorie Brown Trust v Morgan Stanley Smith Barney, LLC, 317993 (February 5, 2015), lv den ___ Mich ____ (2015). Main issue was whether dispute over investment account is subject to arbitration, as specified in account agreement, or whether dispute can proceed in court. Plaintiff admitted her account with Smith Barney Shearson was subject to arbitration agreement, but asserted defendants Morgan Stanley Smith Barney and Citigroup Global Markets were not successors to Smith Barney Shearson, and were not parties to arbitration agreement. Defendants produced evidence that Morgan Stanley Smith Barney and Citigroup Global Markets were successors of Smith Barney Shearson, through consolidations. COA agreed with Circuit Court that defendants were successors and agreement to arbitrate was binding on plaintiff.

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

Heffelfinger v Bad Axe 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 against them. Plaintiff contended defendants waived any challenge to award because they never objected to plaintiff's demand for arbitration. Circuit Court granted plaintiff's motion to enforce award. COA affirmed and indicated that to determine arbitrability, court must consider whether there is arbitration provision in parties' contract, whether dispute is arguably within arbitration clause, and whether dispute is expressly exempt from arbitration by terms of contract, and doubts about arbitrability are resolved in favor of arbitration. COA indicated court may not hunt for errors in award, and facially valid damage award should not be disturbed.

Arbitrator failed to comply with arbitration agreement.

Visser v Visser, 314185 (July 15, 2014). Parties agreed to DRAA arbitration to resolve issues relating to custody, parenting time, child support, and property. Parties agreed, pursuant to MCL 600.5077(2), if custody, child support, or parenting time were at issue, court reporter would be hired to transcribe portion of arbitration proceedings affecting those issues. They agreed arbitrator must adhere to MRE. After successfully mediating custody and parenting time issues, arbitration was held to decide child support and property issues. Without presence of court reporter, and without adhering to MRE, arbitrator entered award and proposed judgment. Defendant argued arbitrator exceeded authority in failing to apply MRE and failing to hire court reporter. Circuit Court ruled in favor of plaintiff, entered arbitrator's proposed judgment, and denied defendant's motion to vacate award. COA held because of arbitrator's failure to comply with arbitration

agreement by neither utilizing MRE nor obtaining court reporter, Circuit Court erred in refusing to vacate provision of award and proposed judgment concerning child support.

Does arbitrator or Court decide sanctions issue?

G&B II, PC v Gudeman, 315607 (July 15, 2014), lv 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 that counsel's defense was frivolous. Circuit Court denied sanction request, ruling it should have been directed to arbitrator. COA affirmed, for reasons different than those used by Circuit Court. Plaintiff could have sought sanctions in arbitration. It did not. Given brief time Circuit Court "conducted" underlying action, COA declined to disturb Circuit Court's conclusion it could not reasonably assess sanction. Arbitration agreement gave arbitrator authority to resolve any 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 language of arbitration agreement, broad powers granted to arbitrators, and court rules. AAA Rules governing commercial arbitration do not prohibit sanctioning attorney for arguing frivolous defense. AAA, Commercial Arbitration Rules & Mediation Procedures, 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 indicated arbitrator should be disqualified if, based on objective and reasonable perceptions, arbitrator has serious risk of actual bias, the appearance of impropriety standard is applicable to arbitrators; and arbitrators are not judges and are not subject to Code of Judicial Conduct. Unintentional e-mail did not give rise to objective and reasonable perception that serious risk of actual bias existed. MCR 2.003(C)(1)(b). COA reversed Circuit Court's order granting plaintiff's motion to disqualify.

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

COA reverses Circuit Court 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 was based on default of employer, who failed to provide discovery during arbitration proceeding. Arbitrator did not conduct hearing, hear testimony, or take proofs. Employee moved to confirm award and defendants moved to vacate. Circuit Court was concerned arbitrator never took any evidence and there were *ex parte* communications between arbitrator and attorneys. Circuit Court granted motion to vacate and denied motion to confirm. COA affirmed. COA said arbitrator can hear testimony, take evidence, and issue award in absence of one of parties if that party, although on notice, has defaulted or failed to appear. Arbitrator may not issue award solely on basis of default, but must take sufficient evidence from non-defaulting party to justify award. Uniform Arbitration Act (UAA) provides, even when arbitrator is entitled to proceed in absence of defaulting party, arbitrator is required to "hear and decide the controversy on the evidence … ." MCL 691.1695(3). UAA, MCL 691.1681 *et seq*, 2012 PA 371 (July 1, 2013).

Rule 31, AAA Commercial Arbitration Rules (October 1, 2013); Rule 29, AAA Employment Arbitration Rules (November 1, 2009); and Rule 26, AAA Labor Arbitration Rules (July 1, 2013), state:

> Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the other party to submit such evidence as may be required for the making of an award.

Rule 12603, FINRA Code of Arbitration for Customer Disputes (April 16, 2007), and Rule 13603, FINRA Code of Arbitration for Industry Disputes (April 16, 2007), state:

> If a party fails to appear at a hearing after having been notified of the time, date and place of the hearing, the panel may determine that the hearing may go forward, and may render an award as though all parties had been present.

Successor to arbitration agreement must prove it is successor.

Brown v Morgan Stanley Smith Barney, 307849 (February 19, 2013). In customer against brokerage firm case, issue was whether agreement to arbitrate customer had signed with non-party prior brokerage firm inured to benefit of defendant brokerage

firm. COA found no evidence which definitively explained relationship, if any, between defendants and Smith Barney Inc. or Smith Barney Shearson Inc. According to COA, brokerage firm was not entitled to order compelling arbitration. This case shows, if a party argues arbitration agreement with another entity inures to the party's benefit, it should have a clear paper trail showing relationship between party and other entity.

Effect of union not taking case to CBA arbitration.

Kucmierz v Dep't of Corrections, 309247 (February 12, 2013). Employee brought lawsuit against employer arguing termination of employee was improper. Parties stipulated to dismiss court case so entities could go to CBA arbitration between union and employer. Union eventually decided not to take matter to arbitration and there was no arbitration. Employee moved to set aside dismissal of court case. Circuit Court set aside dismissal. COA reversed. Employee alleged parties had mistaken belief that union was going to arbitrate the case. The stipulation and order provided that parties agreed to dismiss proceeding with prejudice because it was the subject of agreement to arbitrate. Stipulation did not provide that matter would be arbitrated or that dismissal was contingent on arbitration occurring. Nothing in stipulation precluded union and employer from reaching settlement agreement to avoid arbitration. Employee failed to show mutual mistake occurred and he was not entitled to relief from dismissal order.

Party did not waive objection to arbitration by participating in arbitration.

Fuego Grill, LCC v Domestic Uniform Rental, 303763 (January 22, 2013) (Markey [dissent]), lv den, ___ Mich ___ (2013). Issue was whether Circuit Court erred in concluding there was not an agreement to arbitrate between parties. Plaintiff did not waive issue of arbitrability through participation in arbitration, as it argued during arbitration that no contract existed and, before award was issued, it filed complaint in Circuit Court seeking to preclude arbitration because no contract to arbitrate existed. Absence of valid agreement to arbitrate is defense to action to confirm award. It is for court, not arbitrator, to determine whether agreement to arbitrate exists.

Judge Markey's dissent concluded that on basis of Michigan's policy favoring arbitration and because plaintiff's claims were within scope of arbitration clause that plaintiff signed, that plaintiff may not relitigate its fact-based defenses in Circuit Court.

Three-year limitation precludes claim and arbitration.

Krueger v Auto Club Ins Ass'n, 306472 (January 8, 2013). Arbitration agreement required arbitration demand be filed within three years from date of accident or insurer will not pay damages. Insured did not file arbitration demand within three years of accident. Insured argued three years did not start until insurer communicated it was denying the claim. According to COA, policy requires arbitration demand be filed within three years of accident, and such language does not bar insured from filing arbitration demand in order to comply with three year time limitation even if disagreement has not yet arisen. 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 Police Officers Labor Council, 295913 (April 14, 2011), reversed MERC order in favor of charging parties. Flint argued MERC should have dismissed ULP charges on basis of arbitration provisions in CBAs. COA agreed with Flint that matter was covered by CBA arbitration provisions. COA vacated MERC's order and remanded for further proceedings consistent with its opinion. On remand, it is MERC's responsibility to determine if alleged ULPs should be dismissed.

Federal Arbitration Act does not allow appeal of order to state court.

Midwest Memorial Group LLC v Citigroup Global Markets, Inc, 301867 (March 18, 2011), Federal Arbitration Act, 9 USC 1 *et seq*, case, held 9 USC 16(a)(1)(B) does not create right to appeal state court order denying arbitration to state appellate court. It only provides for appeal from order denying petition to order arbitration under 9 USC 4. 9 USC 4 only allows for petitions for arbitration to United States District Court.

Individual supervisor not covered by arbitration agreement.

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 there was no just cause to terminate Deputy. Arbitrator required fitness for duty examination; and retained jurisdiction to resolve issues concerning implementation of award. Circuit Court refused to vacate reinstatement order, but held arbitrator exceeded authority by retaining jurisdiction providing for fitness for duty examination. COA basically affirmed Circuit Court. Concerning retention of jurisdiction, Article 6(E)(1)(a) of Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the FMCS, NAA, and AAA states: "Unless otherwise prohibited by agreement of the parties or applicable law, an arbitrator may retain remedial jurisdiction without seeking the parties' agreement. If the parties disagree over whether remedial jurisdiction should be retained, an arbitrator may retain such jurisdiction in the award over the objection of a party and subsequently address any remedial issues that may arise." Elkouri & Elkouri, *How Arbitration Works*, 6th Ed, pp 333-337; *CUNA Mut Ins Soc'y v Office & Prof'l Employees*, 443 F3d 556 (7th Cir 2006). Concerning interest, Elkouri & Elkouri, p 1219, states: "The modern view is that the award of interest is within the inherent power of an arbitrator, and in fashioning a 'make-whole' remedy it appears that a growing number of arbitrators are willing to exercise the discretion to award interest where appropriate." 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 in analysis, arbitrator, in making analysis, was interpreting CBA provisions. Majority cited but 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's decision vacating award. Sixth Circuit reversed because arbitrator was acting within scope of authority, company had not accused arbitrator with fraud or dishonesty, arbitrator was arguably construing CBA , 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); ***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); ***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 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 a taxable cost. MCR 2.625(A)(1). Mediator's fee is deemed cost of action, and court may make appropriate order to enforce payment of fee. MCR 2.411(D)(4). Under MCR 2.625(A)(1), MCR 2.411(D)(4), and MCL 600.2405(2), Circuit Court did not err by assessing mediation fees as taxable costs. MCR 3.216(J)(4).

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 necessarily constrained to accept parties' stipulations or agreements verbatim, Circuit Court is 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 in child's best interests, but Circuit Court permitted to accept MSA where dispute was 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 Circuit Court holding party in contempt.

Teachout v Teachout, 349692 (August 20, 2020). COA affirms Circuit Court finding defendant in contempt for violating three orders: (1) order requiring defendant to pay temporary spousal support to plaintiff during pendency of divorce; (2) the 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. **Circuit Court on its own motion could 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 this 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.

Mediation confidentiality.

Tyler v Findling, 348231, 350126 (June 11, 2020). In this defamation case, COA held Circuit Court abused discretion in granting defendants' motion to strike Wright's affidavit and motion in limine to preclude Wright's testimony based on a finding that Findling's statements to Wright were inadmissible mediation communications. Findling was a nonparty mediation participant, not a mediation party. Findling attended mediation to be informed of progress of case. Findling's statements made outside mediation process. Sitting in room designated for plaintiff neither made him party plaintiff nor did his presence in room start the mediation. MCR 2.411 and 2.412. See generally ***Hanley v Seymour***, 334400 (October 26, 2017).

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 a settlement agreement. Instead, Circuit Court awarded plaintiff attorney fees because, in regard to both mediation and sale of marital home, defendant attempted to find loopholes in Circuit Court's 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).

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 judge's jury room and outlined agreement. MSA was silent on pension issue. COA remanded case to Circuit Court to determine distribution, if any, of wife's pension.

COA affirms Circuit Court enforcement of domestic relations MSA even though domestic violence protocol not done.

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

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

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 against defendant as a 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 non-party N's property rights. COA held Circuit Court violated N's due process rights when it added her to Agreement without her consent. Settlement agreement was invalid from outset.

COA reverses 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 the 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). 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 to be in best interests of child. Agreement placed on record and agreed to by plaintiff was binding on her. **LESSON: Sign MSA.**

Custody MSA upheld

Brown v Brown, 343493 (November 27, 2018). COA said this case is indistinguishable from ***Rettig,* 322 Mich App 750**, in which COA rejected challenge to valid 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 plaintiff 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 plaintiff's motion to enforce MSA. MSA was signed by plaintiff. Claims representative said he needed approval from his superiors and Michigan Catastrophic Claims Association (MCCA) before signing agreement. MSA stated **"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 was condition precedent to performance of MSA. Defendant did not waive this condition 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 indicated only persons who signed it had agreed to its terms. It did not indicate Theresa agreed to its terms, agreed the will was valid, or otherwise agreed to release claims against estate or its personal representative. If contract language is clear and unambiguous, must construe it according to its 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 did "pen" her signature on MSA. She explained she signed "fake initials," she had done so because her attorney told her MSA was not legally binding. Plaintiff said she did not believe MSA to be final resolution of case. She believed settlement amount was too low, and her case was worth $300,000. Circuit Court enforced MSA. COA affirmed. Lesson: **People unpredictable. Prepare for worst. Word "mediation" does not appear 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 served as 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) regarding confidentiality of mediation communications.

MSA enforced.

Jaroh v Jaroh, 334216 (October 17, 2017). Defendant moved to set aside MSA, contending she signed MSA under duress, had no food during 9-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 said finding of Circuit Court concerning validity of parties' consent to MSA will not be overturned absent finding of abuse of discretion. COA said defendant's allegation that 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 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 JOD.

Binding settlement agreement.

Roth v Cronin, 329018 (April 25, 2017), lv den 501 Mich 910 (2017). "[S]he understood (1) the terms of the settlement, (2) she would be bound by the terms of the settlement if she accepted it, and (3) she had the absolute right to go to trial, where she could get a better or worse result. She testified she understood the terms and would be bound by the settlement, and had the right to go to trial. Plaintiff further testified that it was her own choice and decision to settle pursuant to the terms that were placed on the record." 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 over case, 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). 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. 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 was 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 signed, written MSA. MCR 3.216(H)(7). She cannot dispute MSA based on change in heart.

Custody MSA not enforced.

Bono v Bono, 325331 (November 19, 2015). Circuit Court abused discretion by entering MSA 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. 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 contract. Majority said considering essential terms that were omitted from MSA, and circumstances surrounding its execution, three-page handwritten MSA was so cursory in treatment of complex matters that parties did not intend document to be binding contract.

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

Repeated challenges to MSA sanctionable.

Annis v Annis, 319577 (April 16, 2015), affirmed Circuit Court 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 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. Judgment entered reflecting MSA. COA vacated property division and spousal support award and remanded to Circuit Court. Antenuptial agreement applies 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 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 JOD.

Incomplete MSA not enforced.

Kendzierski v Macomb Co, 316508 (September 23, 2014). Signed MSA that resolved only damages issue but left unresolved other issues not enforceable. Court cannot force parties to settle and cannot make contract for parties where there is no contract. Plaintiffs failed to prove contract to settle existed. Mere discussions and 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 agreement was not made in open court and written evidence of agreement, subscribed by defendant or its attorney, did not exist. MCR 2.507(G).

MSA enforced.

Faustina v Town Ctr, 311385 (August 7, 2014). Plaintiff failed to comply with MSA. Plaintiff testified she signed MSA, but her medical bills, which she had tried to show attorneys, were not taken into account. Circuit Court held MSA was binding, ordered plaintiff to sign release, and ordered defendants 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 judgment 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 full force and effect until court enters JOD 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.

Post arbitration-mediation conduct of arbitrator-mediator.

Hartman v Hartman, 304026 (August 7, 2012), concerned same individual being arbitrator and mediator and post-arbitration/mediation conduct of 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 judgment hearing, plaintiff said he had concerns about arbitrator acting as neutral. Hearing was continued. Plaintiff's counsel contacted arbitrator. Arbitrator told plaintiff's counsel arbitrator was going to Florida and staying at home of defense counsel while defense counsel would be present. Plaintiff's counsel contacted defense counsel to request new arbitrator to handle remaining issues. Defense counsel refused request.

Plaintiff filed motions to remove arbitrator, have new arbitrator appointed, and obtain relief from settlement. Defendant argued awards moot because settlement had been 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 reached settlement, 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. … .

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.

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

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 not binding but 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 not harm plaintiff because Township had previously provided plaintiff with rational for its position.

MSA binding.

Miller v Miller, 282997 (March 24, 2009). Plaintiff moved to set aside 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, former Editor of *The Michigan Dispute Resolution Journal*, former Chair of the ADR Committee of the Grand Traverse-Leelanau-Antrim Bar Association, former member of the State Bar's Representative Assembly, former President of the Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of the Professional Resolution Experts of Michigan (PREMi), an invitation-only group of Michigan's top mediators, and a Diplomate Member of The National Academy of Distinguished Neutrals.

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 and 2019 for arbitration, and 2020 and 2021 for arbitration and mediation. He is on the 2016, 2017, 2018, 2019, and 2020 Michigan Super Lawyers lists for alternative dispute resolution. He has received a First Tier ranking in Northern Michigan for Arbitration by *U.S. News – Best Lawyers*® Best Law Firms in 2019.

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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