



# REVIEW OF MICHIGAN APPELLATE DECISIONS SINCE 2018 CONCERNING ARBITRATION

BY LEE HORNBERGER, ARBITRATOR AND MEDIATOR

## Introduction

This update reviews significant Michigan cases issued since 2018 concerning arbitration. For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

## Michigan Supreme Court Decisions

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

***Lichon v Morse***.<sup>1</sup> In a split decision, the COA held that a sexual harassment claim was not covered by an arbitration provision in an employee handbook. Because the arbitration provision limits the scope of arbitration to only claims that are “related to” plaintiffs’ employment, and because a sexual assault by an employer or supervisor cannot be related to their employment, the arbitration provision is inapplicable to their claims against Morse and Morse firm. **The COA majority decision said, “central to our conclusion in this matter is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault.”**

Judge O’Brien’s dissent said the parties agreed to arbitrate “any claim against another employee” for “discriminatory conduct” and the plaintiffs’ claims arguably fall within the scope of the arbitration agreement.

The 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.”<sup>2</sup> \_\_\_ Mich \_\_\_ (2019).

## Michigan Court of Appeals Published Decisions

### Confirmation of award partially reversed in construction lien case.

***TSP Services, Inc v National-Standard, LLC***.<sup>3</sup> Michigan law limits a construction lien to the amount of the contract less any payment already made. Although a party suing for breach of contract might recover consequential damages beyond the monetary value of the contract, those consequential damages cannot be subject to a construction lien. The ar-

bitrator concluded otherwise. This clear legal error had substantial impact on the award. The COA reversed with respect to confirmation of that portion of the award.

### COA affirms order to arbitrate labor case.

***Registered Nurses Union v Hurley Medical Center***.<sup>4</sup> The grievants were terminated for allegedly striking in violation of the CBA. Although the defendant may present to the arbitrator undisputed evidence that the plaintiffs were engaged in a strike, a question of fact is for the arbitrator to decide. Any doubt regarding whether a question is arbitrable must be resolved in favor of arbitration. The Circuit Court did not err in ruling that the CBA required arbitration.

### Denial of motion to vacate affirmed.

***Radwan v Ameriprise Ins Co.***,<sup>5</sup> was a first-party no-fault case. The COA held that the Uniform Arbitration Act, MCL 691.1681 *et seq.*, not the MCR, applied; the Circuit Court did not err when it denied motion to vacate the arbitration award on the basis of collateral estoppel.

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

***Lebenbom v UBS***.<sup>6</sup> The COA held that the parties’ arbitration clause providing for FINRA arbitration encompassed plaintiff’s claims alleging conversion against the defendant.

### Arbitration agreement does not have to be in warranty document.

***Galea v FCA US LLC***.<sup>7</sup> Plaintiff alleged a new vehicle was a lemon. She sued the seller and the bank, asserting warranty claims. Defendants countered with a signed arbitration agreement. Plaintiff argued that the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq.*, prohibits binding arbitration of warranty disputes. This argument collided with *Abela v Gen Motors Corp*, 469 Mich 603; 677 NW2d 325 (2004), which held to the contrary. Plaintiff also argued by failing to mention arbitration, the warranty violated the single document rule in 16 CFR 701.3, a Federal Trade Commission (FTC) regulation implementing the MMWA.



According to Plaintiff, this omission foreclosed arbitration. Majority (Gadola and O'Brien) interpreted *Abela* to mean the binding arbitration provision need not be included in the warranty. Gleicher's dissent stated arbitration agreements outside the warranty are not enforceable.

#### **DRAA award partially vacated.**

*Eppel v Eppel*.<sup>8</sup> The COA held the arbitrator deviated from the plain language of the Uniform Spousal Support Attachment by including profit from ASV shares. This deviation was substantial error that resulted in substantially different outcome. *Cipriano v Cipriano*, 289 Mich App 361; 808 NW2d 230 (2010), lv den 489 Mich 869 (2011). The deviation was readily apparent on the face of the award.

#### **Offer of judgment and subsequent award confirmation.**

*Simcor Constr, Inc v Trupp*.<sup>9</sup> MCR 2.405, offer of entry of judgment, applied to the District Court's confirmation of an 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).

### **Michigan Court of Appeals Unpublished Decisions**

#### **COA affirms confirmation of DRAA award.**

*Shannon v Ralston*.<sup>10</sup> The COA affirmed confirmation of a DRAA award that granted motion to change primary physical custody of minor child "in this extremely contentious domestic relations action." Because plaintiff's refusal to provide required financial information and proposed findings of fact and conclusions of law led to delay, plaintiff is barred from claiming that she is entitled to relief on basis of this delay.

#### **COA affirms granting of motion to compel arbitration.**

*Century Plastics, LLC v Frimo, Inc*.<sup>11</sup> The COA affirmed the Circuit Court holding that the parties validly incorporated General Terms and its arbitration agreement by reference. General Terms applied to parties' agreement even though defendant was not a specifically listed entity.

#### **COA affirms confirmation of DRAA award.**

*Daoud v Daoud*.<sup>12</sup> The COA affirmed Circuit Court confirmation of a DRAA award. **There was past domestic violence and a prior PPO.** Where the arbitrator provided the parties equal opportunity to present evidence and testimony on all marital issues, recognized and applied current and controlling Michigan law, and explained his uneven distribution of property, there was no basis for concluding that the arbitrator exceeded its authority in issuing the award.

#### **COA reverses Circuit Court's denial of motion to compel arbitration.**

*Lesniak v Archon Builders, Inc*.<sup>13</sup> The COA reversed the Circuit Court's order denying defendants' motion for arbitration because arbitration terms of construction agreements sufficiently related to plaintiffs' claims to require arbitration, and defendants had not waived their right to arbitration. Any doubts about arbitrability should be resolved in favor of arbitration. The purpose of arbitration is to preserve time and resources of courts in the interest of judicial economy.

#### **Refusal to adjourn arbitration hearing approved.**

*Domestic Uniform Rental v Riversbend Rehabilitation*.<sup>14</sup> After overruling defendant's motion to adjourn the arbitration hearing, the arbitrator entered an award against defendant. The COA affirmed the Circuit Court's confirmation of the award. MCL 691.1703(1)(c).

#### **Incorporation of AAA rules.**

*MBK Constructors, Inc v Lipcaman*.<sup>15</sup> The incorporation of the American Arbitration Association's rules in an arbitration agreement was clear and unmistakable evidence of the parties' intent to have the arbitrator decide arbitrability.

#### **COA affirms Circuit Court confirmation of award.**

*2727 Russell Street, LLC v Dearing*.<sup>16</sup> The COA affirmed the confirmation of the award. The arbitrator's factual findings are not reviewable. The COA referenced "facilitation" and "statutory arbitration." Med-arb.

#### **COA affirms Circuit Court denial of sanctions.**

*Clark v Garratt & Bachand, PC*.<sup>17</sup> The COA affirmed a Circuit Court order denying defendant's motion for sanctions. The language of the arbitration award foreclosed G's ability to request sanctions because the issue of sanctions was either not raised during the arbitration or, having been raised, resulted in the arbitrator declining to award sanctions. The language of the judgment confirming the award also foreclosed defendant's ability to subsequently request sanctions. Defendant had failed to prove that the plaintiff's complaint was frivolous.

#### **Circuit Court order to arbitrate confirmed.**

*Roseman v Weiger*.<sup>18</sup> To the extent that the plaintiff argues that the arbitration agreement is unenforceable on the ground that the purchase agreement was invalid, these are matters for the arbitrator. MCL 691.1686(3). The Circuit Court did not err by concluding the plaintiff's claims against the sellers were required to be resolved in arbitration.



### DRAA award confirmation confirmed.

*Zelasko v Zelasko*,<sup>19</sup> concerned whether husband's winning of \$80 million Mega Millions jackpot was part of marital estate. The arbitrator ruled the jackpot was marital property. The Circuit Court confirmed the award. The COA affirmed the confirmation. The 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.

### DRAA custody dispute award confirmed.

*Shannon v Ralston*.<sup>20</sup> Agreement to arbitrate "all issues in the pending matter." The COA affirmed confirmation of DRAA award that decided change in domicile issue. The arbitrator acted as both mediator and arbitrator. Ex parte contact occurred while the parties were still mediating. At time of ex parte communication, the arbitrator was acting as a mediator, not as an 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 the arbitrator's alleged financial bias was one of the plaintiff's own making by stopping payment in violation of the parties' agreement to split cost of the arbitration and in violation of the arbitrator's instructions.

### DRAA award confirmed.

*Hyman v Hyman*.<sup>21</sup> The COA held that the Circuit Court's modification of DRAA award to include Monday overnights constituted error because the Circuit Court lacked authority to review the arbitrator's factual findings and alter parenting-time schedule without finding that the award adverse to children's best interests.

### COA affirms order to arbitrate labor case.

*Senior Accountants, Analysts and Appraisers Association v City of Detroit Water and Sewerage Dept.*<sup>22</sup> Issue of whether union complied with procedural requirements to arbitration in CBA arbitration clause is procedural question for arbitrator.

### Selection of replacement arbitrator foreclosed in DRAA case.

*Sicher v Sicher*.<sup>23</sup> The arbitration clause in the JOD named only A as the arbitrator and did not provide for alternate, substitute, or successor arbitrators. A became disqualified due to a conflict of interest. MCL 600.5075(1). Because the Circuit Court was presented with no evidence that the parties had agreed upon a new arbitrator to be appointed, the Circuit Court was permitted to "void the arbitration agreement and proceed as if arbitration had not been ordered."



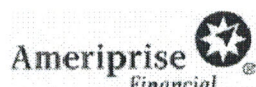
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MCL 600.5075(2). Because the parties had agreed only for A to arbitrate the property division disputes, the Circuit Court's refusal to appoint a different arbitrator was permitted by the DRAA.

#### **COA reverses confirmation of employment arbitration award.**

*Checkpoint Consulting, LLC v Hamm.*<sup>24</sup> The COA held there was no valid arbitration agreement between the parties because the independent contractor agreement voided all prior agreements, including the arbitration clause within the employment agreement.

#### **COA affirms confirmation of employment arbitration award.**

*Wolf Creek Productions, Inc v Gruber.*<sup>25</sup> The COA affirmed confirmation of an employment arbitration award. The COA stated nothing on the face of the award demonstrated that the arbitrators were precluded from deciding the issue of whether just cause existed to terminate the defendant's employment. Courts are precluded from engaging in contract interpretation, which is a question for the arbitrator.

#### **COA affirms confirmation of exemplary damages award.**

*Grewal v Grewal.*<sup>26</sup> The COA affirmed a judgment confirming the arbitrator's award of exemplary damages in favor of the plaintiffs in the amount of \$4,969,463.94 and correcting the arbitrator's award by striking a portion that ordered the plaintiffs to provide an accounting of assets in India.

#### **COA affirms confirmation of award.**

*Hunter v DTE Services, LLC.*<sup>27</sup> In an employment discrimination case, the COA affirmed the confirmation of the award. The arbitrator did not exceed its 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.*<sup>28</sup> The COA affirmed the confirmation of an award. The arbitrator was not required to make findings of fact or conclusions of law. Once the court recognizes that the arbitrator utilized controlling law, it cannot review the legal soundness of the arbitrator's application of law. Courts may not engage in fact-intensive review of how the arbitrator calculated values, and whether the evidence relied on was most reliable or credible evidence presented. Even if the award is against the great weight of evidence or not supported by substantial evidence, the court is precluded from vacating the award.

#### **Case evaluation sanctions after arbitration.**

*Len & Jerry's Modular Components 1, LLC v Scott.*<sup>29</sup> In light of the referral to arbitration order, the Circuit Court was empowered to award case evaluation sanctions.

#### **Scope of submission to the arbitrator.**

*Pietila v Pietila.*<sup>30</sup> The COA affirmed the Circuit Court confirmation of an award concerning an insurance agency. The Circuit Court may not disturb an arbitrator's discretionary finding of fact that neither party prevailed in full and its decision not to award attorney fees. The issue of commissions was submitted as a claim under a grant of power to the arbitrator to determine the legal enforceability of the Agreement.

#### **COA affirms Probate Court confirmation of award.**

*Gordon v Gordon-Beatty.*<sup>31</sup> The COA affirmed the Probate Court's confirmation of an award. Because the parties agreed to arbitrate their disputes and because the arbitrator acted within the scope of its authority the challenges to administration of the trusts lacked merit.

#### **DRAA award confirmed.**

*Thomas-Perry v Perry.*<sup>32</sup> The parties were given the opportunity to present evidence and testimony on all the issues during the arbitration. Because the reviewing court is limited to examining the face of the arbitration ruling, there is no basis for concluding that the arbitrator exceeded its authority in issuing award.

#### **Length of FOF in award.**

*Schultz v DTE.*<sup>33</sup> The COA affirmed the confirmation of a nine page employment arbitration award.

#### **COA affirms Circuit Court confirmation of award.**

*Oliver v Kresch.*<sup>34</sup> The COA confirmed the Circuit Court's confirmation of an award. This was an attorney referral fee case. The 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.**<sup>35</sup> The COA affirmed the Circuit Court’s confirmation of an award. Two to one arbitration panel award. There were ownership of car wash and burden of proof issues. The 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.**<sup>36</sup> The COA affirmed a Michigan Employment Relations Commission (MERC) order granting summary disposition, where Association engaged in an ULP by demanding to arbitrate a grievance concerning a prohibited subject of bargaining under the Public Employment Relations Act, MCL 423.201 *et seq.* MERC ordered the Association to withdraw its demand for arbitration and to cease and desist from demanding to arbitrate grievances concerning prohibited subjects of bargaining.

#### COA affirms Circuit Court confirmation of award.

**Galasso, PC v. Gruda.**<sup>37</sup> The COA affirmed the confirmation of an award because there was no clear error of law on the face of the award. Uniform Arbitration Act, MCL 691.1681 *et seq.* MCL 691.1703(1)(d). The arbitrator’s reasons for declaring the promissory note, mortgage, and service agreement void and unenforceable were not apparent on the face of the award.

#### If parties agree, arbitrator can decide arbitrability.

**Elluru v. Great Lakes Plastic, Reconstructive & Hand Surgery, PC.**<sup>38</sup> The parties may agree to delegate to the arbitrator the question of arbitrability, provided the arbitration agreement clearly so provides. Uniform Arbitration Act, MCL 691.1681 *et seq.* MCL 691.1684(1) provides that “parties may vary the effect of the requirements of this act to the extent permitted by law.”

#### About the Author

**Lee Hornberger** is a former Chair of the State Bar’s ADR Section, former Editor of The Michigan Dispute Resolution Journal, former member of the State Bar’s Representative Assembly, and former President of the Grand Traverse-Leelanau-Antarim Bar Association. He is a member of Professional Resolution Experts of Michigan and a Diplomate Member of The National Academy of Distinguished Neutrals. He has received the ADR Section’s George Bashara Award. He received a First Tier ranking in Northern Michigan for Arbitration by U.S. News – Best Lawyers® Best Law Firms in 2019 and 2020. He is in The Best Lawyers of America 2018 and 2019 for arbitration, and 2020 for arbitration and mediation. He is on the 2016 to 2019 Michigan Super Lawyers lists for ADR.

#### Endnotes

- 1 327 Mich App 375, 339972 (March 14, 2019), lv gtd, \_\_\_\_ Mich \_\_\_\_ (September 18, 2019). See generally *Radtke v Everett*, 442 Mich 368 (1993); *Rembert v Ryan’s Family Steak Houses, Inc.*, 235 Mich App 118 (1999); and Hornberger, “Overview of a Pre-Dispute Employment Resolution Process,” *ADR Newsletter* (February 2005). <https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-c406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Feb05.pdf>
- 2 \_\_\_\_ Mich \_\_\_\_ (2019).
- 3 \_\_\_\_ Mich App \_\_\_\_, 342530 (2019).
- 4 328 Mich App 528, 343473 (2019).
- 5 327 Mich App 159, 341500 (2018), lv den \_\_\_\_ Mich \_\_\_\_ (2019).
- 6 326 Mich App 200, 340973 (2018).
- 7 323 Mich App 360, 334576 (2018).
- 8 322 Mich App 562, 335653, 335775 (2018).
- 9 322 Mich App 508, 333383 (2018).
- 10 350094 and 350110 (March 12, 2020).
- 11 347535 (January 30, 2020).
- 12 347176 (December 19, 2019).
- 13 345228 (December 19, 2019).
- 14 344669 (November 19, 2019).



- 15 344079 (October 29, 2019).
- 16 344175 (September 26, 2019).
- 17 344676 (August 20, 2019).
- 18 344677 (June 27, 2019), lv den \_\_\_\_ Mich \_\_\_\_ (2019).
- 19 342854 (June 13, 2019), **app lv pdg**. See generally *Zelasko v Zelasko*, 324514 (2015), lv den \_\_\_\_ Mich \_\_\_\_ (2016) (The defendant appealed an order appointing a substitute arbitrator after the agreed-upon arbitrator died. The same order denied the defendant's request that interim arbitration orders be vacated. Indicating nothing in the DRAA, MCL 600.5070 et seq., permits the Circuit Court to appoint a substitute arbitrator absent an agreement of the parties, the COA reversed the appointment of a substitute arbitrator. The COA agreed with the Circuit Court that there was no reason to disturb the interim orders, which were either not contested or were affirmed by the Circuit Court and affirmed that portion of order.)
- 20 339944 (May 23, 2019), lv den \_\_\_\_ Mich \_\_\_\_ (2019).
- 21 346222 (April 18, 2019).
- 22 343498 (April 18, 2019).
- 23 341411 (March 21, 2019).
- 24 342441 (February 26, 2019).
- 25 342146 (January 24, 2019).
- 26 341079 (January 22, 2019).
- 27 339138 (January 3, 2019).
- 28 340758 (December 18, 2018), lv den \_\_\_\_ Mich \_\_\_\_ (2019).
- 29 341037 (December 13, 2018).
- 30 339939 (December 13, 2018).
- 31 339296 (November 8, 2018), lv den \_\_\_\_ Mich \_\_\_\_ (2019).
- 32 340662 (October 16, 2018).
- 33 337964 (September 30, 2018). See generally *Rembert*, 235 Mich App 118.
- 34 338296 (July 19, 2018).
- 35 337845 (June 14, 2018).
- 36 334573 (February 22, 2018), lv den \_\_\_\_ Mich \_\_\_\_ (2018). See *Mich Ed Ass'n v Vassar Public Schs*, 337899 (May 22, 2018).
- 37 335659 (February 8, 2018).
- 38 333661 and 334050 (February 6, 2018).

