# Review of Michigan Appellate Decisions Since July 2022 Concerning Arbitration

By Lee Hornberger, Arbitrator and Mediator

## Introduction

This update reviews significant Michigan cases issued since July 2022 concerning arbitration. For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals (COA) unpublished decisions.[1] During the review period, the COA upheld seven arbitration awards or arbitration access in the twelve cases in which awards or access were at issue. Some highlights are discussed below.

## Arbitration

### Michigan Supreme Court Decisions

*Supreme Court reverses COA concerning shortened limitations period.*

In ***McMillon v City of Kalamazoo***,[2] Plaintiff applied for a job with the City of Kalamazoo in 2004. She completed an application and underwent testing and a background check, but she did not get the job. In 2005, the City contacted her about a job as Public Safety Officer, and she was hired. She did not fill out another application in 2005. In 2019, Plaintiff sued the City, alleging discrimination, retaliation, and harassment in violation of Elliott-Larsen Civil Rights Act and Persons with Disabilities Civil Rights Act. The City moved for summary disposition, relying in part on a provision in the application Plaintiff had signed in 2004 which set a nine-month limitation period. The Circuit Court granted the City's motion for summary disposition. The COA affirmed in an unpublished opinion. The Supreme Court ordered oral argument on application to address whether: (1) *Timko v Oakwood Custom Coating, Inc*[3] correctly held limitations clauses in employment applications are part of a binding employment contract; (2) Appellant is bound by the terms of a document that states "this … is not a contract of employment;"[4] (3) contractual limitations clauses that restrict civil rights claims violate public policy, *Rodriguez v Raymours Furniture Co, Inc*,[5] and (4) whether these issues are preserved. *Mich Gun Owners, Inc v Ann Arbor Pub Schs*.[6]

The Supreme Court reversed that part of the COA opinion affirming summary disposition for defendant based on a shortened nine-month limitations period in the employment application, vacated the remainder of the COA opinion, and remanded the case to the trial court for further proceedings. The Supreme Court held there is a genuine issue of material fact as to whether plaintiff had notice of the use of prior application materials' future employment-related terms and whether she agreed to be bound by those materials. The City had not sufficiently demonstrated that the parties had mutuality of agreement to be entitled to summary disposition. Justice Welch, concurring, would have ruled on whether *Timko* correctly held that limitations clauses in employment applications are part of a binding employment contract.

### Michigan Court of Appeals Published Decisions

*Trial court should stay the case instead of ordering dismissal when it orders arbitration.*

***Legacy Custom Builders, Inc v Rogers***.[7] Plaintiff appealed the trial court's order compelling arbitration. The COA held that the trial court correctly enforced the agreement to arbitrate but should have stayed proceedings pending arbitration instead of dismissing the case. The burden is on the party seeking to avoid agreement, not on the party seeking to enforce the agreement. UAA, MCL 691.1681 *et seq*. and Michigan Court Rules both required the trial court to stay the lawsuit pending arbitration. MCL 691.1687; MCR 3.602(C).

*COA reverses trial court order asking question of the arbitrator in the prior case.*

In ***Mahir D Elder, MD, PC v Deborah Gordon, PLC***,[8] Plaintiff sued his former employer for wrongful termination and received a large monetary award following arbitration. The award stated that plaintiff should receive compensation as calculated by Chart B, but the award listed a lower monetary amount from Chart A. Plaintiff's attorney apparently did not notice the discrepancy and confirmed the award. The prior case was then dismissed. When plaintiff sued his attorney for legal

malpractice, the trial court sent a question to the arbitrator to determine whether the arbitrator meant to award plaintiff the monetary amount stated in the arbitration award. Plaintiff appealed. The COA reversed. The inquiry to the arbitrator was, "After you have reviewed the materials, please confirm whether you intended to award Dr. Elder $5,516,907 in back pay, front pay and exemplary damages, or some other amount." According to the COA, MCL 691.1694(4) precludes "any statement, conduct, decision, or ruling occurring during the arbitration proceeding." MCL 691.1694(4) prohibits compelling an arbitrator from giving any factual evidence as a witness regarding any statements, conduct, decisions, or rulings that the arbitrator may have made during the arbitration proceeding.

### Michigan Court of Appeals Unpublished Decisions

#### *COA affirms trial court's confirmation of award.*

***Clancy v Entertainment Managers, LLC***,[9] concerns the return of the deposit for a wedding reception. AAA administered the arbitration under expedited proceedings pursuant to its Commercial Arbitration Rules. According to the COA, defendant did not explain how it was prejudiced by the expedited procedures such that the award would have been "substantially otherwise" had arbitration been conducted differently. Contrary to defendant's assertion, the arbitrator did not disallow official recording of the arbitration hearing or prevent defendant from arranging stenographic recording of the proceeding. Concerning attorney fees, plaintiffs' contention that the arbitration provision allowed an award of reasonable attorney fees for "[a]ll claims and disputes arising under or relating to [the] Agreement" was within the plain language of provision. COA affirmed the trial court's confirmation of award.

#### *COA rules court, not arbitrator, to decide validity of arbitration agreement*

***Domestic Uniform Rental v Custom Ecology of Ohio, Inc***.[10] Reversing the trial court, the COA held that the court, not the arbitrator, must decide the validity of the arbitration agreement. A party cannot be required to arbitrate an issue which it has not agreed to submit to arbitration. The existence of an arbitration agreement and enforceability of its terms are questions for the court, not the arbitrator. MCL 691.1686(2).

#### *COA review DRAA award.*

***Lam v Do.***[11] Following binding domestic relations arbitration, Do was displeased with the results. He cited errors in the arbitrator's calculation of Lam's income for child support purposes and sought credit in the property division for supporting Lam in her postdoctoral work. The arbitrator rejected these points and a final divorce decree was entered. The COA affirmed in part but remanded for recalculation of child support based on Lam's previous three years of income pursuant to 2017 Michigan Child Support Formula (MCSF) 2.02(B).

#### *COA affirms dismissal of action to vacate award.*

***Wolf Creek Production, Inc v Gruber***.[12] The COA affirmed the trial court's *sua sponte* dismissal of the complaint to vacate the award because plaintiff failed to file a timely motion to vacate. MCR 3.602.

#### *Distinction between money judgment and judgment lien.*

In ***Asmar Constr Co v AFR Enters, Inc***,[13] the dispute turned upon the distinction between a money judgment and a judgment lien. In 2011, the trial court entered a judgment confirming the arbitration award. The award, which was incorporated in the judgment, reduced to $550,000 plaintiffs' construction lien on a parcel of property. The award authorized plaintiffs to obtain from defendant a personal guaranty in the amount of the lien only as it related to the sale of property. Almost a decade later, the trial court granted plaintiffs' ex parte motion to renew the judgment. Defendants objected by moving to set aside the judgment lien renewal. The trial court granted the motion, characterizing its 2011 "judgment" as a lien. The COA concluded that the 2011 "judgment" was much more a lien than a "noncontractual money obligation" and affirmed. The issue was whether the trial court's "Judgment Confirming Arbitrator's Award" should be treated as a judgment renewable within ten years pursuant to MCL 600.5809(3) or as a judgment lien that must be renewed within five years under MCL 600.2801 and MCL 600.2809.

#### *COA in reconsideration split decision reverses consent JOD enforcing DRAA award.*

***Hans v Hans***.[14] The trial court entered a JOD, consistent with arbitrator's award. The JOD was approved by plaintiff and defendant. Defendant filed a motion for clarification of the JOD concerning distribution of proceeds from the sale of real property, primarily because of competing attorney liens. The trial court issued an order explaining how the sale proceeds were to be distributed. Plaintiff appealed. The COA reversed in a reconsideration flip split decision. According to the COA, aside from unsecured marital debt, the consent JOD called for sales proceeds from both properties to be divided equally between plaintiff and defendant. The fact that defendant was ordered to pay $50,000 toward plaintiff's attorney fees did not entitle him to more than 50% of net proceeds. The trial court erred by ordering a "75/25" debt split as to the payment of the parties' attorney fees. On remand, the trial court was ordered to enter orders consistent with the COA opinion.

Judge Murray's dissent stated that property settlement provisions of a JOD, unlike alimony or child support provi-

sions, are final and generally cannot be modified. The parties, court, and arbitrator knew that the need for flexibility was paramount. The law allows a court to fill in gaps in JODs. The trial court exercised that flexibility. The result was not inequitable under the circumstances.

## About the Author

***Lee Hornberger*** *is former Chair of SBM ADR Section, Editor Emeritus of* The Michigan Dispute Resolution Journal, *former member of SBM's Representative Assembly, former President of Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of Traverse City Human Rights Commission. He is a member of Professional Resolution Experts of Michigan and Diplomate Member of The National Academy of Distinguished Neutrals. He has received the ADR Section's Distinguished Service Award and George Bashara Award. He received 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 2018-2019 for arbitration, and 2020-2023 for arbitration and mediation. He is on the 2016-2022 Michigan Super Lawyers lists for ADR.*

## Endnotes

1 YouTube video of author's 2021-2022 update presentation is at: www.youtube.com/watch?v=kZpATRmGCcQ

YouTube video of author's 2020-2021 update presentation is at: https://www.youtube.com/watch?v=9Q7deVlExDI

YouTube video of author's 2019-2020 update presentation is at: https://www.youtube.com/watch?v=I0TkP8zs-A8.

2 ___ Mich ___, MSC 162680, COA 351645 (January 11, 2023).

3 244 Mich App 234 (2001).

4 *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405 (1996).

5 225 NJ 343 (2016).

6 502 Mich 695, 708-709 (2018).

7 ___ Mich App ___, COA 359213 (February 9, 2023).

8 ___ Mich App ___, COA 359225 (September 22, 2022). *Elder* is discussed at Henry S. Gorbein and Christina M. DiMichele, *Elder v Gordon*, *Michigan Family Law Journal* (February 2023), p. 5.

9 COA 357990 (February 2, 2023).

10 COA 358591 (December 22, 2022).

11 COA 354174 (November 22, 2022).

12 358559 (Sep 29, 2022), lv den ___ Mich ___ (2023).

13 COA 357147 (September 15, 2022), app lv pdg.

14 COA 355468 and 356936 (July 7, 2022), app lv pdg.

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