At our annual meeting we'll say thank you and good bye to several devoted members of our Section Council. I say "hats off" to Marc Stanley, Peter Kupelian, Lisa Taylor, Hon. Paula Manderfield (ret) and Hon John Hohman (ret) for their service and wise counsel over many years. Especial thanks to Lisa Taylor for her indefatigable service as secretary to our Executive Committee and Section Council meetings. Lisa's immaculate record keeping has been invaluable and most appreciated.

I hope you enjoy this edition of *The Michigan Dispute Resolution Journal*, and I look forward to seeing you at the Annual Meeting in October.

Lee Hornberger

Michigan Arbitration Caselaw Update

by Lee Hornberger

This update reviews significant Michigan cases issued since 2017 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 For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

ARBITRATION

A. Michigan Supreme Court Decisions

Arbitration in underinsured motorist (UIM) no fault case.

Nickola v MIC General 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*. Court of Appeals ("COA") discussed attorney fee and interest issues arising from uninsured motorist case that included an arbitration.

Waiver of right to arbitration.

Nexteer Automotive Corp v Mando Am Corp, 500 Mich 955 (2017), dn lv 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 a checked box next to statement: "An agreement to arbitrate this controversy . . . exists . . . [and] is not applicable." He would have reversed COA on express waiver and remanded for consideration of whether defendant's conduct gave rise to implied waiver, waiver by estoppel, or no waiver.

B. Michigan Court of Appeals Published Decisions

Denial of motion to vacate affirmed.

Radwan v Ameriprise Ins Co, 341500 (December 20, 2018), lv dn 503 Mich 1037 (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 affirms order to arbitrate labor case.

Registered Nurses, Registered Pharmacisys Union v Hurley Medical Center, ___ Mich App ___, 343473 (April 18, 2019). Although defendant may present to arbitrator undisputed evidence that plaintiffs 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.

COA reverses Circuit Court order to compel arbitration.

Lichon v Morse, ___ Mich App ___, 339972 (March 14, 2019), **app lv pdg**. In split decision, COA held that 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 in this matter is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault." O'Brien's dissent said parties agreed to arbitrate "any claim against another employee" for "discriminatory conduct" and plaintiffs' claims arguably fall within scope of arbitration agreement.

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 collided 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 included in warranty. Gleicher's dissent stated arbitration agreements outside warranty are not enforceable.

Domestic Relations Arbitration Act ("DRAA") award partially vacated.

Eppel v Eppel, 322 Mich App 562, 335653, 335775 (January 9, 2018). COA held arbitrator deviated from plain language of Uniform Spousal Support Attachment by including profit from shares and stock options in employer. Deviation was substantial error that resulted in substantially different outcome. *Cipriano v Cipriano*, 289 Mich App 361; 808 NW2d 230 (2010). Deviation was readily apparent on face of award.

Offer of judgment and subsequent award confirmation.

Simcor Constr, Inc v Trupp, 322 Mich App 508, 333383 (January 9, 2018). MCR 2.405, offer of entry of judgment, applied to District Court's confirmation of arbitration award, and offer of judgment costs were merited. *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338; 852 NW2d 22 (2014) (case evaluation sanctions).

C. Michigan Court of Appeals Unpublished Decisions

Circuit Court order to arbitrate confirmed.

Roseman v Weiger, 344677 (June 27, 2019), **app lv pdg**. 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), 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).

DRAA custody dispute award confirmed.

Shannon v Ralston, 339944 (May 23, 2019), **app lv pdg**. Agreement to arbitrate "all issues in the pending matter." COA affirmed confirmation of DRAA award that decided change in domicile issue. Arbitrator was acting as both mediator and arbitrator. Ex parte contact occurred while parties were still mediating. At time of ex parte communication, arbitrator was acting as mediator, not as arbitrator and prohibition against ex parte communications did not apply. Plaintiff belatedly alleged disparaging remarks by neutral and neutral's 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 that Circuit Court's modification of DRAA award to include Monday overnights constituted error because Circuit Court lacked authority to review arbitrator's factual findings and alter parenting-time schedule without finding 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 Department, 343498 (April 18, 2019). Issue of whether union complied with procedural requirements to arbitration in CBA arbitration clause is procedural question for arbitrator.

Selection of replacement arbitrator foreclosed in DRAA case.

Sicher v Sicher, 341411 (March 21, 2019). Arbitration clause in parties' consent judgment of divorce 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 was permitted to "void the arbitration agreement and proceed as if arbitration had not been ordered." MCL 600.5075(2). Because parties had agreed only for A to arbitrate property division disputes, Circuit Court's refusal to appoint different arbitrator was permitted by DRAA.

COA reverses confirmation of employment arbitration award.

Checkpoint Consulting, LLC v Hamm, 342441 (February 26, 2019). COA held there was no valid arbitration agreement between parties 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 that arbitrators were precluded from deciding on issue of whether just cause existed to terminate defendant's employment. Courts are precluded from engaging in contract interpretation, which is question for arbitrator.

COA affirms confirmation of exemplary damages award.

Grewal v Grewal, 341079 (January 22, 2019). COA affirmed judgment confirming arbitrator's award of exemplary damages in favor of plaintiffs in amount of $4,969,463.94 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), **app lv pdg.** COA affirmed confirmation of award. Arbitrator not required to make findings of fact or conclusions of law. 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 the arbitrator.

Pietila v Pietila, 339939 (December 13, 2018). COA affirmed 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.

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

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

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

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, 338196 (September 20, 2018). COA affirmed Circuit Court's confirmation of nine page employment arbitration award. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118 (1999)(arbitration awards in Michigan "must be in writing and contain findings of fact and conclusions of law").

COA affirms awards and speaks to judicial review of arbitration awards.

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

> "Judicial review of arbitration awards is limited." *Konal v Forlini*, 235 Mich App 69, 74; 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.*

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 because of an error of law, the error must have been so substantial that, but for the error, the award would have been substantially different. Any such error must be readily apparent on the face of the award without second-guessing the arbitrator's thought processes, and the arbitrator's findings of fact are immune to review altogether.

Demand for labor arbitration concerning prohibited subject of bargaining.

Ionia Co Intermediate Ed Assn v Ionia Co Intermediate Sch Dist, 334573 (February 22, 2018), lv dn 503 Mich 860 (2018). COA affirmed Michigan Employment Relations Commission (MERC) order granting summary disposition, where Association engaged in unfair labor practive 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 Public Schs***, 337899 (May 22, 2018).

COA affirms Circuit Court confirmation of award.

Galasso, PC v Gruda, 335659 (February 8, 2018). COA 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 the award. The award did not, out of necessity, stem from an error of law.

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." Here, parties' employment agreement incorporated AAA rules that called for arbitrating arbitrability.

COA considers waiver of arbitration agreement.

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

Amended award confirmed.

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

COA reverses vacatur of award.

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

Claims subject to arbitration.

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

"May" does not mean mandatory.

Skalnek v Skalnek, 333085 (October 26, 2017), lv dn 502 Mich 902 (2018). In this employment case, COA agreed with Circuit Court, that parties' agreement did not provide for mandatory arbitration because of use of word "may" in phrase, "Either party may submit a dispute for resolution…" and because other wording in their agreement was unclear as to whether arbitration was the only means of resolution contemplated by parties.

Arbitration, frozen embryos, and sua sponte analysis.

Karungi v Ejalu, 337152 (September 26, 2017), lv dn 501 Mich 1051 (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 had subject-matter jurisdiction. Dissent (Jansen) would not have altered entire procedural posture, sua sponte, to remand matter and allow parties to re-litigate theories they failed to properly raise.

Arbitration involving non-signatories to arbitration agreement.

Scodeller v Compo, 332269 (June 27, 2017), affirmed Circuit Court's 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 by filing cross-complaint.

Universal Academy v Berkshire Dev, Inc, 330707 (June 20, 2017). Party did not waive right to arbitration by filing cross-complaint. "Except as otherwise provided in subsections (2) and (3), a party to an agreement to arbitrate or to an arbitration proceeding may waive or the parties may vary the effect of the requirements of this act to the extent permitted by law." Uniform Arbitration Act, MCL 691.1681, *et seq*., at MCL 691.1684(1).

Supplemental labor arbitration award.

Dept of Transportation v Michigan State Employees Assn, 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 arbitrator 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.

Cases ordered to arbitration.

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

Rozanski v Findling, 330962 and 332085 (March 14, 2017). Plaintiffs appealed Circuit Court order granting defendant's motion to compel arbitration and Circuit Court confirmation of award. Plaintiffs argued Circuit Court erred in granting summary disposition in favor of defendant where attorney fee agreement that contained arbitration provision was invalid. COA 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(c)(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. Michigan law respects separate corporate entities, "absent abuse of the corporate form." Circuit Court erred in ruling that Pepperco's lawsuit was barred by agreement to arbitrate.

Arbitrator may decide res judicata and estoppel as to grievances.

AFSCME Local 1128 v City of Taylor, 328669 (January 19, 2017). Dispute arose over number of Local 1128 employees to be employed by city with union alleging too few employees. Arbitrator held grievance, which implicated articles 5.2, 24.2, and 45.2 of the CBA, was not timely per CBA terms. Despite finding grievance was 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 heavily on hearing referee/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 CBA articles 5.2, 24.2, and 45.2, grievance was denied.

Following arbitration of the first grievance, union requested arbitration relating to arguably related grievances. City refused to arbitrate, arguing res judicata and collateral estoppel precluded "rematch" on issues that were litigated before in first grievance.

Circuit Court determined issue in one of the additional grievances had not been decided. Preclusion issue was "close question" to be decided by arbitrator. COA affirmed. Unless otherwise specified in CBA, whether arbitration is precluded under res judicata and collateral estoppel is for arbitrator to decide. Because CBA contained no indication res judicata and collateral estoppel should be addressed by court, rather than arbitrator, Circuit Court properly submitted matter to arbitration. In determining preclusion issues should be decided by arbitrator, COA offered no opinion on merits of city's preclusive arguments. City is free to assert during arbitration that res judicata and collateral estoppel bar arbitration of grievances. Should arbitrator reach merits of case, submitting matter to arbitration will not prevent city from asserting, after arbitration, that there was impermissible conflict between MERC decision and arbitration decision.

Collateral estoppel from arbitration award?

Ric-Man Constr, Inc v Neyer, Tiseo & Hindo Ltd, 329159 (January 17, 2017), dn lv 501 Mich 942 (2017). NTH contended Ric-Man was collaterally estopped from seeking lost profits because in its arbitration against OMIDDD, arbitration panel declined to award same lost profits to Ric-Man. Collateral estoppel applies to factual determinations made during arbitration. Circuit Court found issue decided by arbitration panel was not identical to that at issue in this case and collateral estoppel did not apply. Basis for arbitration panel's ruling is not entirely clear. Collateral estoppel applies only when basis of prior judgment can be clearly, 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 and referred claims to arbitration. COA reversed.

Arbitration clause provided, "Any controversy or claim arising out of or relating in any way to this agreement shall be settled exclusively by arbitration administered by 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.

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 SMART***, 342678 (January 15, 2019); ***AFSCME v Wayne Co***, 337964 (September 20, 2018); ***Roetken v Roetken***, 333029 (December 19, 2017), lv dn 503 Mich 858 (2018).

About the Author

Lee Hornberger is Immediate Past Chair of the ADR 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 GTLA Bar Association, and former Chair of the Traverse City Human Rights Commission. He is a member of The National Academy of Distinguished Neutrals and the Professional Resolution Experts of Michigan (PREMi).*

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

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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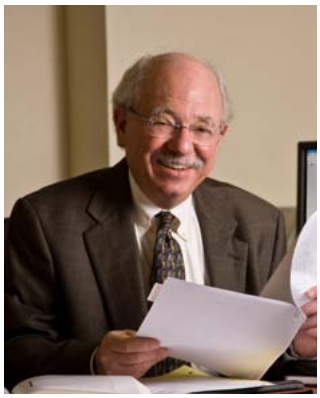

Sheldon J. Stark

Why You Should Avoid Putting A Dollar Demand/Offer in Your Written Mediation Summary

by Sheldon J. Stark

Advocates for parties in mediation often set forth a specific dollar demand or counter-offer in the written mediation summaries they exchange with the other side. In my experience, with some exceptions, the reaction is often consternation or worse. I recommend against it.

Ways in Which Putting a Number in Writing Sends the Wrong Message

1. When a number is included in the summary, it is either the first demand/offer of the case, or the first demand/offer of the mediation process. Either way, it's generally intended as a *start* to the negotiation, not an end. No one seriously expects acceptance of their first offer. Experienced advocates know that. Their clients may not. Opening numbers sometimes give a party the wrong idea about the value of their case. With little experience resolving civil litigation, they are unfamiliar with how the process works. Their only experience has been limited to negotiating the sale of a home or purchasing a car. They have learned to expect that the sale price will be fairly close to the asking price. Civil litigation negotiations are not like that. Although competent