

MICHIGAN ARBITRATION AND MEDIATION CASE LAW UPDATE

Lee Hornberger
Arbitrator and Mediator

I. Introduction

This update reviews Michigan cases issued since January 2019 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 For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions. A full review going back to 2008 is at: www.leehornberger.com/files/ADR%20Update%20October%202020.pdf. The YouTube video of the author's 2019-2020 update presentation is at: www.youtube.com/watch?v=I0TkP8zs-A8&feature=youtu.be.

II. ARBITRATION

A. Michigan Supreme Court Decisions

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

Lichon v Morse, 327 Mich App 375; 933 NW2d 506, 339972 (March 14, 2019), lv gtd, ___ Mich ___, 932 NW2d 785 (September 18, 2019). In a split decision, the Court of Appeals held a sexual harassment claim was not covered by an arbitration provision in an employee handbook. Because the arbitration provision limited the scope of arbitration to only claims that are “related to” plaintiffs’ employment, and because sexual assault by an employer or supervisor cannot be related to their employment, this arbitration provision was 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.” The O’Brien dissent said the parties agreed to arbitrate “any claim against another employee” for “discriminatory conduct” and the plaintiffs’ claims arguably fell within the scope of the arbitration agreement.

The Supreme Court granted leave to appeal. The Supreme Court oral argument was October 8, 2020.

B. Michigan Court of Appeals Published Decisions

Pre-dispute arbitration agreement in legal malpractice case.

Tinsley v Yatooma, ___ Mich App ___, 349354 (August 13, 2020). Pre-dispute arbitration provision in legal malpractice case. Under the plain language of MRPC 1.8(h)(1) and EO R-23 the arbitration provision was enforceable because the 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 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 arbitrator concluded otherwise. This was clear legal error that had a substantial impact on the award. The Court of Appeals reversed with respect to confirmation of that portion of award.

Court of Appeals affirms order to arbitrate labor case.

Registered Nurses Union v Hurley Medical Center, 328 Mich App 528, 343473 (April 18, 2019). 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.

C. Michigan Court of Appeals Unpublished Decisions

Court of Appeals affirms confirmation of award.

Soulliere v Berger, 349428 (October 29, 2020). The Court of Appeals affirmed the Circuit Court confirmation of an award because the defendants’ disagreement with the award implicated the arbitrator’s resolution of evidence, and the defendants have not demonstrated an error of law apparent from the face of the award.

Waiver of arbitration.

Wells Fargo Bank, NA, v Walsh, 350960 (October 29, 2020). The Court of Appeals affirmed the Circuit Court finding that the defendant waived the right to compel arbitration. Defending action without seeking to invoke right to compel arbitration, constitutes a waiver of right to arbitration.

Settling case with help of arbitrator.

Estate of O’Connor v O’Connor, 349750 (October 15, 2020). In this dispute over the enforcement of a settlement agreement, the defendant appealed the Circuit Court order granting the plaintiff’s motion for entry of judgment. The defendant argued the parties agreed to arbitration and the arbitrator lacked authority to broker a settlement agreement. The Court of Appeals held the defendant contributed to the alleged error by seeking settlement, participating in the settlement negotiations, and signing the settlement agreement. The Court of Appeals affirmed the Circuit Court.

Court of Appeals affirms Circuit Court ordering arbitration in insurance case.

Fisk Ins Agency v Meemic Ins, 350832 (September 10, 2020). The Court of Appeals held the Circuit Court properly concluded, in accordance with the terms of the Agreement, the matter must be returned to the arbitrator and the arbitrator must address the 90-day contractual limitation in Agreement.

Court of Appeals reverses vacatur of DRAA award.

Moore v Glynn, 349505 (August 27, 2020), **app lv pdg**. The Court of Appeals held the Circuit Court erred by determining the arbitrator exceeded its scope of authority by looking beyond the four corners of the parties’ settlement agreement. The Circuit Court erroneously determined that the settlement agreement was not ambiguous. The Circuit Court only had the power to determine whether the arbitrator acted within the scope of its authority and did not have power to interpret the parties’ contract. Because the arbitrator did not exceed the scope of its authority, the Circuit Court’s review should have ended and the court should have confirmed award.

Court of Appeals affirms Circuit Court 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 provide for arbitration at "election and written consent of the parties." The plural noun "parties" demonstrates all parties to dispute must elect and consent to arbitration in lieu of litigation. The word "consent" supports this interpretation. It takes two to consent to participate in an arbitration. The Circuit Court correctly determined the Tuers were not permitted to unilaterally demand arbitration.

Court of Appeals affirms Circuit Court order confirming award.

Altobelli v Hartmann, 348953 and 348954 (May 21, 2020), **app lv pdg**. The plaintiff appealed the Circuit Court confirmation of an award. The award held the plaintiff was not entitled to relief because he voluntarily withdrew from membership with the defendant and had not sufficiently proved proximate cause or amount of damages. Because the Circuit Court properly determined the award rested in part on issues of proximate cause and damages, which were beyond the scope of judicial review, the Court of Appeals affirmed. See *Altobelli v Hartmann*, 499 Mich 284; 884 NW2d 537 (2016).

Court of Appeals affirms Circuit Court denying arbitration.

Andrus v Dunn, 345824, 346897, and 348305 (April 9, 2020). The award, which was adopted in the JOD, required arbitration of disputes that arose regarding **St. Martin property**. The August 2015 order provided Andrus waived any claims she had relating to St. Martin, including pursuant to any prior awards and the JOD, and the Circuit Court had jurisdiction to enforce the terms and conditions of the settlement agreement regarding the St. Martin property issue. Because the JOD and the August 2015 order covered the same subject matter but contain inconsistent provisions regarding the forum for resolving disputes on St. Martin property, the August 2015 order reflects later agreement and supersedes the JOD on that issue. The Circuit Court properly denied Andrus's request to compel arbitration of the St. Martin dispute.

Court of Appeals affirms confirmation of DRAA award.

Shannon v Ralston, 350094, 350110 (March 12, 2020), lv den ___ Mich ___ (2020). The Court of Appeals affirmed confirmation of a 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, the plaintiff was barred from claiming she was entitled to relief on the basis of this delay.

Court of Appeals affirms granting of motion to compel arbitration.

Century Plastics, LLC v Frimo, Inc, 347535 (January 30, 2020). In this contract case, the Court of Appeals affirmed the Circuit Court holding that the parties validly incorporated General Terms and its arbitration agreement by reference. The Terms applied to the parties' agreement even though the defendant was not a listed entity.

Court of Appeals affirms confirmation of DRAA award.

Daoud v Daoud, 347176 (December 19, 2019). The Court of Appeals affirmed the Circuit Court confirmation of a DRAA award. **Past domestic violence and 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 its uneven distribution of property, there was no basis for concluding the arbitrator exceeded its authority in issuing award.

Court of Appeals reverses Circuit Court denial of motion to compel arbitration.

Lesniak v Archon Builders, Inc, 345228 (December 19, 2019). The Court of Appeals reversed the Circuit Court denying the defendants' motion for arbitration because the arbitration terms in the construction agreements were sufficiently related to the plaintiffs' claims to require arbitration, and the defendants had not waived their right to arbitration. The purpose of arbitration is to preserve the time and resources of courts in the 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 the arbitration hearing, the arbitrator entered an award against R. The Court of Appeals affirmed the Circuit Court's confirmation of the award. MCL 691.1703(1)(c).

Incorporation of AAA rules.

MBK Constructors, Inc v Lipcaman, 344079 (October 29, 2019), lv den ___ Mich ___ (2020). Incorporation of AAA's rules in arbitration agreement clear and unmistakable evidence of parties' intent to have arbitrator decide arbitrability.

Court of Appeals affirms confirmation of award.

2727 Russell Street, LLC v Dearing, 344175 (September 26, 2019), lv den ___ Mich ___ (2020). Court of Appeals affirmed confirmation of award. Arbitrator's factual findings are not reviewable. **The Court of Appeals referenced "facilitation" and "statutory arbitration."** Med-arb.

COURT OF APPEALS affirms denial of sanctions.

Clark v Garratt & Bachand, PC, 344676 (August 20, 2019). The Court of Appeals affirmed the Circuit Court denying G's motion for sanctions. 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 judgment confirming the award also foreclosed G's ability to request sanctions. G had failed to prove that the plaintiff's complaint was frivolous.

Circuit Court order to arbitrate confirmed.

Roseman v Weiger, 344677 (June 27, 2019), lv den ___ Mich ___ (2019). To the extent the plaintiff argues 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, 342854 (June 13, 2019), lv den ___ Mich ___ (2020), concerned whether the husband's winning of \$80 million Mega Millions jackpot was part of the marital estate. The arbitrator ruled the jackpot was marital property. The Circuit

MICHIGAN ARBITRATION AND MEDIATION CASE LAW UPDATE

(Continued from page 2)

Court confirmed the award. The Court of Appeals affirmed the confirmation. The Court of Appeals 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 *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.” The Court of Appeals affirmed confirmation of a DRAA award that decided change in domicile issue. The arbitrator acted as both mediator and arbitrator. At time of the ex parte communication, the arbitrator was acting as a mediator, not as an arbitrator and the prohibition against ex parte communications did not apply. The belated raising of the alleged disparaging remarks by neutral. The arbitrator's alleged financial interest in the arbitration process. The plaintiff was ordered to pay fees associated with the investigative guardian ad litem. The 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 the cost of the arbitration and in violation of the arbitrator's instructions.

DRAA award confirmed.

Hyman v Hyman, 346222 (April 18, 2019). The Court of Appeals held that the Circuit Court's modification of a DRAA award because the Circuit Court lacked authority to review the arbitrator's factual findings and alter parenting-time schedule without finding award adverse to the children's best interests.

Court of Appeals 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). The issue of whether the union complied with the CBA procedural requirements to arbitrate is a procedural issue for arbitrator.

Selection of replacement arbitrator foreclosed in DRAA case.

Sicher v Sicher, 341411 (March 21, 2019). 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. MCL 600.5075(2). Because the parties had agreed only for A to arbitrate property division disputes, the Circuit Court's refusal to appoint a different arbitrator permitted by DRAA.

Court of Appeals reverses confirmation of employment arbitration award.

Checkpoint Consulting, LLC v Hamm, 342441 (February 26, 2019). The court of Appeals held there was no valid arbitration agreement because the independent contractor agreement voided all prior agreements, including the arbitration clause within the employment agreement.

Court of Appeals affirms confirmation of employment arbitration award.

Wolf Creek Productions, Inc v Gruber, 342146 (January 24, 2019). The Court of Appeals affirmed the confirmation of an employment arbitration award. The Court of Appeals 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 arbitrator.

Court of Appeals affirms confirmation of exemplary damages award.

Grewal v Grewal, 341079 (January 22, 2019). The Court of Appeals affirmed a judgment confirming the arbitrator's award of \$4,969,463.94 exemplary damages and correcting the arbitrator's award by striking portion that ordered the plaintiffs to provide accounting of assets in India.

Court of Appeals affirms confirmation of award.

Hunter v DTE Services, LLC, 339138 (January 3, 2019). In employment discrimination case, the Court of Appeals affirmed the confirmation of an award. The arbitrator did not exceed its authority by failing to provide citations to case law.

III. MEDIATION

A. Michigan Supreme Court Decisions

There were apparently no Michigan Supreme Court decisions concerning mediation during this review period.

B. Michigan Court of Appeals Published Decisions

There were apparently no Michigan Court of Appeals published decisions concerning mediation during this review period.

C. Michigan Court of Appeals Unpublished Decisions

Apparent oral agreement to mediate not enforced.

Kuiper Orlebeke, PC v Crehan, 348315 (November 12, 2020). The defendant argued that an agreement to mediate precluded the Circuit Court from granting summary disposition in favor of the plaintiff. The defendant provided no case law in support of argument that the option of mediation precluded summary disposition. An appellant may not merely announce its position and leave it to the Court of Appeals to discover and rationalize the basis for its claims, nor may it give issues cursory treatment with no citation of authority. **LESSON: Agreements to mediate should be in writing.**

Attorney fee issue where party failed to mediate.

Daniels v Daniels, 348950 (Sep 17, 2020). The Circuit Court said the defendant walked out of the mediation causing "lost expense." This may implicate MCR 3.206(D)(2)(b) because suggests the defendant failed to comply with an order to participate in mediation. The Circuit Court did not determine what "lost expense" was and said the Circuit Court was awarding attorney fees because of disparity of income. It did not appear the Circuit Court awarded fees under MCR 3.206(D)(2)(b). The Court of Appeals affirmed the JOD but vacated the attorney fee award. If parties choose to further litigate the attorney fee issue, the Circuit Court must make findings as required by statute. **LESSON: Comply with orders to mediate.**

Court of Appeals affirms Circuit Court holding party in contempt.

Teachout v Teachout, 349692 (August 20, 2020), **app lv pdg**. The Court of Appeals affirmed the Circuit Court finding defendant in contempt for violating three orders: (1) order requiring defendant to pay temporary spousal support to the plaintiff during the pendency of the divorce action; (2) order regarding appraisals of property and required the defendant to allow access to the marital home for appraisal; and (3) scheduling order that required mediation. The Circuit Court did not order MCR 3.216(I) evaluative mediation. **LESSON: Circuit Court can sua sponte order mediation. MCR 3.216.**

MCR 2.612 not applicable to outside of court case MSA.

Smith v Forrest, 349810 (July 30, 2020). In this law firm partnership case, the Court of Appeals held that because MCR 2.612 regarding relief from judgment has no application to the plaintiff's effort to challenge the validity of the MSA that was executed by the parties outside of a judicial or court proceeding, and because the Circuit Court relied on MCR 2.612 in summarily dismissing the plaintiff's lawsuit, the Court of Appeals reversed and remanded.

Mediation confidentiality.

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

Violation of orders to mediate.

Lang v Lang, 347110 (May 14, 2020). The Court of Appeals affirmed the granting of attorney fees. The Circuit Court did not award the plaintiff attorney fees because the defendant exercised the right to go to trial after failing, in good faith, to reach a settlement agreement. The Circuit Court awarded the plaintiff attorney fees because, in regard to both the mediation and the sale of the marital home, the defendant attempted to find loopholes in the Circuit Court's order, rather than participating in good faith.

Court of Appeals reverses enforcement of MSA.

Estate of Brown, 342485 and 342486 (April 9, 2020). Barbara argued the MSA should be set aside because Barbara did not receive notice of the mediation. The Court of Appeals agreed and reversed the Circuit Court's enforcement of the MSA. See *Dolan v Cuppori*, 345310 (September 12, 2019), and *Peterson v Kolinske*, 338327 (April 17, 2018). **LESSON: Make sure all required persons are at the mediation.**

Court of Appeals affirms enforcement of recorded DR MSA.

Brooks v Brooks, 345168 (February 11, 2020). The Court of Appeals affirmed the Circuit Court's enforcement of a recorded MSA. The mediator recited the MSA in open court. The parties agreed it was their agreement. The parties were sitting in the judge's jury room and outlined the agreement. The MSA was silent on the pension issue. The Court of Appeals remanded the case to the Circuit Court to determine the distribution, if any, of the wife's pension. **LESSON: Putting the MSA "on the record" can be helpful.**

Court of Appeals affirms enforcement of domestic relations MSA even though no domestic violence protocol done.

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

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

Court of Appeals affirms dismissal of case with prejudice.

Pearson v Morley Cos Inc, 345547 (November 26, 2019). The Court of Appeals affirmed the Circuit Court dismissing with prejudice the plaintiff's hostile work environment lawsuit against the defendant as a sanction for the plaintiff's failure to comply with discovery and scheduling orders, including "**counsel's failure to adequately prepare for facilitation ...**"

Court of Appeals holds MSA invalid.

Dolan v Cuppori, 345310 (September 12, 2019). D and N owned property as **tenants by entirety**. N was not a party to the lawsuit. It violated N's due process rights for settlement reached by D alone to effect non-party N's property rights. The Court of Appeals held the Circuit Court violated N's due process rights when it added her to the Agreement without her consent. The settlement agreement was invalid from outset.

Court of Appeals reverses Circuit Court dismissal for failure to appear.

Corrales v Dunn, 343586 (May 30, 2019). After case evaluation, the Circuit Court ordered mediation. Because of a communication glitch, the plaintiff failed to appear at the mediation. The Circuit Court dismissed the case. Issue on appeal was whether the dismissal was a proper sanction under the circumstances. The Court of Appeals reversed the 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). The plaintiff contended the Circuit Court forced her to comply with an unenforceable MSA. The MSA was not written or recorded. MCR 3.216(H)(8). An MSA could not, absent other valid proof of settlement, be a basis for a JOD. At the hearing, held one day after the mediation, the parties placed a partial agreement on the record. MCR 2.507(G). At that hearing, the Circuit Court indicated its understanding as to the "gist" of the MSA was that the parties were to continue with joint physical and legal custody and equal parenting time. The plaintiff agreed on the record with that statement. The Circuit Court found that this arrangement to be in the best interests of the child. The agreement was placed on the record and agreed to by the plaintiff was binding on her. **LESSON: Make sure MSA is signed. ■**