



REVIEW OF MICHIGAN APPELLATE DECISIONS SINCE OCTOBER 2020 CONCERNING ARBITRATION AND MEDIATION

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Introduction

This update reviews Michigan cases issued since October 2020 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the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals (COA) unpublished decisions.¹

During the review period, the COA upheld eighteen arbitration awards or arbitration access in the eighteen cases where awards or arbitration access were at issue. The COA enforced six mediated settlement agreements (MSAs) in the eight cases where enforcement or nonenforcement of an MSA was directly at issue.

Arbitration

Michigan Supreme Court Decisions

Supreme Court vacates COA and remands cases to Circuit Courts for reconsideration of whether plaintiffs' claims are subject to arbitration.

*Lichon v Morse*² vacated the Court of Appeals³ decision and remanded the circuit court cases to their respective circuit court. In *Lichon*, the Supreme Court majority (Cavanaugh, McCormack, Bernstein, and Clement) reviewed whether plaintiffs' claims which fell within the scope of arbitration agreements were limited to matters that are "relative to" plaintiffs' employment. The question of whether plaintiffs' allegations of sexual assault and the claims stemming from those allegations are "relative to" plaintiffs' employment is resolved by asking whether such claims can be maintained without reference to the contract or relationship at issue. *Doe v Princess Cruise Lines, Ltd.*⁴ ("If the cruise line had wanted a broader arbitration provision, it should have left the scope of it at 'any and all disputes, claims, or controversies whatsoever' instead of including the limitation that narrowed the scope to only those disputes, claims, or controversies 'relating to or in any way arising out of or connected with the Crew Agreement, these terms, or services performed for the Company.'" [Emphasis added]). Because the circuit courts did not have the benefit of this framing, the Supreme Court

vacated the decision of the COA and remanded these cases to the circuit courts for reconsideration of whether plaintiffs' claims are subject to arbitration. Because plaintiffs also did not have the benefit of this framing when filing their claims, plaintiffs may seek to amend their complaints before the circuit courts make this determination.

The Supreme Court dissent (Viviano and Zahra) said the court must interpret contractual language to determine whether the parties meant to assign plaintiffs' present claims to arbitration. According to the dissent, the majority takes a standard from out-of-state caselaw and imposes it upon the parties. A proper interpretation of the contract's language shows that plaintiffs' claims against the defendant law firm are arbitrable under the contract. The dissent would reverse the COA decision. The claims against defendant Morse individually are also arbitrable under the contract if he can invoke the arbitration clause. Because the COA did not determine whether Morse has the authority to enforce the agreement, which he did not sign, the dissent would remand on that issue.

Justice Welch did not participate in the disposition of the case because the Court considered it before she assumed office.

Previously, in the now vacated *Lichon v Morse* COA split decision,⁵ the COA held a sexual harassment claim was not covered by the arbitration provision in an employee handbook. Because the arbitration provision limited the scope of arbitration only to claims related to the plaintiffs' employment, and because a sexual assault by the employer or supervisor cannot be related to employment, the arbitration provision was inapplicable to the claims against Morse and the law 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 COA dissent said the parties agreed to arbitrate "any claim against another employee" for "discriminatory conduct" and claims that arguably fell within the scope of the arbitration agreement.

Michigan Court of Appeals Published Decisions

There were no COA published decisions concerning arbitration during the period covered by this update.

Michigan Court of Appeals Unpublished Decisions

COA affirms confirmation of DRAA award.

In *Dixon v Dixon*,⁶ plaintiff appealed the circuit court denying plaintiff's motion to vacate an arbitration award which granted the parties an equal interest in their former marital home and granting defendant's motion to confirm the award. The COA affirmed.

COA affirms order to arbitrate.

In *Webb v Fidelity Brokerage Services*,⁷ the COA affirmed the circuit court that the parties' brokerage contract contained an enforceable agreement to arbitrate.

COA affirms confirmation of clarified award.

Advanced Integration Technology, Inc v Rekab Industries Excluded Assets, LLC.⁸ The arbitrator granted a motion for summary disposition. In response to a motion to vacate the award, the circuit court remanded the award to the arbitrator for clarification. The arbitrator issued a clarified award. The circuit court confirmed the clarified award. The COA confirmed the circuit court's confirmation of the clarified award. Plaintiffs argued the circuit court should not have remanded the case to the arbitrator for clarification, but rather, the circuit court should have vacated the award. MCL 691.1700(4) allows the circuit court to remand to the arbitrator "[t]o clarify the award." The circuit court was not required to vacate the award on the basis that it was unclear or appeared the arbitrator may have erred.

COA affirms confirmation of award.

Sean D Gardella & Assoc v Sieber.⁹ Darcy did not sign the contract. Darcy, along with Jonathan, owned property on which the plaintiff made improvements pursuant to the contract. The agreement identified both defendants as contracting parties. The written agreement could be considered an offer. Although Darcy did not sign the contract, this was not dispositive. Darcy could be said to have accepted the plaintiff's offer and assented to the terms of the contract by accepting the plaintiff's performance of the contract; specifically, improvements to her home, which the plaintiff completed in accordance with the agreement. The arbitrator said Darcy "was familiar with the terms and conditions of the work to be performed, the cost of the work[,] and . . . participated in decisions regarding the work." It was not improper for the arbitrator to find Darcy jointly and severally liable for damages resulting from the defendants' breach of contract and award attorney fees, as authorized by the contract. The COA affirmed the circuit court's confirmation of the award.

COA affirms confirmation of award.

In *Centennial Home Group, LLC v Smith*,¹⁰ the COA affirmed confirmation of an award concerning retaining wall construction.

COA reverses not ordering arbitration.

Wieland Corp v New Genetics, LLC,¹¹ concerned whether the defendants could compel arbitration of Wieland's claims and claims of the subcontractors related to the construction project. Wieland is a construction company and New Genetics cultivates medical cannabis. The circuit court erred by not ordering arbitration of the contractor claim. The subcontractor claims were not subject to arbitration. The circuit court was not required to keep all the claims in one forum.

COA affirms Probate Court asking arbitrator for clarification.

In *Dina Mascarin Living Trust v Adkinson*,¹² the COA held the probate court did not err when it referred the matter back to the arbitrator for correction or clarification. MCL 691.1700(4)(c).

COA affirms confirmation of no-fault award.

Lewis v IDS Property Casualty Ins Co.¹³ The arbitrator issued an award for \$50,000. The defendant issued a pay-off check for \$40,000. The defendant did not file a motion to amend or correct the arbitration award. The COA affirmed the circuit court's confirmation of the award.

COA affirms confirmation of award.

Prospect Funding Holdings v Reifman Law Firm, PLLC.¹⁴ The arbitrator declined to consider the defendant's arguments because the defendant failed to pay associated filing fees. The COA affirmed the circuit court's confirmation of the award.

COA affirms refusal to reopen attack on old award.

Asmar Constr Co v AFR Enterprises, Inc.¹⁵ In this unusual business dispute, which involved two arbitration hearings which took place ten years ago regarding a project from more than twenty years ago, and allegations that the arbitrator was bribed, plaintiffs appealed the circuit court denial of a motion for relief from judgment. MCR 2.612(C)(1)(f). The judgment was entered in February 2011 as a result of the arbitration between the plaintiffs and the defendants which confirmed the second award. The circuit court held plaintiffs' motion for relief from judgment was untimely. The COA affirmed.

COA affirms Circuit Court in complicated benefits case.

*Michigan Spine & Brain Surgeons v Citizens Ins Co of the Midwest.*¹⁶ Ford and Citizens agreed to dismiss with prejudice litigation between them regarding PIP benefits, including an action filed by Ford, and to submit the case to arbitration. The parties agreed the award would represent resolution of all claims for PIP benefits and for all monies owing to Ford related to the accident. The agreement provided, with exception of provider plaintiffs that have either intervened, settled privately, or filed independent causes of action at time of the agreement, the arbitration shall include all medical billings known to either party. When Ford assigned to MSBS his right to payment by Citizens for his surgery, he had already agreed to submit all claims for PIP benefits that stemmed from the accident to an arbitrator and had stipulated to dismissal of his lawsuit against Citizens with prejudice. At the time Ford assigned his right to payment of PIP benefits to MSBS, he had no right to assert legal action against Citizens for these claims. He could not assign to MSBS more rights than he possessed. The circuit court did not err by holding MSBS did not have standing to assert a claim against Citizens for payment of PIP benefits for the medical care rendered to Ford.

COA affirms confirmation of DRAA award.

*Davidson v Davidson.*¹⁷ Plaintiff argued the arbitration was void for lack of authority. The arbitrator derives authority from the arbitration agreement. The arbitration agreement, entered into while there was an active case, was not affected by the dismissal of the divorce action. Plaintiff failed to show the arbitration was void or without authority. Plaintiff did not show from the face of the award how the arbitrator exceeded its authority or committed an error of law.

COA affirms that arbitration agreement forecloses court case.

*Gray v Yatooma.*¹⁸ Plaintiff had a compensation agreement and a non-compete with a broad arbitration agreement. The COA affirmed the circuit court order that the arbitration agreement prevented a court suit.

COA affirms denial of vacatur of award.

In *Rahaman v Ameriprise Ins Co*,¹⁹ appellant argued the award should be vacated because the attorney, not the party, signed the agreement to arbitrate. The COA held that the at-

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torney can enter into a binding arbitration agreement on behalf of the client. MCR 2.507(G).

COA affirms denial of vacatur in disclosure case.

Wilson v Louis D. Builders.²⁰ Plaintiffs moved to vacate the award because of the arbitrator's alleged bias toward a party and the party's attorney. The plaintiffs also alleged that the arbitrator and opposing counsel held municipal positions together, worked on township matters, and interacted socially. Plaintiffs asserted these interactions were substantial and material relationships. The circuit court denied the motion to vacate and the COA affirmed. MCL 691.1962.

COA affirms confirmation of award.

In *Kada v Nouri*,²¹ the plaintiffs appealed the circuit court's confirmation of an award, and the circuit court's denial of attorney fees and costs. The COA held that the circuit court did not abuse its discretion in confirming the award and denying attorney fees.

COA affirms confirmation of award.

In *Soulliere v Berger*,²² the COA affirmed the confirmation of an award because defendants' disagreement with the award implicated the arbitrator's resolution of the evidence and defendants did not demonstrate an error of law apparent from the face of the award.

Waiver of arbitration.

In *Wells Fargo Bank, NA, v Walsh*,²³ the COA affirmed the circuit court order finding defendant waived his right to compel arbitration. Defending the action without seeking to invoke arbitration constituted waiver of the right to arbitration.

Settling case with help of arbitrator.

Estate of O'Connor v O'Connor.²⁴ In this dispute over enforcement of a settlement agreement, defendant appealed the circuit court order granting the plaintiff's motion for entry of judgment. Defendant argued the parties agreed to arbitration and the arbitrator lacked the authority to broker a settlement agreement. The COA held that defendant contributed to the alleged error by seeking settlement, participating in the settlement negotiations, and signing the settlement agreement. The COA affirmed the circuit court.

Mediation

Michigan Supreme Court Decisions

Supreme Court protects mediation confidentiality.

*Tyler v Findling*²⁵ reversed the Court of Appeals.²⁶ *Tyler* is

a defamation case arising from statements made by one attorney acting as a receiver to another attorney before meeting in person with the mediator at the start of a court-ordered mediation. The Supreme Court said the COA erred when it held that a cause of action for defamation existed based on these communications. The Supreme Court held that these statements were MCR 2.412(B)(2) "mediation communications" and therefore confidential under MCR 2.412(C). The phrase "mediation communications" is defined broadly to include statements that "occur during the mediation process" and statements that "are made for purposes of ... preparing for ... a mediation." MCR 2.412(B)(2). The conversation between the two attorneys took place within the "plaintiff's room" while the parties to the mediation were waiting for the mediation session to start and were part of the "mediation process." "The mediator should include a statement concerning the obligations of confidentiality in a written agreement to mediate."²⁷

Supreme Court remands case in domestic violence protocol case.

Pohlman v Pohlman.²⁸ In a split decision, the COA affirmed the circuit court's enforcement of a domestic relations MSA even though no domestic violence protocol was done. Because 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. MCL 600.1035.

Judge Gleicher's dissent said the circuit court was obligated to hold a hearing to determine whether the wife was coerced into a settlement. Only by evaluating the 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 the presumption against mediation when there is domestic violence do not go away because the parties used "shuttle diplomacy." That may help diffuse immediate tensions, but it cannot undo years of manipulation and mistreatment.

The Supreme Court on November 25, 2020, requested oral argument and additional briefing concerning the application for leave to appeal.

On April 23, 2021, the Supreme Court remanded the case to the circuit court to hold an evidentiary hearing and report its findings back to the Supreme Court. The circuit court's findings and transcript were filed with the Supreme Court on July 2, 2021.

Michigan Court of Appeals Published Decisions

There were no COA published decisions concerning mediation during the period covered by this update.

Michigan Court of Appeals Unpublished Decisions

COA affirms nonenforcement of settlement agreement.

*Jones Lang LaSalle Mi, LLC, v Trident Barrow Mgmt 22, LLC.*²⁹ Although the parties apparently agreed to some terms of the settlement agreement, they did not reach an agreement on the scope of the release clause. Because the parties did not reach a meeting of minds over essential terms, there was no enforceable settlement agreement. This was not an MSA or a “mediation term sheet.” **LESSON: In the MSA, provide for a method to resolve post-settlement technical issues.**

COA reverses Circuit Court refusal to accelerate.

*CIGL Properties, LLC v CM Renovation Services, LLC.*³⁰ The MSA provided for a payment plan with acceleration and attorney fees if payment were missed. Because of “undergoing surgery” the party missed one payment. In light of the surgery, the circuit court refused to order acceleration. The COA reversed.

Waiver of right to appeal.

In *Zyble v Michael Fischer Builders, LLC*,³¹ the defendant appealed the circuit court order denying an ex parte motion to stay enforcement of the judgment in favor of plaintiffs. Plaintiffs cross-appealed the portion of an order concerning the award of attorney fees. The COA concluded the repairs considered in the inspection company’s calculation of damages were within the scope of the settlement agreement, the COA affirmed the portion of the order that denied the defendant’s motion to stay enforcement of the judgment. The COA remanded the matter to reconsider plaintiffs’ motion for attorney fees. Defendant waived appellate review of the settlement agreement and judgment by signing a provision in the settlement agreement that stated: “In consideration of Dream Maker’s agreement to the terms set forth above, Dream Makers [sic] hereby waives its right to appeal after entry of said Confession of Judgment.”

COA affirms enforcement of settlement agreement.

*Drake v Auto Club Ins Assoc.*³² In a no fault case, the facilitator issued a written Facilitator’s Recommendation. Plaintiff accepted the Recommendation and then had a change of heart. The COA enforced the accepted Recommendation and the COA affirmed. Plaintiff admitted both parties accepted the Recommendation. Plaintiff argued the agreement was unenforceable because of illusory promises, mutual mistake, fraudulent misrepresentation by facilitator, and unconscionability.

COA partially affirms JOD entry incorporating MSA.

In *Kohl v Kohl*,³³ defendant argued the circuit court erred in entering a JOD because it did not conform to the MSA concerning the marital home. The COA agreed, in part, and remanded for further proceedings. “The parties have both faithfully and truthfully participated in mediation with their attorneys and have arrived at the following resolution meant to be full and final and binding. It will be incorporated into the [JOD].”

COA reverses default judgment.

*Nalcor, LLC v Condom Sense, Inc.*³⁴ Kahn (guarantor) argued good cause to set aside the default judgment existed because his failure to appear at the mediation and status conference was inadvertent. Kahn claimed his counsel was retained just before the mediation and status conference and was not provided a copy of the scheduling order. Kahn and his counsel failed to appear at the mediation and status conference because they were unaware the mediation and status conference were scheduled. The COA held it was not an abuse of discretion for the circuit court to conclude Kahn failed to establish good cause to set aside the default judgment. A lesser showing of good cause is required if the moving party can demonstrate a strong meritorious defense.

COA affirms dismissal for failure to post bond.

In *Neff v Chapel Hill Condominium Ass’n*,³⁵ plaintiff argued the circuit court, by ordering mediation, deprived her of her right to a jury trial and wrongfully reopened discovery only as to Chapel Hill and Mixer. Plaintiff said the circuit court order, which required her to post a security bond and \$4,426 in mediator fees, deprived her of her right to a jury trial. The COA held that plaintiff was wrong. Damages was not the only issue to be decided. The circuit court denied summary disposition on plaintiff’s contract claim, leaving open the question of liability. Discovery was not reopened only for Chapel Hill and Mixer; the court made no discovery order and the mediator sought inspection of property only for purposes of conducting mediation. Mediation is a form of ADR that all civil cases in Michigan are subject to, unless otherwise directed by statute or court rule. MCR 2.410(A). In the event mediation fails, jury trial is available. The mediation failed. On Chapel Hill and Mixer’s motion to dismiss for refusal to participate in the mediation, the court entered a security bond in lieu of dismissal. When plaintiff did not post bond, her case was dismissed. The court’s decision to order mediation did not deprive plaintiff of her right to a jury trial. The plaintiff’s actions led to imposition of bond and the plaintiff’s failure to post security ultimately led to the dismissal.

COA affirms enforcement of probate MSA.

Tewell v Stoll.³⁶ In this estate-related dispute, the plaintiff appealed the circuit court's order finding the MSA valid, based on a previous order denying plaintiff's motion to set aside the MSA or for an evidentiary hearing. Plaintiff argued that the circuit court abused its discretion when it refused to set aside the MSA because it was entered into based on fraudulent or innocent misrepresentation and the circuit court should have conducted an evidentiary hearing on these issues. The COA affirmed.

Apparent oral agreement to mediate not enforced.

In *Kuiper Orlebeke, PC v Crehan*,³⁷ defendant argued the agreement to mediate precluded the circuit court's granting of summary disposition in favor of plaintiff. Defendant provided no case law in support of the argument that the option of mediation precluded summary disposition. The appellant may not merely announce its position and leave it to the COA to discover and rationalize the basis for its claims, nor may it give issues cursory treatment with little or no citation of supporting authority. **LESSON: Agreement to mediate should be in writing.**

About the Author

Lee Hornberger is a former Chair of the State Bar's ADR Section, Editor Emeritus of The Michigan Dispute Resolution Journal, former member of the State Bar's Representative Assembly, and former President of the Grand Traverse-Leelanau-Antirrim 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 2018-2019 for arbitration, and 2020-2021 for arbitration and mediation. He is on the 2016-2021 Michigan Super Lawyers lists for ADR.

Endnotes

- 1 An earlier review covering 2008 to 2020 is at: <https://www.leehornberger.com/files/ADR%20Update%20October%202020.pdf>.
- 2 ___ Mich ___, MSC 159492 and 159493 (July 20, 2021). Pre-dispute mandatory arbitration of statutory employment claims is discussed in the following articles. Hornberger, "Due Process Protocol Influence on Statutory Claims Employment Arbitration in Michigan," *The General Practitioner* (January/February 2017). <https://www.leehornberger.com/media/Pro->

[ocol-GP--JanFeb2017.pdf](https://www.leehornberger.com/media/Pro-tocol-GP--JanFeb2017.pdf) Hornberger, "Overview of a Pre-Dispute Employment Resolution Process," *ADR Newsletter* (February 2005). <https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Feb05.pdf>.

- 3 327 Mich App 375 (2019).
- 4 657 F.3d 1204, 1218-1219 (11th Cir., 2011).
- 5 327 Mich App 375 (2019).
- 6 COA 355445 (August 12, 2021).
- 7 COA 354691 (July 29, 2021).
- 8 COA 354302 (July 15, 2021).
- 9 COA 354556 (June 17, 2021).
- 10 COA 353854 (April 15, 2021).
- 11 COA 353484 (April 15, 2021), *lv app pdg*.
- 12 COA 352816 (April 15, 2021).
- 13 COA 351108 (March 25, 2021), *lv den ___ Mich ___* (2021).
- 14 COA 352808 (March 11, 2021), *lv app pdg*.
- 15 COA 350488 (March 11, 2021), *lv app pdg*.
- 16 COA 350498 (March 4, 2021).
- 17 COA 348788 and 348808 (January 28, 2021), *lv den ___ Mich ___* (2021).
- 18 COA 351360 (December 17, 2020).
- 19 COA 349463 (November 24, 2020).
- 20 COA 351560 (November 19, 2020).
- 21 COA 351402 (November 19, 2020).
- 22 COA 349428 (October 29, 2020).
- 23 COA 350960 (October 29, 2020).
- 24 COA 349750 (October 15, 2020).
- 25 ___ Mich ___, MSC 162016 (August 4, 2021). See *Hanley v Seymour*, COA 334400 (October 26, 2017).
- 26 COA 348231, 350126 (June 11, 2020).
- 27 Standard V(A)(2), SCAO, Michigan Standards of Conduct for Mediators (effective February 1, 2013).
- 28 COA 344121 (January 30, 2020), *lv app pdg*.
- 29 COA 353367 (June 17, 2021).
- 30 COA 353595 (May 27, 2021).
- 31 COA 352681 (May 27, 2021).
- 32 COA 353942 (May 13, 2021).
- 33 COA 353686 (May 13, 2021).
- 34 COA 351764 (January 21, 2021).
- 35 COA 349444, 349976 (January 14, 2021), *lv den ___ Mich ___* (2021).
- 36 COA 352730 (December 10, 2020), *lv app pdg*.
- 37 COA 348315 (November 12, 2020).