LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

Volume 29, No. 2 Summer 2019

MICHIGAN MEDIATION CASE LAW UPDATE

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Arbitrator and Mediator

I. Introduction

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 For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

II. 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

Mediation fee is taxable cost.

Patel v Patel, 324 Mich App 631, 339878 (June 19, 2018). COA affirmed Circuit Court's award of defendants' **mediation expense as a taxable cost** under MCR 2.625(A)(1). "[M]ediator's fee is deemed a cost of the action, and the court may make an appropriate order to enforce the payment of the fee." MCR 2.411(D)(4).

COA affirms enforcement of custody mediation settlement agreement (MSA).

Rettig v Rettig, 322 Mich App 750, 338614 (January 23, 2018). Parties signed MSA concerning custody. Over objection of one parent that Circuit Court should have hearing concerning CCA best interests factors and whether there was established custodial environment, Circuit Court entered judgment incorporating MSA. COA affirmed. COA said although Circuit Court is not necessarily required to accept parties' stipulations or agreements verbatim, Circuit Court is permitted to accept them and presume at face value that parties meant what they signed. Circuit Court remains obligated to come to independent conclusion that parties' agreement is in child's best interests, but Circuit Court is permitted to accept that agreement where dispute was resolved by parents. Circuit Court was not required to make finding of established custodial environment.

MSA stated, "This memorandum of understanding spells out the agreement that we have reached in mediation. This resolves all disputes between the parties and the parties agree to be bound by this agreement."

C. Michigan Court of Appeals Unpublished Decisions

COA reverses Circuit Court dismissal for failure to appear.

Corrales v Dunn, 343586 (May 30, 2019). Circuit Court ordered mediation at Dispute Resolution Center of Western Michigan. Because of communication glitch, plaintiff failed to appear at mediation. Circuit Court dismissed case. COA reversed Circuit Court's dismissal. Dismissal of plaintiff's case after over two years of litigation was manifest injustice.

Custody MSA upheld.

Brown v Brown, 343493 (November 27, 2018). COA said this case is indistinguishable from *Rettig*, 322 Mich App 750 (2018), in which COA rejected challenge to valid judgment of divorce that included custody and parenting-time provision from MSA.

Non-MSA DR prop settlement approved.

Nowak v Nowak, 339541 (August 23, 2018). COA affirmed enforcement of non-MSA settlement agreement. Kidnapping, gun safe, alleged duress and coercion, unconscionable, credibility. Not MSA case. Circuit Court did FOF of situation.

To settle or not to settle?

Smith v Hertz Schram, PC, 337826 (July 26, 2018), **lv app pdg**. COA split decision. Legal malpractice action arising out of post JOD proceeding. Matter went to mediation. Mediator, also served as the "discovery

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master." Plaintiff did not go to Family Court to challenge discovery roadblock. Plaintiff decided to settle.

Jansen dissent said attorney should have advised plaintiff to walk away from $65,000 figure offered in mediation and to return to Family Court to pursue discovery matter further. Settlement should never have been serious consideration. With respect to language in settlement agreement that acknowledged that neither party had relied on any "representation, inducement, or condition not set forth in this agreement," attorney should never have allowed it. The fact that attorney essentially released Leider from future liability for any material misrepresentations made in connection with settlement agreement was negligent. Attorney should have had plaintiff sign a release, indicating it was her intention to enter into settlement agreement despite her counsel's advice to contrary.

Post-MSA surveillance is okay.

Hernandez v State Automobile Mutual Ins Co, 338242 (April 19, 2018). COA reversed Circuit Court's granting of plaintiff's motion to enforce MSA. MSA was signed by plaintiff; however, claims representative for defendant indicated he would need approval from his superiors and Michigan Catastrophic Claims Association (MCCA) before signing agreement. MSA stated **"[t]his settlement is contingent on the approval of MCCA."** MCCA did not approve MSA. Circuit Court did not err in concluding there was meeting of minds on essential terms of MSA. MSA was properly subscribed as required by MCR 2.507(G). MCCA approval of MSA was condition precedent to performance of MSA. Defendant did not waive this condition by conducting surveillance on plaintiff and **submitting reports of surveillance to MCCA.**

Probate MSA not approved.

Peterson v Kolinske, 338327 (April 17, 2018). Probate MSA not approved. MSA indicated only that persons who signed it had agreed to its terms. It did not indicate Theresa agreed to its terms, agreed that the will was valid, or otherwise agreed to release claims against the estate or its personal representative. If contract's language is clear and unambiguous, must construe it according to its plain sense and meaning, without reference to extrinsic evidence. Lessons: **Get everyone's signature. Be careful when necessary people are absent.**

A signature is a signature.

Krake v Auto Club Ins Assoc, 333541 (February 22, 2018), lv dn ___ Mich ___ (2018). "Facilitation Agreement." Plaintiff was present at mediation. She initially denied she had signed MSA. She admitted she did "pen" her signature on MSA. She explained she had signed "fake initials," and she had done so because her attorney told her MSA was not legally binding document. Plaintiff explained she did not believe MSA to be final resolution of case. She believed amount of settlement was too low. Circuit Court enforced MSA. COA affirmed. Lessons: **People are unpredictable. Prepare for the worst. The word "mediation" does not appear in this opinion.**

Party dies after signed MSA but before judgment.

Estate of James E Rader, Jr, 335980 (February 13, 2018), lv dn ___ Mich ___ (2018). After signed MSA in domestic relations case, one of parties **died before entry of judgment**. Because settlement agreement was to be incorporated into judgment of divorce, agreement has no effect, since decedent died before judgment of divorce could be entered. Entry of judgment of divorce served as condition precedent to enforcement of settlement agreement. Because entry of judgment of divorce became impossible following decedent's death, settlement agreement could not be incorporated or given effect as intended. Lesson: **Act quickly.**

Mediation confidentiality.

Hanley v Seymour, 334400 (October 26, 2017). Defendant ex-wife sent to an attorney suing her ex-husband's current wife financial information about current wife and defendant's ex-husband, who happened to be the attorney representing current wife. Plaintiff ex-husband sued defendant for contempt, claiming violation of protective order in their divorce that prohibited parties from disclosing financial information learned during discovery. Defendant argued an unclean hands defense, claiming plaintiff had learned about the contemptuous materials during mediation session and so could not use those materials in contempt proceedings. COA found communications received by attorney from defendant ex-wife were not part of mediation proceedings. Plaintiff ex-husband was made aware of communications at conclusion of mediation in which plaintiff participated with opposing attorney. Opposing attorney had received documents from defendant before mediation was conducted. There was no violation of MCR 2.412(C) regarding confidentiality of mediation communications.

"There are other ways to divide the pie," the mediator suggests.

MSA enforced.

Jaroh v Jaroh, 334216 (October 17, 2017). Defendant moved to set aside MSA, contending she signed MSA under duress because she had no food during nine-hour mediation and was pressured by her attorney and mediator to sign MSA. Circuit Court enforced MSA. Defendant argued MSA was obtained by fraud and Circuit Court abused discretion by failing to set it aside and by failing to hold evidentiary hearing when defendant asserted plaintiff had procured MSA by fraud. COA, affirming Circuit Court, said finding of Circuit Court concerning validity of parties' consent to settlement agreement will not be overturned absent finding of abuse of discretion. *Vittiglio v Vittiglio*, 297 Mich App 391, 400; 824 NW2d 591 (2012), lv dn 493 Mich 936; 825 NW2d 584 (2013). According to COA, defendant's allegation that she did not eat during nine-hour mediation and was pressured to accept terms of MSA by her attorney and mediator did not demonstrate coercion necessary to sustain claim of duress. **Mediator provided parties with snacks.** There was no evidence defendant was refused request to get something to eat or was not allowed to bring in her own food during mediation. Mediation was conducted as **shuttle mediation**. Lessons: **Refreshments can be important. Separate sessions can sometimes be helpful.**

Mediation and domestic violence.

Kenzie v Kenzie, 335873 (August 8, 2017). Attorney fees granted, in part, because husband initiated altercation with wife following mediation at which he called police and accused wife of domestic violence; and he obstructed mediation process that would have allowed case to reach settlement posture.

Spousal support language not in MSA.

Amante v Amante, 331542 (June 20, 2017). Plaintiff argued both counsel and mediator forgot to include

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provision barring spousal support in settlement agreement. Plaintiff argued under plain language of judgment of divorce, dispute regarding provision barring spousal support should have been decided by arbitrator. Under terms of judgment, "any disputes regarding the judgment language" should be submitted to arbitrator. Circuit Court did not abuse its discretion in following settlement agreement and entering judgment and denying plaintiff's motion for relief from judgment.

Binding settlement agreement.

Roth v Cronin, 329018 (April 25, 2017), lv dn 501 Mich 910 (2017). This is not an MSA case. "[S]he understood (1) the terms of the settlement, (2) she would be bound by the terms of the settlement if she accepted it, and (3) she had the absolute right to go to trial, where she could get a better or worse result. She testified she understood the terms and would be bound by the settlement, and had the right to go to trial. Plaintiff further testified that it was her own choice and decision to settle pursuant to the terms that were placed on the record."

Circuit Court Judge not disqualified.

Ashen v Assink, 331811 (April 20, 2017), lv dn 501 Mich 952 (2018). Plaintiff argued Circuit Court judge should have been disqualified because, as mediator over case, he would have had personal knowledge of disputed evidence concerning proceeding. Mediation scheduled for June 11, 2015, was cancelled on June 2, 2015. Judge never actually mediated case. Plaintiff failed to show what personal knowledge, if any, judge had of disputed evidentiary facts concerning proceeding. MCR 2.003(C)(1)(c).

Can Circuit Court appoint a Discovery Master?

Barry A Seifman, PC v Raymond Guzell, III, 328643 (January 17, 2017), lv dn 500 Mich 1060 (2017). Defendant contended Circuit Court lacked authority to appoint independent attorney as Discovery Master and to require parties to pay Master's fees; and Circuit Court should have made determination regarding reasonableness of Master's fees. COA held once parties accepted case evaluation award, defendant lost ability to appeal earlier Discovery Master order. ■