

**Michigan Arbitration and Mediation Case Law Update**  
**Alternative Dispute Resolution Committee**  
**Oakland County Bar Association**  
**February 13, 2024**  
**Lee Hornberger**  
**Arbitrator**

**INTRODUCTION**

This update reviews Michigan appellate decisions issued since September 2023 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the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals (COA) unpublished decisions.

The video of the author’s 2022-2023 update presentation is at:

<https://www.youtube.com/watch?v=I2zY1-1VKE0>

The video of the author’s 2021-2022 update presentation is at:

[www.youtube.com/watch?v=kZpATRMGCcQ](http://www.youtube.com/watch?v=kZpATRMGCcQ)

The video of the author’s 2020-2021 update presentation is at:

<https://www.youtube.com/watch?v=9Q7deVIExDI>

The video of the author’s 2019-2020 update presentation is at:

<https://www.youtube.com/watch?v=I0TkP8zs-A8>

**ARBITRATION**

**Michigan Supreme Court Decisions**

**November 8, 2023, oral argument to Supreme Court on COA, utilizing *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407 (1982), standard, affirming vacatur of labor arbitration award.**

*Mich AFSCME Council 25 v Wayne Co*, 356320 and 356322 (April 21, 2022), **app lv pdg**. In split decision, COA affirmed Circuit Court vacatur of labor arbitration award. On verge of discharge, employee took cash-in retirement. Employee applied for retirement while awaiting outcome of disciplinary action initiated by employer. His retirement application required him to agree to “separation waiver.” The “waiver” stated he was terminating his employment and not seeking reemployment. Defendant terminated his employment following day. Employee allowed his retirement application to proceed, but he also filed grievance pursuant to CBA with employer, seeking

reinstatement of employment. In meantime, County Retirement System approved employee's retirement. Employee thereafter transferred his defined contribution retirement account funds to an IRA. Arbitrator reinstated employee in spite of retirement issues. Circuit Court and COA vacated award in light of retirement issues.

Judge Jansen dissent stated that because arbitrator did not exceed its authority in issuing award, Circuit Court should have confirmed award. Applicability of defenses to arbitration, including waiver, is for arbitrator to decide. Only two issues before arbitrator were (1) whether employee was terminated for just cause, and (2), if not, whether remedy limited to back pay rather than reinstatement. Separation waiver was raised before arbitrator as defense, but not as total bar to reinstatement. Arbitrator properly treated it as affirmative defense. Employer's argument that award was illegal or violated public policy because of possible tax code violations irrelevant.

Top link is two judge decision. Middle link is dissent. Bottom link is COA oral argument.

[https://www.courts.michigan.gov/498579/siteassets/case-documents/uploads/opinions/final/coa/20220421\\_c356320\\_57\\_356320.opn.pdf](https://www.courts.michigan.gov/498579/siteassets/case-documents/uploads/opinions/final/coa/20220421_c356320_57_356320.opn.pdf)

[https://www.courts.michigan.gov/498579/siteassets/case-documents/uploads/opinions/final/coa/20220421\\_c356320\\_58\\_356320d.opn.pdf](https://www.courts.michigan.gov/498579/siteassets/case-documents/uploads/opinions/final/coa/20220421_c356320_58_356320d.opn.pdf)

[https://www.courts.michigan.gov/496f07/siteassets/case-documents/uploads/coa/public/audiofiles/audio\\_356320\\_04122022\\_102538.mp3](https://www.courts.michigan.gov/496f07/siteassets/case-documents/uploads/coa/public/audiofiles/audio_356320_04122022_102538.mp3)

On September 28, 2022, Supreme Court ordered oral argument on application be scheduled. Parties will address: (1) **whether standard in *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407 (1982), applies to labor arbitration cases**, see *Bay City Sch Dist v Bay City Ed Ass'n, Inc*, 425 Mich 426, 440 n 20 (1986), and *Port Huron Area Sch Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150 (1986); and (2) whether Circuit Court erred in vacating arbitrator's awards. **Oral argument was November 8, 2023.**

The November 8, 2023, oral argument is at:

<https://www.youtube.com/watch?v=SmXSv2v0nc8&t=15s>

*Mich AFSCME Council 25* is discussed at Hornberger, "*Michigan AFSCME Council 25 v Wayne Co: the Steelworkers Trilogy, Michigan Family, and Gavin Epic*," *The Michigan Dispute Resolution Journal* (Winter 2023), p. 3.

[https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/TheMichiganDisputeResolutionJournal\\_Newsletter\\_VOL\\_32-NO4\\_WINTER\\_2-23.pdf](https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/TheMichiganDisputeResolutionJournal_Newsletter_VOL_32-NO4_WINTER_2-23.pdf)

**November 8, 2023, oral argument to Supreme Court on COA reversing Circuit Court order denying arbitration.**

***Saidizand v GoJet Airlines, LLC*, 355063 (September 23, 2021), app lv pdg.** Plaintiff brought claims against employer and supervisor under Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*, alleging he was harassed and discriminated against because of his ethnic background and religion. Defendants requested summary disposition, citing arbitration agreement signed by plaintiff when he completed job application. Agreement stated he and GoJet agreed to resolve all claims arising out of application, employment, or termination exclusively by arbitration. Circuit Court denied defendants' motion for summary disposition as to plaintiff's ELCRA claims. COA reversed holding Circuit Court erred by determining whether ELCRA claims were subject to arbitration because under terms of agreement plaintiff and GoJet agreed that arbitrator had authority to determine whether plaintiff's claims subject to arbitration. On June 23, 2023, Supreme Court ordered oral argument on application to address **whether discrimination claims under ELCRA may be subjected to mandatory arbitration as condition of employment under Michigan law**. Cf *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118 (1999), with *Heurtebise v Reliable Business Computers*, 452 Mich 405 (1996). **Oral argument was on November 8, 2023.**

[https://www.courts.michigan.gov/49ef23/siteassets/case-documents/uploads/opinions/final/coa/20210923\\_c355063\\_45\\_355063.opn.pdf](https://www.courts.michigan.gov/49ef23/siteassets/case-documents/uploads/opinions/final/coa/20210923_c355063_45_355063.opn.pdf)

[https://www.courts.michigan.gov/49ef24/siteassets/case-documents/uploads/sct/public/orders/163664\\_52\\_01.pdf](https://www.courts.michigan.gov/49ef24/siteassets/case-documents/uploads/sct/public/orders/163664_52_01.pdf)

<https://www.courts.michigan.gov/courts/supreme-court/cases-awaiting-argument/163664-yaser-saidizand-v-gojet-airlines,-llc/>

The November 8, 2023, oral argument is at:

<https://www.youtube.com/watch?v=efTeoNPnbo8&t=60s>

### **Michigan Court of Appeals Published Decisions**

#### **COA reverses Circuit Court vacatur of labor arbitration award**

***Michigan Dep't of State Police v Michigan State Police Troopers Ass'n*, \_\_\_ Mich App \_\_\_, 363241 (December 28, 2023).** Defendant Union appealed Circuit Court's order denying Union's motion to enforce labor arbitration award, and granting Employer's motion to vacate award. COA reversed Circuit Court and remanded for entry of order enforcing award. Issue was whether award complied with terms of CBA, and

whether Circuit Court substituted its own judgment for that of arbitrator by vacating award. CBA indicated arbitrator had authority to reinstate an employee, reduce length of a suspension, and take any other action necessary to make employee whole after a wrongful discharge or suspension. Nothing in CBA provided that employee charged with or convicted of a crime was subject to automatic discharge. CBA did not indicate arbitrator did not have authority to reduce Grievant’s discipline from discharge to unpaid suspension. Under CBA, arbitrator was given power to determine whether employee was discharged without just cause. Arbitrator concluded Grievant was discharged without good cause and instead determined that unpaid suspension should be imposed. COA held Circuit Court erred by vacating the award.

[https://www.courts.michigan.gov/4b0e1f/siteassets/case-documents/uploads/opinions/final/coa/20231228\\_c363241\\_28\\_363241.opn.pdf](https://www.courts.michigan.gov/4b0e1f/siteassets/case-documents/uploads/opinions/final/coa/20231228_c363241_28_363241.opn.pdf)

### **COA affirms Circuit Court concerning arbitration of WFBA and ELCRA claims**

*Kilpatrick v Lansing Community College*, \_\_\_ Mich App \_\_\_, 361300 (August 22, 2023). COA affirmed Circuit Court ruling that arbitrators lack jurisdiction over claims to which Legislature has granted exclusive jurisdiction to administrative agencies. Because Wages and Fringe Benefits Act (WFBA), MCL 408.471 *et seq*, grants exclusive jurisdiction to the Department of Labor for all WFBA claims, arbitrator was without jurisdiction to consider plaintiff’s WFBA claim. With respect to ELCRA claims properly before arbitrator, although arbitrator made several errors of law, correcting them would not substantially change award.

[https://www.courts.michigan.gov/4a43a0/siteassets/case-documents/uploads/opinions/final/coa/20230822\\_c361300\\_52\\_361300.opn.pdf](https://www.courts.michigan.gov/4a43a0/siteassets/case-documents/uploads/opinions/final/coa/20230822_c361300_52_361300.opn.pdf)

### **Michigan Court of Appeals Unpublished Decisions**

#### **COA affirms Circuit Court confirmation of DRAA award**

*Mann v Whitefield*, 359342 (January 25, 2024). COA affirmed Circuit Court confirmation of comprehensive DRAA award. There was an unsuccessful mediation and then the arbitration. Apparently the domestic violence protocol might not have been done and the appellant argued that this invalidated the award. The COA stated “The plain language of MCR 3.216(H)(2) indicates that **[the domestic violence protocol] applies to mediators during mediation, not arbitrators during arbitration.** ... We found no authority applying the domestic violence screening requirement of a mediator under MCR 3.216(H)(2) to arbitrators.” Emphasis added.

[https://www.courts.michigan.gov/48fd72/siteassets/case-documents/uploads/opinions/final/coa/20240125\\_c359342\\_42\\_359342.opn.pdf](https://www.courts.michigan.gov/48fd72/siteassets/case-documents/uploads/opinions/final/coa/20240125_c359342_42_359342.opn.pdf)

### COA affirms Circuit Court confirmation of award

*UHG Boca, LLC v Medical Mgt Partners, Inc*, 361539 (January 18, 2024). After arbitrator issued final award, plaintiff moved to vacate in part award, asserting arbitrator improperly applied **wrongful conduct rule** when arbitrator refused to enforce the agreements. Plaintiff also argued arbitrator improperly applied **adverse inference rule** when arbitrator concluded, on the basis of adverse inference, that parties were conducting an illegal enterprise. Circuit Court disagreed and confirmed award. COA affirmed Circuit Court.

[https://www.courts.michigan.gov/490365/siteassets/case-documents/uploads/opinions/final/coa/20240118\\_c361539\\_48\\_361539.opn.pdf](https://www.courts.michigan.gov/490365/siteassets/case-documents/uploads/opinions/final/coa/20240118_c361539_48_361539.opn.pdf)

### COA affirms Circuit Court order confirming award

*Quinlan v Gendron*, 363579 (October 26, 2023), **app lv pdg**. COA affirmed Circuit Court order enforcing award and holding that appellant was bound by arbitration agreement. Appellant signed arbitration agreement personally, without disclosing his agency status. *Altobelli v Hartman*, 499 Mich 284; 884 NW2d 537 (2016).

[https://www.courts.michigan.gov/4aaaf5/siteassets/case-documents/uploads/opinions/final/coa/20231026\\_c363579\\_44\\_363579.opn.pdf](https://www.courts.michigan.gov/4aaaf5/siteassets/case-documents/uploads/opinions/final/coa/20231026_c363579_44_363579.opn.pdf)

### COA reversals Circuit Court order ordering arbitration

*Mona v Farm Bureau General Ins Co of Michigan*, 364662 (October 19, 2023). Stipulated order indicated it was not an arbitration agreement, and dismissal of plaintiffs' claims would be contingent upon binding arbitration agreement. Parties never agreed on an arbitration agreement apart from the stipulated order. Circuit Court erred when it ordered parties to select a "neutral" arbitrator because Circuit Court not permitted to read that provision into stipulated order. COA reversed Circuit Court order ordering arbitration.

[https://www.courts.michigan.gov/4a9c3c/siteassets/case-documents/uploads/opinions/final/coa/20231019\\_c364662\\_24\\_364662.opn.pdf](https://www.courts.michigan.gov/4a9c3c/siteassets/case-documents/uploads/opinions/final/coa/20231019_c364662_24_364662.opn.pdf)

[https://www.courts.michigan.gov/4a9c3d/siteassets/case-documents/uploads/opinions/final/coa/20231019\\_c364662\\_25\\_364662c.opn.pdf](https://www.courts.michigan.gov/4a9c3d/siteassets/case-documents/uploads/opinions/final/coa/20231019_c364662_25_364662c.opn.pdf)

### COA affirms Circuit Court confirmation of DRAA award

*Stonisch v Stonisch*, 362982 (September 28, 2023). COA, in affirming Circuit Court, stated reviewing court must accept arbitrator's factual findings and decisions on the merits, and it cannot engage in contractual interpretation because that is reserved for arbitrator. COA concluded that because arbitrator was arguably construing or applying contractual language, there was no basis to vacate DRAA award.

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### **COA affirms Circuit Court denying confirmation in credit union case**

*Perna v Health One Credit Union*, 362472 (September 28, 2023). COA held Circuit Court correctly determined that it lacked subject-matter jurisdiction over plaintiff's request for confirmation of arbitration award because Federal Credit Union Act (FCUA), 12 USC 1751, *et seq*, preempts state law by precluding state trial court from exercising jurisdiction of plaintiff's claim.

[https://www.courts.michigan.gov/4a7f61/siteassets/case-documents/uploads/opinions/final/coa/20230928\\_c362472\\_33\\_362472.opn.pdf](https://www.courts.michigan.gov/4a7f61/siteassets/case-documents/uploads/opinions/final/coa/20230928_c362472_33_362472.opn.pdf)

### **COA affirms Circuit Court confirmation of DRAA award**

*Maczik v Maczik*, 363954 (September 14, 2023). COA affirmed Circuit Court denial of motion to vacate DRAA award because motion to vacate was filed late. MCR 3.602(J)(3). This was even though arbitrator did not meet requirements to be a DRAA arbitrator. MCL 600.5073(2). *Valentine v Valentine*, 277 Mich App 37; 742 NW2d 627 (2007).

[https://www.courts.michigan.gov/4a6267/siteassets/case-documents/uploads/opinions/final/coa/20230914\\_c363954\\_33\\_363954.opn.pdf](https://www.courts.michigan.gov/4a6267/siteassets/case-documents/uploads/opinions/final/coa/20230914_c363954_33_363954.opn.pdf)

### **COA affirms Circuit Court confirmation of award**

*Ortman Commercial Real Estate, LLC v JC Construction, Inc*, 362566 (September 14, 2023). Plaintiffs filed suit alleging breach of contract. Parties stipulated "this matter" would be submitted to arbitration and "Arbitrator's ruling/awards shall be final and finding upon the parties." Arbitration resulted in award in favor of plaintiffs. Circuit Court denied motion to vacate award. COA affirmed. Court does not review arbitrator's factual findings or decision on merits. Nor does court review arbitrator's mental process. *TSP Services, Inc v National-Standard, LLC*, 329 Mich App 615; 944 NW2d 148 (2019).

[https://www.courts.michigan.gov/4a6267/siteassets/case-documents/uploads/opinions/final/coa/20230914\\_c362566\\_49\\_362566.opn.pdf](https://www.courts.michigan.gov/4a6267/siteassets/case-documents/uploads/opinions/final/coa/20230914_c362566_49_362566.opn.pdf)

## MEDIATION

### Michigan Supreme Court Decisions

#### Supreme Court orders oral argument on COA affirming Circuit Court that no settlement agreement

*Citizens Ins Co of Am v Livingston Co Rd Comm'n*, \_\_\_ Mich App \_\_\_, 356294 (September 15, 2022), **app lv pdg, oral argument to be scheduled**. COA held local government can be bound by settlement agreement entered into by its attorney if (1) government later ratifies agreement or (2) attorney had prior special authority to settle claim. Attorney may bind client to agreement if lawyer had “some precedent special authority” to enter into such settlement on behalf of client, even if client is governmental unit. If ongoing discovery related to whether Commission’s attorney had authority from Commission to settle case on its behalf, then, notwithstanding there was no public meeting ratifying agreement, Commission would be bound by settlement agreement. Mediation. Subsequent email negotiations. Attorney-client privilege issue.

[https://www.courts.michigan.gov/4a67f4/siteassets/case-documents/uploads/opinions/final/coa/20220915\\_c356294\\_55\\_356294.opn.pdf](https://www.courts.michigan.gov/4a67f4/siteassets/case-documents/uploads/opinions/final/coa/20220915_c356294_55_356294.opn.pdf)

On March 31, 2023, Supreme Court ordered oral argument on application. Parties shall file briefs addressing: (1) whether material question of fact exists regarding whether parties entered into binding settlement agreement; (2) **whether material question of fact exists regarding whether defendant’s former attorney had authority to approve settlement agreement**; and (3) whether defendant waived attorney-client privilege as to documents related to its former attorney’s authority to settle. **The oral argument will be in March 2024.**

### Michigan Court of Appeals Published Decisions

#### COA affirms Circuit Court concerning bad-faith exercise case

*Kircher v Boyne USA, Inc*, \_\_\_ Mich App \_\_\_, 360821 (November 2, 2023), **app lv pdg**. COA held that when a contract confers discretion on a party, a breach-of-contract action will lie for an alleged bad-faith exercise of that discretion.

[https://www.courts.michigan.gov/4aa8df/siteassets/case-documents/uploads/opinions/final/coa/20231102\\_c360821\\_50\\_360821.opn.pdf](https://www.courts.michigan.gov/4aa8df/siteassets/case-documents/uploads/opinions/final/coa/20231102_c360821_50_360821.opn.pdf)

### Michigan Court of Appeals Unpublished Decisions

#### Was mediation a mandatory condition precedent?

*Knoepp v IHA Health Servs Corp, Inc*, 362282 (September 14, 2023). Mediation clause stated “[b]oth parties agree to act in good faith to preserve and maintain the relationship including the use of mediation and alternative dispute resolution approaches

as needed.” COA indicated that “agree to act” is a promise explaining how parties are expected to act and not a mere condition. Parties promised to act in good faith to preserve employment relationship, including use of mediation and ADR as needed. COA held that this promise created a right or duty, which promise Circuit Court appropriately held defendant breached. But despite the breach of this requirement, the jury did not find any damages. The COA affirmed.

[https://www.courts.michigan.gov/4a626f/siteassets/case-documents/uploads/opinions/final/coa/20230914\\_c362282\\_55\\_362282.opn.pdf](https://www.courts.michigan.gov/4a626f/siteassets/case-documents/uploads/opinions/final/coa/20230914_c362282_55_362282.opn.pdf)

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Lee Hornberger is a member of the National Academy of Arbitrators. He is former Chair of Alternative Dispute Resolution Section of State Bar of Michigan, Editor Emeritus of *The Michigan Dispute Resolution Journal*, former member of State Bar’s Representative Assembly, former President of Grand Traverse-Leelanau-Antrim Bar Association, and former Chair of Traverse City Human Rights Commission. He is member of Professional Resolution Experts of Michigan (PREMi), and Diplomate Member of The National Academy of Distinguished Neutrals. He is Fellow of American Bar Foundation. He is also Fellow of Michigan State Bar Foundation.

He has received Distinguished Service Award from ADR Section in recognition of significant contributions to field of dispute resolution. He has received George N. Bashara, Jr. Award from ADR Section in recognition of exemplary service. He has received Hero of ADR Awards from ADR Section.

He is in *The Best Lawyers of America* 2018 and 2019 for arbitration, and 2020 to 2024 for arbitration and mediation. He has First Tier ranking in Northern Michigan for Mediation by *U.S. News – Best Lawyers® Best Law Firms* in 2022, 2023, and 2024; and Second Tier ranking in Northern Michigan for Arbitration by *U.S. News – Best Lawyers® Best Law Firms* in 2022, 2023, and 2024. He has Second Tier ranking in Northern Michigan for Mediation by *U.S. News – Best Lawyers® Best Law Firms* in 2020. He has First Tier ranking in Northern Michigan for Arbitration by *U.S. News – Best Lawyers® Best Law Firms* in 2019. He is on 2016 to 2023 Michigan Super Lawyers lists for ADR.

While serving with U.S. Army in Vietnam, he was awarded Bronze Star Medal and Army Commendation Medals. The unit he was in was awarded Meritorious Unit Commendation and Republic of Vietnam Gallantry Cross Unit Citation with Palm.

He holds his B.A. and J.D. *cum laude* from University of Michigan and his LL.M. in Labor Law from Wayne State University.

He can be contacted at [leehornberger@leehornberger.com](mailto:leehornberger@leehornberger.com) and 231-941-0746. His website is <https://www.leehornberger.com/> .

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