MICHIGAN ARBITRATION AND MEDIATION CASE LAW UPDATE

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I. INTRODUCTION

This article reviews significant Michigan cases issued since late 2012 concerning arbitration and mediation. For the sake of brevity, this article uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

II. ARBITRATION

A. Michigan Supreme Court Decisions

1. Arbitrator, not MERC, to decide past practice issue.

Macomb Co v AFSCME Council 25, 494 Mich 65 (2013) (Young, Markman, Kelly, and Zahara [majority]; McCormack and Cavanagh [dissent]; Viviano [took no part]). The employer did not commit an unfair labor practice when it refused to bargain with the union over employer's decision to change the actuarial table used to calculate retirement benefits for employees. The unfair labor practice complaints concerned a subject covered by the CBA. The grievance process in the CBA was the appropriate avenue to challenge employer's actions. The arbitrator, not MERC, is best equipped to decide whether a past practice has matured into a new term or condition of employment.

2. Arbitrator can hear claims arising after referral to arbitration.

Wireless Toyz Franchise, LLC v Clear Choice Commc'n, Inc, ___ Mich ___, 825 NW2d 580 (2013) (Young, Cavanagh, Markman, Kelly, Zahra, and McCormack). The Supreme Court, in lieu of granting leave to appeal, reversed Court of Appeals judgment, for the reasons stated in Court of Appeals dissenting opinion, and reinstated

Circuit Court order, denying defendants' motion to vacate arbitration award and confirming the award.

Judge Servitto's dissent in *Wireless Toyz Franchise, LLC*, 303619 (May 31, 2012) (Cavanagh and Fort Hood [majority] and Servitto [dissent]), indicated the stipulated order intended the arbitration would include claims beyond those that were pending because it allowed further discovery, gave the arbitrator the powers of a Circuit Court judge, and stated that the award would represent a "full and final resolution" of the matter. The order did not exclude new claims from arbitration. The parties' intent appears to have been that the arbitrator would determine all claims in the case. Claims that were not pending at the time the order was entered were not outside the scope of the arbitrator's powers.

3. Shareholder arbitration agreement covers discrimination claims.

Hall v Stark Reagan, PC, 493 Mich 903 (2012) (Young, Markman, MB Kelly and Zahra [majority]; Hathaway, Cavanagh and M Kelly [dissent]) The Supreme Court reversed that part of Court of Appeals judgment, *Hall*, 294 Mich App 88 (2012) (Gleicher and Stephens [majority] and Kelly [dissent]), which had held that the matter was not subject to arbitration. The Supreme Court reinstated Circuit Court order granting summary disposition in favor of defendants and ordering arbitration. The dispute in this case concerned the motives of defendant shareholders in invoking the separation provisions of the Shareholders' Agreement. According to the majority, this, including allegations of violations of the Civil Rights Act, MCL 37.2101 *et seq*, is a "dispute regarding interpretation or enforcement of . . . the parties' rights or obligations" under the

Shareholders' Agreement, and was subject to binding arbitration pursuant to the Agreement.

The dissents basically stated that the Shareholders Agreement provided only for arbitration of violations of the Agreement, and not for allegations of discrimination under the Civil Rights Act.

4. CBA just cause provision gives arbitrator authority.

In ***36th Dist Ct v Mich Am Fed of State Co and Muni Employees***, ___ Mich ___ (2012), the Supreme Court, in lieu of granting leave to appeal, reversed that portion of Court of Appeals judgment that reversed arbitrator's award of reinstatement and back pay for the grievants. According to the Supreme Court, MCR 3.106 does not preclude such relief where the CBA has a just cause standard for termination. In ***36th Dist Ct***, 295 Mich App 502 (2012) (Murray, Talbott, and Servitt), the Court of Appeals had ruled that because the CBA did not abrogate the Chief Judge's statutory or constitutional authority to appoint court officers, the arbitrator exceeded his jurisdiction by requiring the Chief Judge to re-appoint the grievants to their former positions.

B. Michigan Court of Appeals Published Decisions

1. Pre-award lawsuit concerning arbitrator selection.

Oakland-Macomb Interceptor Drain Drainage Dist v Ric-Man Constr, Inc, 304 Mich App ___, 2014 WL 4066630 (2014) (Saad and Sawyer [majority]; Jansen [dissent]), is an example of the viewpoint that "[n]o part of the arbitration process is more important than that of selecting the person who is to render the decision[,]" Elkouri & Elkouri, How Arbitration Works (7th ed), p 4-37, and "[c]hoosing an arbitrator may be the most important step the parties take in the arbitration process." Abrams, Inside

Arbitration (2013), p 37. In *Oakland-Macomb Interceptor Drain Drainage Dist*, the American Arbitration Association (AAA) did not appoint a member of the arbitration panel who had the specialized qualifications required in the agreement to arbitrate. The agreement modified the AAA rules by mandating qualifications for the panel and outlining the manner in which AAA must appoint the panel. Plaintiff brought suit against defendant and AAA to enforce these requirements. The Circuit Court ruled in favor of defendant and AAA. The Court of Appeals in a two to one decision reversed.

The issue was whether plaintiff could bring a pre-award lawsuit concerning the arbitrator selection process. According to the majority decision, courts usually will not entertain suits to hear pre-award objections to arbitrator selection. But, when a suit is brought to enforce essential provisions of the agreement concerning the criteria for choosing arbitrators, courts will enforce such mandates.

According to the majority, the agreement to arbitrate made the specialized qualifications of the panel central to the entire agreement; and that, when such a provision to arbitrate is central to the agreement, the Federal Arbitration Act (FAA), 9 USC 1, *et seq*, provides that it should be enforced by the courts prior to the arbitration hearing. "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed … ." 9 USC 5.

According to the majority, a party may petition a court before an award has been issued if (1) the arbitration agreement specifies detailed qualifications the arbitrator(s) must possess and (2) the arbitration administrator fails to appoint an arbitrator that meets these qualifications. Also a court may issue an order, pursuant to § 4 of the FAA, requiring that the arbitration proceedings conform to the terms of the arbitration

agreement. In addition, the majority awarded plaintiff its Circuit Court and Court of Appeals costs and attorney fees.

Judge Jansen's dissent indicated that a party cannot obtain judicial review of the qualifications of arbitrators prior to an award. According to the dissent, there was no claim that the selection of the panel member involved fraud or any other fundamental infirmity that would invalidate the arbitration agreement, or any claim that the appointee had an inappropriate relationship with a party. Although the appointee might not have had the requirements for appointment set forth in the agreement, plaintiff was required to wait until after issuance of the award in order to raise the issue in a proceeding to vacate. 9 USC 10.

C. Michigan Court of Appeals Unpublished Decisions

1. Court of Appeals reverses Circuit Court order to disqualify arbitrator.

Thomas v City of Flint, 314212 (April 22, 2014) (Donofrio and Cavanagh [majority]; Jensen [concurring]. During the course of a pending arbitration, the neutral arbitrator inadvertently sent an e-mail to plaintiff's counsel that was intended for one of the arbitrator's own clients. Plaintiff's counsel then requested the neutral arbitrator to recuse herself and she declined. The Circuit Court granted plaintiff's motion to disqualify the neutral arbitrator. Plaintiff appealed. The Court of Appeals indicated an arbitrator should be disqualified if, based on objective and reasonable perceptions, the arbitrator has a serious risk of actual bias, the appearance of impropriety standard is applicable to arbitrators; and arbitrators are not judges and are not subject to the Code of Judicial Conduct. The unintentional e-mail did not give rise to an objective and reasonable perception that a serious risk of actual bias existed. MCR 2.003(C)(1)(b). The Court of

Appeals reversed the Circuit Court's order granting plaintiff's motion to disqualify the neutral arbitrator.

Judge Jansen concurred in the result. In the concurrence's viewpoint, if plaintiff wished to challenge the neutrality or impartiality of the neutral arbitrator, he was required to wait until after an award was issued and file a motion to vacate. MCR 3.602(J)(2)(b).

2. Court of Appeals reverses Circuit Court vacatur of award.

Hillsdale County Medicare Care and Rehabilitation Center v SEIU, 310024 (April 22, 2014) (Meter, O'Connell, and Shapiro). Plaintiff discharged employee licensed practical nurse because she allegedly used inappropriate language concerning residents. The employer self-reported the situation to the Michigan Department of Community Health's Bureau of Health Systems (BHS). Without interviewing the employee, BHS concluded that "resident verbal abuse was substantiated to have occurred by" the employee. The SEIU took the matter to arbitration. The arbitrator found there was not just cause for the discharge and reinstated the employee with back pay. The arbitrator did not give deference to the BHS conclusion because BHS had not interviewed the employee.

The employer filed a complaint in Circuit Court seeking to have the award vacated on the grounds that reinstating the employee would violate Section 20173a(1) of the Public Health Code. MCL 333.20173a. In effect, the employer argued that the award was inconsistent with the BHS conclusion. Because of the BHS conclusion, the Circuit Court vacated the award.

On appeal, the Court of Appeals indicated that the Circuit Court should have considered the arguments that BHS had denied due process to the employee and had not

complied with its own investigatory requirements. The Court of Appeals reversed the Circuit Court's order and remanded for an evidentiary hearing concerning whether there was a substantiated BHS finding that the employee engaged in abuse and, if so, whether that finding was made pursuant to an appropriate investigation.

3. Court of Appeals reverses Circuit Court confirmation of award.

In ***Rogensues v Weldmation, Inc***, 310389 and 311211 (February 11, 2014) (MJ Kelly, Cavanagh, and Shapiro), defendant appealed Circuit Court judgment confirming an arbitration award. The Court of Appeals held that Circuit Court erred in confirming the award and that defendant did not enter into an arbitration agreement with plaintiff and was not bound by the employment agreement plaintiff had with defendant. Defendant was not required to file a motion to vacate the award under MCR 3.602(J) in order to affirmatively defend against confirmation of the award. Circuit Court erroneously failed to consider defendant's defense that no arbitration agreement existed between plaintiff and defendant before confirming the award. Defendant was not required to arbitrate any dispute plaintiff had with defendant. The arbitrator acted contrary to controlling law and exceeded her authority when she concluded that defendant was bound by plaintiff's employment agreement to arbitrate plaintiff's claim that he was entitled to a severance payment.

4. Court of Appeals affirms Circuit Court vacatur of awards.

In ***AFSCME, Council 25 v Charter Twp of Harrison***, 312541 (January 16, 2014) (Murphy, Donofrio and Fort Hood), the Court of Appeals affirmed Circuit Court's vacatur of arbitration award. The CBA provided, "[i]n the event that either party fails to answer or appeal within the time limits prescribed, the grievance will be considered

decided in favor of the opposite party." The employer failed to answer the grievance within the required time limits, but the award did not decide the grievance in AFSCME's favor. According to Court of Appeals, this was erroneous. The Employer's failure to respond to the grievance within 10 days triggered the CBA's default provision. This required that the grievance be decided in AFSCME's favor. By refusing to apply clear and unambiguous CBA language, the award was beyond the scope of the authority granted the arbitrator under the CBA, and did not draw its essence from the CBA.

5. Arbitrator to resolve factual issues.

In ***Command Officers Ass'n of Sterling Heights v Sterling Heights***, 310977 (December 17, 2013) (Boonstra, Donofrio, and Beckering), the Court of Appeals vacated Circuit Court order vacating a labor arbitration award concerning reduction of work hours. The Court of Appeals indicated that while Circuit Court may disagree with the arbitrator's interpretation of the CBA, and of the interplay between CBA sections, the CBA vests in the arbitrator the authority to render that interpretation. Circuit Court's disagreement with arbitrator's interpretation was not grounds for vacating the award.

6. Cannot compel arbitration by nonsignatory.

Ric-Man Constr Inc v Neyer, Tiseo & Hindo Ltd, 309217 (March 26, 2013) (Stephens, Hoekstra, and Ronayne Krause). The Court of Appeals held that Circuit Court erred by concluding that defendant had the right to compel arbitration between it and plaintiff, based on plaintiff's arbitration agreement with a third entity. The Court of Appeals indicated that, although arbitration is favored by public policy as a means for resolving disputes, arbitration is voluntary, and a party cannot be required to submit to arbitration a dispute which it has not agreed to submit.

7. Arbitration award can be *res judicata* in subsequent lawsuit.

Sloan v Madison Heights, 307580 (March 21, 2013) (Jansen, Fitzgerald and KF Kelly). The Court of Appeals affirmed Circuit Court's ruling that a prior arbitration award was *res judicata* on the issue of whether the City had the unilateral right to change retiree insurance carriers. The grievances were based on CBA language that was substantially similar to the language contained in plaintiffs' CBAs. A substantial identity of interests existed between those retirees represented by the former union and those retirees represented by the present union. Plaintiffs' interests were presented and protected in the arbitration.

8. Arbitrator cannot render "default" award without a hearing.

Hernandez v Gaucho, LLC, 307544 (February 19, 2013) (Jansen, Whitbeck, and Borrello). The parties arbitrated plaintiff's employment termination claim. The arbitrator ruled in favor of the employee. The award was based on the default of employer, who had failed to provide discovery during the arbitration proceeding. The arbitrator did not conduct an arbitration hearing, hear any testimony, or take any proofs. The employee moved to confirm the award and defendants moved to vacate the award. The Circuit Court was concerned by the fact that the arbitrator never took any evidence and there were ex parte communications between the arbitrator and the attorneys. The Circuit Court granted employer's motion to vacate and denied employee's motion to confirm. The Court of Appeals affirmed. According to the Court of Appeals, an arbitrator can hear testimony, take evidence, and issue an award in the absence of one of the parties if that party, although on notice, has defaulted or failed to appear. An arbitrator may not issue an award solely on the basis of the default of one of the parties, but must take sufficient

evidence from the non-defaulting party to justify the award. § 15 of the Uniform Arbitration Act (UAA) provides, even when the arbitrator is entitled to proceed in the absence of a defaulting party, the arbitrator is required to "hear and decide the controversy on the evidence … ." MCL 691.1695(3). The UAA, MCL 691.1681 *et seq*, 2012 PA 371, took effect July 1, 2013.

Rule 31, AAA Commercial Arbitration Rules (October 1, 2013); Rule 29, AAA Employment Arbitration Rules (November 1, 2009); and Rule 26, AAA Labor Arbitration Rules (July 1, 2013), provide that:

> Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made [based] solely on the default of a party. The arbitrator shall require the other party to submit such evidence as may be required for the making of an award.

Rule 12603, FINRA Code of Arbitration for Customer Disputes (April 16, 2007), and Rule 13603, FINRA Code of Arbitration for Industry Disputes (April 16, 2007), provide that:

> If a party fails to appear at a hearing after having been notified of the time, date and place of the hearing, the panel may determine that the hearing may go forward, and may render an award as though all parties had been present.

9. Successor to arbitration agreement must prove that it is successor.

Brown v Morgan Stanley Smith Barney, 307849 (February 19, 2013) (Cavanagh, Sawyer, and Saad). In this customer against brokerage firm case the issue was whether an agreement to arbitrate that customer had signed with a non-party prior brokerage firm inured to the benefit of the defendant brokerage firm. The Court of Appeals found no evidence which definitively explained the relationship, if any, between defendants and

either Smith Barney Inc. or Smith Barney Shearson Inc. Thus, according to the Court of Appeals, defendant brokerage firm was not entitled to an order compelling arbitration. This case shows that if a party argues that an arbitration agreement with another entity inures to the party's benefit, it should have a clear paper trail showing the relationship between the party and the other entity.

10. Effect of union not taking case to CBA arbitration.

Kucmierz v Dep't of Corrections, 309247 (February 12, 2013) (Jansen, Whitbeck and Borrello). Employee brought a lawsuit against employer arguing the termination of employee was improper. The parties stipulated to dismiss the court case so that the entities could go to CBA arbitration between the union and the employer. The union eventually decided not to take the matter to arbitration and there was no arbitration. The employee then moved to set aside the dismissal of the court case. The Circuit Court set aside the dismissal. The Court of Appeals reversed. The employee alleged the parties had the mistaken belief that the union was going to arbitrate the case. The stipulation and order provided that the parties agreed to dismiss the proceeding with prejudice because it was the subject of an agreement to arbitrate. The stipulation did not provide that the matter would actually be arbitrated or that the dismissal was contingent on arbitration occurring. Nothing in the stipulation precluded the union and the employer from reaching a settlement agreement to avoid the arbitration process. The employee failed to show that a mutual mistake occurred and he was not entitled to relief from the dismissal order.

11. Party did not waive objection to arbitration by participating in arbitration.

Fuego Grill, LCC v Domestic Uniform Rental, 303763 (January 22, 2013) (Murray and Shapiro [majority]; and Markey [dissent]), lv den, ___ Mich ___ (2013). The issue in this case was whether Circuit Court erred in concluding that there was not an agreement to arbitrate between the parties. Plaintiff did not waive the issue of arbitrability through participation in the arbitration, as it argued during arbitration that no contract existed and, before the award was issued, it filed a complaint in Circuit Court seeking to preclude arbitration because no contract to arbitrate existed. The absence of a valid agreement to arbitrate is a defense to an action to confirm an award. It is for the court, not the arbitrator, to determine whether an agreement to arbitrate exists.

Judge Markey's dissent concluded that on the basis of Michigan's policy favoring arbitration and because plaintiff's claims were within the scope of the arbitration clause that plaintiff signed, that plaintiff may not relitigate its fact-based defenses in Circuit Court.

12. Three-year limitation precludes claim and arbitration.

Krueger v Auto Club Ins Ass'n, 306472 (January 8, 2013) (Roynane Krause, Servitto, and Shapiro). The arbitration agreement between the insurer and the insured required that an arbitration demand must be filed within three years from the date of the accident or the insurer will not pay damages. Insured did not file an arbitration demand within three years of the accident. Insured argued that the three years did not start until the insurer communicated that it was denying the claim. According to the Court of Appeals, the policy requires that any arbitration demand be filed within three years of the accident, and such language does not bar an insured from filing an arbitration demand in

order to comply with the three year time limitation even if a disagreement has not yet arisen. Therefore the arbitration demand was untimely.

13. Court of Appeals reverses confirmation of award.

Elsebaei v Ahmed, 303623 and 304605 (December 27, 2012) (Meter, Fitzgerald and Wilder). The Court of Appeals reversed Circuit Court order confirming an arbitration award. The Circuit Court had earlier granted plaintiffs' partial summary disposition by finding that defendants owed plaintiffs a duty with regard to plaintiffs' negligence claim. The negligence case then proceeded to arbitration on the remaining issues. The arbitrator ruled in favor of the plaintiffs on these remaining issues. Defendants reserved their right to appeal the earlier "duty" ruling. The decision being reversed by the Court of Appeals was the "duty" ruling of the Circuit Court. There is no discussion concerning arbitration law or the deference to be given an arbitration award.

14. Court of Appeals affirms confirmation of DRAA award.

Cullens v Cullens, 306519 (December 18, 2012) (Hoekstra, Borrello, and Boonstra). The parties had an unsuccessful mediation. The parties then submitted the case to arbitration pursuant to the Domestic Relations Arbitration Act (DRAA), MCL 600.5070, *et seq*, before the same attorney who had been the mediator. The arbitrator rendered an award. Defendant moved to vacate the award. The Circuit Court denied the motion to vacate. The Court of Appeals affirmed the Circuit Court. The Court of Appeals indicated that its review of an arbitration award is extremely limited and that "[a] court's review of an arbitration award 'is one of the narrowest standards of judicial review in all of American jurisprudence.'" *Way Bakery v Truck Drivers Local No 164*, 363 F3d 590,

593 (6th Cir, 2004), quoting *Tennessee Valley Auth v Tennessee Valley Trades & Labor Council*, 184 F3d 510, 514 (6th Cir, 1999).

15. CBA arbitration award did not violate public policy.

Wayne-Westland Community Schools v Wayne-Westland Ed Ass'n, 304486 and 305296 (December 6, 2012) (Jansen, Fort Hood and Shapiro). The Court of Appeals affirmed Circuit Court order confirming a labor arbitration award. The District contended that the award violated public policy established by Michigan law which required the District to hire certified teachers, prohibited the District from hiring noncertified teachers when a certified teacher is available, and placed responsibility for having teaching credentials on the teacher. According to the Court of Appeals, assuming this public policy was well defined and dominant, there were exceptions to this public policy. The Michigan Department of Education had exception rules, including allowing districts to apply for authorization. A district could hire a noncertified teacher when one of those exceptions applied. The award requiring the District pay the employee for the 2009-2010 school year and to determine his eligibility for employment did not violate public policy in light of the exceptions to the hiring of certified teachers and the arbitrator's factual findings.

The District further argued that the arbitrator exceeded her authority by relying on a CBA provision which the Association did not allege the District violated. The Association cited the provision in its post-hearing brief. According to the Court of Appeals, even if the Association had not alleged the provision was violated, the arbitrator was not prohibited from relying on the provision, even if the parties failed to cite the

provision, since the provision was not expressly withheld from arbitration, and CBAs are to be read as a whole.

Furthermore, according to the Court of Appeals, the award drew its essence from the CBA.

16. State did not waive Eleventh Amendment immunity from ADA claim by participating in CBA arbitration.

Montgomery v Dep't of Corrections, 305574 (October 18, 2012) (O'Connell, Donofrio and Beckering). In this case, defendant state appealed Circuit Court's order denying its motion for summary disposition on the basis of sovereign immunity. Because the state did not waive its sovereign immunity defense to employee's claim under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*, by participating in the arbitration of employee's grievance pursuant to the CBA, the Court of Appeals reversed and remanded for further proceedings. The grievance had alleged that defendant violated the CBA by refusing to accommodate the employee's disability. The arbitrator granted the grievance, finding that the employer had violated the CBA.

In addition to the arbitration proceeding, the employee had brought a Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*, and ADA lawsuit against his state employer. Because the employee had not timely requested an accommodation in writing, his state PWDCRA claim failed. The employee argued to the Circuit Court that the arbitrator's finding that the employer had violated the CBA was *res judicata* on the ADA allegations in his court case. The state argued to the Circuit Court that any ADA portion of the award was precluded by Eleventh Amendment, US Const, sovereign

immunity. The Circuit Court's denial of summary disposition with respect to plaintiff's Title I ADA claim was the sole issue in this appeal.

The Court of Appeals held that Circuit Court erred by denying summary disposition for the state because the state did not unequivocally express intent to waive its sovereign immunity with respect to the Title I ADA claim by participating in the arbitration of plaintiff's grievance pursuant to the CBA. The limited purpose of the arbitration was to decide plaintiff's grievance, which alleged CBA violations. The employee's Title I ADA claim had nothing to do with the CBA, and the state's participation in CBA arbitration of the grievance was not an unequivocal expression of intent to waive sovereign immunity concerning the ADA claim.

17. Court of Appeals affirms Circuit Court orders favoring arbitration.

In the following cases the Court of Appeals affirmed orders ordering arbitration or declining to vacate awards. ***Kosiur v Kosiur***, 314841 (April 22, 2014) (Meter, O'Connell, and Shapiro) (DRAA); ***Emrick v Menard Builders, Inc***, 314038 (April 17, 2014) (Borrello, Whitbeck, and KF Kelly) (quiet title and breach of land contract); ***Pugh v Crowley***, 313471 (April 8, 2014) (Donofrio, Cavanagh, and Jansen) (attorney fees); ***Taylor v Great Lakes Casualty Ins Co***, 308213 (September 19, 2013) (Stephens, Wilder and Owens) (automobile insurance); ***Mager v Giarmarco, Mullins & Horton, PC***, 309235 (June 25, 2013) (Jansen, Cavanagh and Markey) (deferred compensation); ***Holland v French***, 309367 (June 18, 2013) (Gleicher and Murphy [majority], O'Connell [dissent]) (employment), lv dn ___ Mich ___ (2014); ***Yacisen v Woolery***, 308310 (May 30, 2013) (Krause, Gleicher and Boonstra) (auto restoration); ***Platt v Berris***, 297292 and 298872 (April 23, 2013) (Owens, Whitbeck and Fort Hood) (firm dispute); ***Derwoed v***

Wyandotte, 308051 (April 16, 2013) (Jansen, Sawyer and Servitto) (CBA); ***California Charley's Corp v Allen Park***, 295575, 295579 (April 9, 2013) (Talbot, Jansen and Meter) (alleged interference with business); ***Herman J Anderson, PLLC v Christ Liberty Ministry***, 307931 (March 14, 2013) (Talbot, Donofrio and Servitto) (attorney fees); ***Haddad v KC Property Service, LLC***, 306548 (February 21, 2013) (Riordan, Hoekstra and O'Connell) ("may" v "shall"); ***Detroit v Detroit Police Officers Ass'n***, 306474 (February 12, 2013) (Jansen, Whitbeck and Borello) (right to interest); ***Suchyta v Suchyta***, 306551 (December 11, 2012) (Wilder, Meter and Gleicher) (DRAA); ***James D Campo, Inc v Trevis***, 305112 (December 4, 2012) (Wilder, Gleicher and Boonstra) (statute of limitations); ***Wendy Sabo & Associates, Inc v American Associates, Inc***, 305575 (December 4, 2012) (Owens, Talbot and Wilder) (real estate commission); ***Rouleau v Orchard, Hiltz and McCliment, Inc***, 308151 (October 25, 2012) (Murphy, Sawyer and Hoekstra) (indemnity); ***Vandekerckhoue v Scarfore***, 301310 (October 11, 2012) (Gleicher, Owens and Boonstra) (attorney fee dispute); ***Bies-Rice v Rice***, 295631, 295634, 300271 (September 4, 2012) (Meter, Fitzgerald, and Wilder), lv den, ___ Mich ___ (2013) (DRAA).

III. MEDIATION

A. Michigan Supreme Court Decisions

1. Supreme Court denies leave to appeal in "pressure to settle" case.

In ***Vittiglio v Vittiglio***, ___ Mich ___; 825 NW2d 584 (2013), the Supreme Court denied leave to appeal from *Vittiglio v Vittiglio*, 297 Mich App 391 (2012) (KF Kelly, Sawyer, and Ronayne Krause). In *Vittiglio* the Court of Appeals had affirmed Circuit Court's holding that the audio recorded settlement agreement at the mediation session

was binding and that "a certain amount of pressure to settle is fundamentally inherent in the mediation process." The Court of Appeals also affirmed Circuit Court's holding that plaintiff was liable for sanctions because plaintiff's motions were filed for frivolous reasons and Circuit Court did not abuse its discretion in awarding costs and attorney fees.

B. Michigan Court of Appeals Published Decisions

There do not appear to have been any Michigan Court of Appeals published decisions concerning mediation during the review period.

C. Michigan Court of Appeals Unpublished Decision

1. Mediation in parental rights case.

In re Vanalstine, Minors, 312858 (April 11, 2013) (Fitzgerald, O'Connell and O'Brien). The Circuit Court ordered the parties to participate in mediation, which resulted in a mediation agreement concerning parental rights to minor children. The mother did not comply with the agreement and the Court terminated her parental rights. The Court of Appeals indicated that contrary to the mother's assertion, the Circuit Court did not terminate her parental rights solely for her failure to comply with the agreement. The Circuit Court's decision was based on the mother's conduct, which included but was not limited to her failure to comply, and which led to the Circuit Court's assessment of the statutory termination factors. The Court of Appeals found it unnecessary to resolve whether a defense of impossibility could render such an agreement void or voidable.

IV. CONCLUSION

Michigan appellate court decisions since late 2012 reviewed the following ADR issues.

1. What issues are for the arbitrator to decide? *Macomb Co, Wireless Toyz Franchise, LLC, Hall, 36th Dist Ct,* and *Command Officers Ass'n of Sterling Heights*.

2. Can there be pre-award court challenge to arbitrator selection process? *Oakland-Macomb Interceptor Drain Drainage Dist* and *Thomas*.

3. Can a non-signatory entity be compelled to arbitrate? *Ric-Man Constr Inc*.

4. Can an arbitration award be *res judicata*? *Sloan*.

5. Does a default award require a hearing? *Hernandez*.

6. Does an alleged affiliate have to prove that it is affiliated with predecessor signatory to arbitration agreement? *Brown*.

7. What can be the result of union not taking case to arbitration? *Kucmierz*.

8. Whether participating in the arbitration is a waiver? *Fuego Grill, LLC* and *Montgomery*.

9. What happens when a limitation period is missed? *Krueger*.

10. Can an award be vacated? *Elsebaei*, *Cullens*, *Wayne-Westland Community Schools*, and *Hillsdale Co Medical Care and Rehabilitation Ctr*.

11. Are mediated settlement agreements enforced? *Vittiglio* and *In re Vanalstine, Minors*.

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