RECENT DEVELOPMENTS IN MICHIGAN ARBITRATION, CASE EVALUATION, AND MEDIATION LAW

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I. INTRODUCTION

This article reviews recent Michigan Supreme Court and Court of Appeal cases concerning arbitration, case evaluation, and mediation law.

II. ARBITRATION

A. *Ex Parte* Submission To Arbitration Panel Inappropriate

In ***Gates v USA Jet Airlines, Inc***, 482 Mich 1005 (2008), the Supreme Court vacated an arbitration award and remanded the case to the Circuit Court because one of the parties submitted to the arbitration panel an *ex parte* submission in violation of the arbitration rules. The submission may have violated MRPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) and 3.5(b) (prohibiting *ex parte* communication with a judge, juror, or other official regarding a pending matter).

B. Preliminary Injunction Vacated - Six to One Decision

Detroit Fire Fighters Ass'n IAFF Local 344 v City of Detroit, 482 Mich 18 (2008), was a public labor law dispute between the Fire Fighters Association and the City of Detroit. The issue was whether the Circuit Court properly issued a preliminary injunction to prevent the implementation of the City's proposed layoff and restructuring plan.

Local 344 contended that the layoff and restructuring plan violated the "*status quo*" provision, MCL 423.243, of the Michigan Compulsory Arbitration of Labor Disputes for Police

and Fire Departments Act, MCL 423.231 *et seq*, by, in part, jeopardizing the remaining firefighters' safety.

The *status quo* provision is violated where the restructuring and layoff plan alters a condition of employment, namely firefighter safety. A Circuit Court must conclude that the employer's challenged plan is so "inextricably intertwined with safety" that its implementation would impermissibly alter the *status quo* by altering this employment "condition." The Circuit Court found that there were issues of fact concerning whether the layoffs would have an impact on the firefighters' safety which is a mandatory subject of bargaining. The Court of Appeals affirmed the Circuit Court. *Detroit Fire Fighters Ass'n v Detroit*, 271 Mich App 457 (2006).

The Supreme Court held that the injunction had been erroneously entered.

The *status quo* provision of Act 312 states that:

> "[d]uring the pendency of proceedings before the arbitration panel, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other but a party may so consent without prejudice to his rights or position under this act." MCL 423.243.

Whether a layoff and restructuring plan jeopardizes employee safety requires a scrutiny of the plan details and a finding that the plan is "inextricably intertwined with safety" such that it would have a "significant impact" on safety. If a Circuit Court concludes that the standards for a preliminary injunction have been met and chooses to issue an injunction, it must promptly decide the merits of the *status quo* claim.

The Supreme Court held that the Circuit Court erred when it issued the preliminary injunction preventing the implementation of the restructuring plan. The Circuit Court, in effect, issued a permanent injunction where the underlying merits of the alleged *status quo* violation

would never be resolved, contrary to the requirements of MCR 3.310(A)(5). The Supreme Court also held that, when a safety claim is alleged, a public employer's challenged action alters the *status quo* during the pendency of an Act 312 arbitration only if the action is so "inextricably intertwined with safety" that the action would alter a "condition of employment."

C. Preliminary Injunction Vacated - Four to Three Decision

Pontiac Fire Fighters Union Local 376 v City of Pontiac, 482 Mich 1 (2008), addressed whether the Circuit Court abused its discretion in issuing a preliminary injunction preventing the City of Pontiac from implementing its plan to lay off Local 376 members.

The Plaintiff filed a complaint in the Circuit Court seeking a preliminary injunction against Defendant's proposed layoffs pending the resolution of an unfair labor practice charge, collective bargaining, or interest arbitration. The Circuit Court granted the preliminary injunction after ruling that the Plaintiff satisfied the four traditional elements for injunctive relief. The Court of Appeals upheld the preliminary injunction in a split, unpublished decision. November 30, 2006 (Docket No. 271497).

The Supreme Court held that the Circuit Court had abused its discretion. The Court concluded that Local 376 had failed to meet its burden of establishing that irreparable harm would result without the injunction. The Supreme Court reversed the Court of Appeals and vacated the Circuit Court order granting the preliminary injunction.

D. Tape Recording of Domestic Relations Arbitration Hearing

In ***Kirby v Vance***, 481 Mich 889 (2008), the Supreme Court, in lieu of granting leave to appeal, reversed the Court of Appeals and held that the arbitrator exceeded the arbitrator's authority under the Domestic Relations Arbitration Act, MCL 600.5070 *et seq*, when the

arbitrator failed to adequately tape record the arbitration proceedings. The Circuit Court erred when it failed to remedy the arbitrator's error by conducting its own evidentiary hearing. The Supreme Court remanded the case to the Circuit Court for entry of an order vacating the arbitration award and ordering another arbitration before the same arbitrator.

E. Parties Covered By Arbitration

The Supreme Court in ***Werdlow v City of Detroit Policemen & Firemen Ret Sys Bd of Trs***, 477 Mich 893 (2006), in lieu of granting leave to appeal, vacated, in part, the Court of Appeals' decision and remanded the case to the Circuit Court for entry of an order granting summary disposition to Defendants. The Court of Appeals correctly held that the Circuit Court lacked jurisdiction to grant the relief requested by Plaintiffs because the Defendant unions were not parties to the arbitration. Section 10, MCL 423.240, of the Michigan Compulsory Arbitration of Labor Disputes for Police and Fire Departments Act, MCL 423.231 *et seq*, provides that arbitration awards are final and binding on the parties.

F. Continued Existence Of Common-Law Arbitration

In ***Wold Architects & Eng'rs v Strat***, 474 Mich 223 (2006), the Supreme Court held that common-law arbitration is not preempted by the Michigan Arbitration Act, MCL 600.5001 *et seq*. Common-law arbitration continues to exist in Michigan. Common-law arbitration agreements continue to be unilaterally revocable before an arbitration award is made.

Statutory arbitration has to comply with the requirements of the MAA, MCL 600.5001 *et seq*, including that the written arbitration agreement provide that the award is enforceable in Circuit Court. With such compliance, a party cannot withdraw from the arbitration process. With common-law arbitration, the arbitration agreement is unilaterally revocable before an arbitration

award is made.

The parties' conduct during the arbitration process of non-written acquiescence in proceeding under arbitration rules that provided for court enforcement did not transform common-law arbitration into statutory arbitration. The agreement to proceed with court enforceable arbitration had to be in writing. The Supreme Court affirmed the Court of Appeals determination that the Circuit Court erred in denying Plaintiff's motion to vacate the arbitration award.

G. Formal Hearing Format Not Required

Miller v Miller, 474 Mich 27 (2005), held that the Domestic Relations Arbitration Act, MCL 600.5070 *et seq*, does not require a formal hearing during arbitration concerning property issues similar to that which occurs in regular trial proceedings.

H. Court of Appeals Confirms Common-Law Arbitration Award

In ***Harleysville Lake States Insurance Co v Kangas***, unpublished opinion of the Court of Appeals, issued April 21, 2009 (Docket No 282500), the Court of Appeals affirmed a Circuit Court's denial of a motion to vacate a common-law arbitration award. The decision held that the Circuit Court erred when it concluded that, with common-law arbitration, the Circuit Court was precluded from considering whether the arbitrator had made an error of law. The Court of Appeals affirmed the denial of the motion to vacate, noting that there was no error of law on the face of the award.

I. Court of Appeals Confirms Labor Arbitration Award

Michigan Association of Police v City of Pontiac, unpublished opinion of the Court of Appeals, issued March 26, 2009 (Docket No 281353), reversed the Circuit Court's vacation of a

labor arbitration award. The grievant, a uniformed police officer was discharged for allegedly filing a false report. The arbitrator found that the report was exaggerated but granted the grievance and reinstated the grievant because of "disparate treatment." The parties agreed that the award drew its essence from the contract. The employer argued that the award violated public policy. The Court of Appeals held that the manual of conduct is not law or legal precedent for the purpose of creating "public policy." The Court also ruled that *Brady v Maryland*, 373 US 83 (1963), is not violated by the reinstatement. The Court indicated, "The public policy of not falsifying police reports will not be weakened by enforcing the ... award as there is no evidence that when reinstated the grievant will falsify a report." The Court of Appeals had issued a similar public policy decision in *City of Pontiac v Michigan Association of Police*, unpublished opinion of the Court of Appeals, issued February 19, 2009 (Docket No 280919).

J. Court of Appeals Approves Probate Arbitration

In a two to one decision, ***Petrovski v Nestorovski***, ___ Mich App ___ (2009), held that probate proceedings are not inherently unarbitrable.

K. Court of Appeals Rules Act 312 Constitutional

In ***Ottawa County v Police Officers Ass'n of Michigan***, 281 Mich App 668 (2008), the Court of Appeals held that Act 312 is constitutional. A 312 arbitrator can award non-economic benefits retroactively.

L. Court of Appeals Approves Non-detailed Arbitration Award

Mehl v Fifth Third Bank, unpublished opinion of the Court of Appeals, issued December 11, 2008 (Docket No 278977), held that the arbitrator did not exceed the arbitrator's authority because the award did not contain detailed findings of fact and conclusions of law, setting forth

the arbitrator's reasoning.

M. Court of Appeals Rejects Arbitration Of Post-CBA Term Grievance

In ***Grand Rapids Employees Ind Union v City of Grand Rapids***, unpublished opinion of the Court of Appeals, issued October 16, 2008 (Docket No 280360), the Court of Appeals held that a Union cannot maintain a right to compel arbitration of grievances where the collective bargaining agreement plainly excludes arbitration of grievances when an administrative action is filed on the same matter.

III. CASE EVALUATION

A. Right to a Hearing for Attorney Fee Amount

Young v Nandi, 482 Mich 1007 (2008), reiterated that the losing party is entitled to a hearing concerning the amount of attorney fees and costs to be assessed because of case evaluation sanctions.

B. Determination of Reasonable Attorney Fee - Four to Three Decision

Smith v Khouri, 481 Mich 519 (2008), reviewed a Circuit Court's award of "reasonable" attorney fees as part of case evaluation sanctions under MCR 2.403(O). The Court held that the Circuit Court should begin the process of calculating a reasonable attorney fee by determining the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence. This number would then be multiplied by the reasonable number of hours expended.

C. Discovery Sanction Dismissal Order Not A "Verdict"

Oram v Oram, 480 Mich 1163 (2008), indicated that case evaluation sanctions are not available when the dismissal order is the result of discovery sanctions rather than a "verdict."

D. Interest On Case Evaluation Sanctions

Ayar v Foodland Distribs, 472 Mich 713 (2005), held that interest begins to accrue on costs and attorneys fees assessed for case evaluation sanctions from the date of the filing of the complaint. MCL 600.6013(8).

E. Appellate Attorney Fees Not Available For Sanctions

Haliw v City of Sterling Heights, 471 Mich 700 (2005), held that attorney fees for case evaluation sanctions do not include appellate attorney fees and costs.

F. Court of Appeals: Summary Disposition Order Is Verdict

In ***Peterson v Fertel***, ___ Mich App ___ (2009), the ultimately prevailing Defendants filed their motions for summary disposition before the case evaluation session and evaluation. The Court granted the motions before the evaluation. Plaintiff did not accept the evaluation, hence rejecting it. After the evaluation, the Plaintiff filed a timely motion for reconsideration which was denied after the evaluation was not accepted. The Circuit Court granted Defendants's motion for case evaluation sanctions because, in its viewpoint, the entry of the order after the evaluation rejection denying the reconsideration of the summary disposition order was a "verdict."

Plaintiffs appealed arguing that the denial of the reconsideration motion was not a "verdict" because the original order granting the summary disposition motions was entered before the evaluation. The Court of Appeals affirmed the Circuit Court's granting of attorney fee sanctions. According to the Court of Appeals, the ruling on Plaintiff's reconsideration motion was a "verdict" within the meaning of the case evaluations rule.

G. Court of Appeals: Stipulated Damage Amount

In ***Tevis v Amex Assurance Co***, ____ Mich App ____ (2009), the parties stipulated the

amount of damages. Only the issue of liability was decided by the jury. The losing party argued that, since the parties stipulated the amount of damages, there was no "verdict" concerning monetary amount and hence case evaluation sanctions could not be granted. The Court of Appeals disagreed and reversed the trial court's denial of evaluation sanctions.

H. Court of Appeals: Party Refuses To Settle As Affecting Sanctions

In ***Moravcik v Trinity Health-Michigan***, unpublished opinion of the Court of Appeals, issued March 24, 2009 (Docket No 281838), both parties rejected the evaluation. The Defendant made no attempt to settle. At trial, the jury returned a no cause of action verdict in favor of Defendant. The Circuit Court denied Defendant's motion for case evaluation sanctions because Defendant had made no attempt to settle. The Court of Appeals reversed. According to the Court of Appeals, the Circuit Court had impermissibly added a restriction that depended on the rejecting party's willingness to settle.

I. Court of Appeals: Statutory Attorney Fees As Affecting "Verdict" Amount

Ivezaj v Auto Club Ins Ass'n, 275 Mich App 349 (2007), held that the award of statutory attorney fees should not be included as part of the "verdict" when determining if a party is liable for case evaluation sanctions. The decision also indicated that, if the case evaluators incorporated statutory attorney fees when determining the valuation, the attorney fees should be considered part of the "verdict."

IV. MEDIATION

A. Confidentiality in Mediation

In ***Detroit Free Press Inc v City of Detroit***, 480 Mich 1079 (2008), the Supreme Court held that the Circuit Court did not abuse its discretion when it dissolved the non-disclosure

provision in its previous order and permitted, with one redaction, the disclosure of the deposition in question.

As indicated in Justice Kelly's concurring opinion, statements made during mediation are confidential. MCR 2.411(C)(5). "Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties." *Id*. Although portions of the deposition testimony recited "statements made during mediation," the City of Detroit did not argue for the redaction of this testimony. Because the City did not argue for redaction, the Circuit Court did not abuse its discretion in not ordering it.

B. Court of Appeals: Mediation Settlement Binding

Miller v Miller, unpublished opinion of the Court of Appeals, issued March 24, 2009 (Docket No 282997), was a domestic relations case. The parties signed a mediated settlement agreement. Plaintiff moved to set aside the settlement agreement arguing that she was tricked by her attorney, she misunderstood the agreement, and the agreement gave the other party an unconscionable advantage. The Circuit Court denied the motion and the Court of Appeals affirmed.

V. CONCLUSION

In conclusion, the Michigan Supreme Court and Courts of Appeal have generally continued to support alternative dispute resolution. This includes: (1) *Miller*, *id*, no formal hearing required in DRAA arbitration; (2) *Harleysville Lake States Insurance Co*, *id*, common-law arbitration awarded confirmed; (3) *Michigan Association of Police*, *id*, award confirmation in face of public policy objection; (4) *Petrovski*, *id*, authorization of probate arbitration; (5) *Ottawa County*, *id*, Act

312 constitutional; (6) *Mehl*, *id*, non-detailed award allowed; (7) *Ayar*, *id*, interest on case evaluation sanction; (8) *Peterson*, *id*, summary disposition is case evaluation verdict; (9) *Tevis*, *id*, stipulated damage amount can be verdict; (10) *Moravcik*, *id*, sanction rights unaffected by refusal to settle; and (11) *Miller*, *id*, mediation settlement binding.

On the other hand, a few decisions have arguably espoused policy principles other than, or in addition to, the alternative dispute resolution process in question. These decisions include: (1) *Detroit Fire Fighters Ass'n*, *id*, and *Pontiac Fire Fighters Union*, *id*, vacating preliminary injunction during arbitration process; (2) *Werdlow*, *id*, parties to arbitration process; (3) *Wold Architects & Eng'rs*, *id*, common-law arbitration unilaterally revocable until award issued,; (4) *Grand Rapids Employees Ind Union*, *id*, post-CBA grievance arbitration; (5) *Haliw*, *id*, appellate attorney fees not available for case evaluation sanctions; and (6) *Detroit Free Press Inc*, *id*, confidentiality in mediation.

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