

MICHIGAN ARBITRATION, CASE EVALUATION, AND MEDIATION 2010-2011 CASE LAW UPDATE

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I. INTRODUCTION

This article supplements "Michigan Arbitration, Case Evaluation, and Mediation Case Law Update," *Labor and Employment Lawnotes* (Spring 2010), <http://www.leehornberger.com/UserFiles/File/ADR-Update-LEL-Lawnotes-Spring2010.pdf> , by reviewing significant case law developments concerning Michigan arbitration, case evaluation, and mediation since early 2010. For the sake of brevity, this article uses a shortened citation style rather than the official style for Michigan Court of Appeals unpublished decisions.

II. ARBITRATION

A. Michigan Supreme Court Decisions

1. Parental pre-injury waivers and arbitration

Woodman ex rel Woodman v Kera LLC, 486 Mich 228; 785 NW2d 1 (2010), was a five (Justices Young, Hathaway, Kelly, Weaver, and Cavanaugh) to two (Justices Markman and Corrigan) decision authored by Justice Young, which held that a parental pre-injury waiver is unenforceable under Michigan common law because, absent special circumstances, a parent does not have authority to contractually bind his or her child. In reaching this conclusion, Justice Young cited *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167; 405 NW2d 88 (1987). In *McKinstry*, a pregnant mother signed a medical waiver requiring arbitration of any claim on behalf of her unborn child. The mother contested the validity of the waiver after her child

was injured during delivery. The Court considered the effect of the Medical Malpractice Arbitration Act, MCL 600.5046(2) (since repealed by 1993 PA 78), which provided:

A minor child shall be bound by a written agreement to arbitrate disputes, controversies, or issues upon the execution of an agreement on his behalf by a parent or legal guardian. The minor child may not subsequently disaffirm the agreement.

In *McKinstry*, the Court held that the statute required that the arbitration agreement signed by the mother bound her child. According to Justice Young, *McKinstry* acknowledged that the arbitration agreement would not have been binding under the common law. He indicated that *McKinstry*'s interpretation of MCL 600.5046(2) was a departure from the common law rule that a parent has no authority to release or compromise claims by or against a child. He indicated that the common law can be modified or abrogated by statute. A child can be bound by a parent's act when a statute grants that authority to a parent. Justice Young believed that MCL 600.5046(2) changed the common law to permit a parent to bind a child to an arbitration agreement.

2. Michigan Supreme Court reopens issue of how may correction motions allowed

Vyletel-Rivard v Rivard, 486 Mich 938; 782 NW2d 502 (2010), granted the application for leave to appeal the Court of Appeals' judgment in *Vyletel-Rivard v Rivard*, 286 Mich App 13; 777 NW2d 722 (2009). The Michigan Supreme Court ordered the parties to address whether the Court of Appeals correctly held that: (1) MCL 600.5078(1) and (3) contemplate no more than two arbitration awards (the initial written award and any modified award following a motion to correct errors and omissions); (2) MCL 600.5078(3) does not permit the filing of more than one motion to correct; and (3) defendant's motion to vacate the award was untimely. In *Vyletel-Rivard*, 286 Mich App 13, defendant had challenged the trial court's order denying his motion to

vacate the arbitration award concerning tort damages in a Domestic Relations Arbitration Act (DRAA), MCL 600.5070 *et seq*, case. The Court of Appeals affirmed the Circuit Court's denial because the Court concluded that defendant's motion to vacate was not timely filed.

The Supreme Court's order renews the issue of whether there can be more than one motion to modify or correct an arbitration award.

B. Michigan Court of Appeals Published Decisions

1. Michigan Court of Appeals affirms denial of motion to modify award

Nordlund & Assoc, Inc v Village of Hesperia, 288 Mich App 222; 792 NW2d 59 (2010) (Owens, Sawyer, and O'Connell), affirmed the Circuit Court's denial of a motion to modify an arbitration award. The Court of Appeals indicated that it must carefully evaluate claims of arbitrator error to ensure that such claims are not being used as a ruse to induce the Court to review the merits of the arbitrator's decision. MCR 3.602(K)(2)(a) allows for modification or correction of an award only when it is based on a mathematical miscalculation, such as addition errors, or an evident mistake in a description. Because plaintiff's alleged error concerned the interpretation of the underlying contract, and not descriptions or mathematical calculations, there was not an evident mistake for MCR 3.602(K)(2)(a) purposes.

C. Michigan Court of Appeals Unpublished Decisions

1. Arbitration remedy may preclude MERC order

Flint v Police Officers Labor Council, 295913 (April 14, 2011)(O'Connell, MF Kelly, and Krause), reversed the order of the Michigan Employment Relations Commission (MERC) in favor of charging parties. Respondent argued that MERC should have dismissed the unfair labor

practices charges on the basis of the arbitration provisions in the collective bargaining agreements. The Supreme Court agreed with respondent that the matter was covered by the arbitration provisions of the CBAs. The Court of Appeals vacated MERC's order and remanded for further proceedings consistent with its opinion. On remand, it is MERC's responsibility to determine if the alleged unfair labor practices should be dismissed.

2. Michigan Court of Appeals reverses vacation of award

WHRJ, LLC v Taylor, 295299 (March 29, 2011) (Wilder, Saad, and Donofrio), reversed the Circuit Court's vacation of an arbitration award. The Court of Appeals held that the letter of credit issue was subject to arbitration and the Circuit Court improperly engaged in contract interpretation.

3. Michigan Constitution trumps collective bargaining agreement

AFSCME Council 25 v Wayne Co, 298655 (March 24, 2011) (Murphy, Stephans, and MJ Kelly), held that under the judicial branch's inherent constitutional authority the Third Circuit Court's judges have the exclusive authority to determine the assignment or selection of a particular court clerk to serve in a judge's courtroom. Promulgation of Local Administrative Order No 2005-06 was a proper exercise of the Circuit Court's authority, and the Circuit Court was not bound by the collective bargaining agreement, or the arbitrator's ruling, on the narrow issue of courtroom assignments. The Court of Appeals ruled that a Public Employment Relations Act, MCL 423.201 *et seq*, *aegis* CBA and arbitration award that encroach on the judicial branch's inherent constitutional powers cannot be enforced to the extent of the encroachment.

4. Michigan Court of Appeals affirms ruling that case is subject to arbitration

Wilson Motors Inc v Credit Acceptance Corp, 295409 (March 22, 2011) (KF Kelly,

Borrello, and Krause), affirmed the Circuit Court order dismissing the court case because the subject-matter of the lawsuit was subject to arbitration. The Court of Appeals held that the Circuit Court did not err when it concluded that plaintiff's claims were subject to arbitration.

5. Federal Arbitration Act does not allow appeal of order to state court

Midwest Memorial Group LLC v Citigroup Global Markets, Inc, 301867 (March 18, 2011) (Whitbeck, Owens, and Borrello), a Federal Arbitration Act, 9 USC 1 *et seq*, case, held that 9 USC 16(a)(1)(B) does not create a right to appeal a state court order denying arbitration to a state appellate court. 9 USC 16(a)(1)(B) only provides for an appeal from an order denying a petition to order arbitration under 9 USC 4. 9 USC 4 only allows for petitions for arbitration to a United States District Court.

6. Michigan Court of Appeals affirms orders declining to vacate awards

Schroeder v Muller Weingarten Corp, 296420 (April 26, 2011) (Servitto, Hoekstra, and Owens); *Smaza v ARS Investments*, 293933 (March 15, 2011) (Sawyer, Markey, and Fort Hood); *Sharonann v WHIC-USA, Inc*, 295800 (March 10, 2011) (Sawyer, Markey, and Fort Hood); *Detroit Police Officers Ass'n v Detroit*, 293510 (February 15, 2011) (Talbot, Sawyer, and MJ Kelly); *Nat'l Environmental Group, LLC v Landfill Avoidance Sys, LLC*, 292454 (January 20, 2011) (Zahra, Talbot, and Meter); *Kulongowski v Brower*, 293996 (November 9, 2010) (Servitto, Zahra, and Donofrio); *Select Construction Co, Inc v LaSalle Group, Inc*, 293143 (November 2, 2010) (Fort Hood, Jansen, and Whitbeck); *Merkel v Lincoln Consolidated Schools*, 292795 (October 19, 2010) (Sawyer, Fitzgerald, and Saad); *Cipriano v Cipriano*, 291377, 292806 (August 10, 2010) (Sawyer, Bandstra, and Whitbeck); *Putruss v Mary A & Edward P O'halloran Trust*, 291160 (August 5, 2010) (Sawyer, Bandstra, and Whitbeck); *EnGenius, Inc v Ford Motor*

Co, 290682 (July 29, 2010) (Shapiro, Jansen, and Donofrio); *lv gtd*, 488 Mich 1052; 794 NW2d 615 (2011); *Realty v MLP Enterprises, Inc*, 289598 (June 17, 2010) (Zahra, Cavanagh, and Fitzgerald); *Gonzalez v Ecopro Recycling, Inc*, 285376 (April 22, 2010) (Bandstra, Borrello, and Shapiro); *Rubenzaer v PHC of Mich, Inc*, 289044 (April 20, 2010) (Jansen, Cavanagh, and KF Kelly); *Crowley v Crowley*, 288888 (April 15, 2010)(Markey, Zahrat, and Gleicher); *Pontiac v Pontiac Firefighters Local 376*, 289866 (March 18, 2010) (Servitto, Bandstra, and Fort Hood); and *Center Line v Police Officers Ass'n*, 289248 (February 9, 2010) (Beckerling, Markey, and Borrello), affirmed Circuit Court orders denying motions to vacate arbitration awards.

7. Michigan Court of Appeals supports award concerning tenure and promotion

Central Mich Univ Faculty Ass'n v Central Mich Univ, 293003 (February 10, 2010) (Borrello, Jansen, and Fort Hood), is a very interesting case involving tenure and promotion. Defendant University appealed the Circuit Court's order that vacated an award denying a grievance regarding grievant's application for promotion and remanding the matter to the arbitrator to consider grievant's application without consideration of the quality of the works submitted for publication. Defendant University argued that the Circuit Court erred in vacating the award denying the promotion grievance and remanding the matter to the arbitrator. The Court of Appeals held that because the promotion award drew its essence from the CBA, the Circuit Court's review of the award ceased, and the Circuit Court erred in vacating and remanding the promotion award.

The Court of Appeals indicated that it was noteworthy that the Circuit Court did not articulate the scope of judicial review of an arbitration award and did not make any statements

indicating that it understood its limited role in reviewing the award. According to the Court of Appeals, the Circuit Court did not grasp the concept of judicial deference in the context of labor arbitration.

Plaintiff Association cross-appealed the portion of the Circuit Court order confirming the arbitrator's denial of the grievance regarding tenure. The Court of Appeals affirmed the Circuit Court order confirming the award denying the tenure grievance.

8. Arbitrator to determine timeliness issue

AFSCME, Council 25 v Hamtramck Housing Comm, 293505 (November 18, 2010) (Murphy, Meter, and Shapiro), held that the determination of timeliness and the defense of laches must be made by the arbitrator in assessing whether a claim is arbitrable.

9. Complaint must be filed to obtain award confirmation

Jaguar Trading Limited Partnership v Presler, 290972 (August 3, 2010) (Swayer, Bandstra, and Whitbeck), held that a complaint must be filed in order to obtain confirmation of an award. Having failed to invoke Circuit Court jurisdiction under the Michigan Arbitration Act by properly initiating a civil action by filing a complaint, plaintiff was not entitled to confirmation of the award. The issue was whether plaintiff, as a party seeking confirmation of an award under MCR 3.602(I) and the Michigan Arbitration Act (MAA), MCL 600.5001 *et seq*, was required to file a complaint in order to invoke Circuit Court jurisdiction. The Court of Appeals held that, because no action was pending between the parties, plaintiff was required to file a complaint to initiate a civil action under the MAA. The Court further held that, pursuant to MCR 3.602(I), since plaintiff had timely filed the arbitration award with the court clerk, the matter was remanded

so that plaintiff could file a complaint in the Circuit Court.

10. Michigan Court of Appeals reverses vacation of attorney fee arbitration award

Joseph Chevrolet, Inc v Hunt, 290882 (June 8, 2010) (Hoekstra, Markey, and Davis), reversed the Circuit Court's order vacating an arbitrator's award of attorney fee to plaintiff in a statutory discrimination case. According to the Court of Appeals, although the Circuit Court claimed the arbitrator "exceeded his power," it was apparent that the Circuit Court simply disagreed with the arbitrator's conclusion that \$270,000 was a reasonable attorney fee. Whether the Circuit Court would have decided the issue differently was irrelevant because courts may not substitute their judgment for that of the arbitrators. According to the Court of Appeals, since the award contained no evident facial error and was within the powers given to the arbitrator, the Circuit Court improperly vacated the award.

11. Individual supervisor not covered by arbitration agreement

In *Riley v Ennis*, 290510 (February 25, 2010) (Fitzgerald, Cavanagh, and Davis), plaintiff brought an employment discrimination case against only his individual supervisor. Defendant moved to dismiss the case because of an arbitration agreement between plaintiff and the non-party corporate employer. The Circuit Court granted defendant's motion and dismissed the action. The Court of Appeals reversed, indicating that although defendant signed the employment contract, the contract specified that he did so "For the Agency." According to the Court of Appeals, a corporation can only act through its officers and agents. Therefore, the arbitration agreement was applicable to the corporate employer but not to the individual supervisor.

12. Arbitration agreement may benefit non-signatory

Lyddy v Dow Chemical Co, 290052 (January 19, 2010) (Kelly, Hoekstra, and Whitbeck), found that the terms of the arbitration agreement, incorporating claims against any entity for whom or with whom GSI had done or might be doing work during the time of employment, precluded plaintiff's suit against Dow. The issue on appeal was whether plaintiff's agreement with GSI required plaintiff to arbitrate his claims against Dow. The Court of Appeals held that, in certain instances, an arbitration agreement may extend to persons who were not parties to the agreement.

III. CASE EVALUATION

A. Michigan Supreme Court Decisions

1. Michigan Supreme Court rules “all other persons” does not always mean “all other persons”

Shay v Aldrich, 487 Mich 648; 790 NW2d 629 (2010), was a four (Justices Weaver, Kelly, Cavanaugh, and Hathaway) to three (Justices Markman, Corrigan, and Young) decision. In *Shay*, case evaluation resulted in a resolution against Allen Park police officers but not against Melvindale police officers. The release document with the Allen Park officers also released “all other persons.” Based on this language, the nonsettling Melvindale officers argued that they were covered by the release with the settling Allen Park officers. The Melvindale officers had rejected case evaluation awards against them; a trial date was set for them; and the Circuit Court had entered a consent order indicating that plaintiff's case was dismissed against the Allen Park officers only. The Melvindale officers remained parties to plaintiff's lawsuit after the Allen Park officers were released. The Circuit Court denied the Melvindale officers' motion. The Court of

Appeals reversed and held that the Melvindale officers were third-party beneficiaries because on its face, the release unambiguously released "all other persons." The Court of Appeals order was an example of how no good deed goes unpunished.

The Supreme Court reversed the Court of Appeals. According to the Supreme Court majority, considering the language of the releases and the extrinsic evidence, it was clear that the settling parties did not include the term "persons" in the releases in order to release the Melvindale officers from liability.

Shay overruled *Romska v Oppper*, 234 Mich App 512; 594 NW2d 853 (1999), to the extent *Romska* precluded the use of parol evidence when an unnamed party asserts third-party-beneficiary rights based on broad language included in a release and an ambiguity exists with respect to the intended scope of the release.

Shay is briefly discussed at *Pitsch v Citizens Ins Co*, 295485 (March 1, 2011) (Owens, Markey, and Meter).

B. Michigan Court of Appeals Published Decisions

1. Information of case evaluation in prior case can be introduced

In *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589; 792 NW2d 344 (2010) (Gleicher, Fitzgerald, and Wilder), plaintiff-appellant argued that the Circuit Court improperly allowed defendants to elicit testimony concerning the settlement of a prior Circuit Court litigation, in violation of MRE 408, and making other "prejudicial" references to the merits of the other litigation. Plaintiff had unsuccessfully moved *in limine* to exclude references to case evaluation

settlements in the prior case. Unfortunately for plaintiff, plaintiff first raised the topic of the prior case evaluation award in its complaint in the case at bar. The Court of Appeals held that since plaintiff had injected the prior case evaluation situation into the present case, its objection to evidence being introduced on that topic was correctly overruled.

C. Michigan Court of Appeals Unpublished Decisions

1. Summary disposition reconsideration order extends time period

In *Meemic Ins Co v DTE Energy Co*, 295232, 296102 (April 7, 2011) (O’Connell, KF Kelly, and Krause), defendants filed their motion for case evaluation sanctions on November 19, 2009, 37 days after the entry of summary disposition, but only 16 days after the Circuit Court denied plaintiff’s reconsideration motion. The Court of Appeals held that when a trial court has entered a summary disposition order that fully adjudicates the entire action, MCR 2.403(O)(8) requires a party to file and serve a case evaluation sanctions motion within 28 days after entry of a ruling on a motion for reconsideration of the order. The Court of Appeals reversed the Circuit Court’s finding that defendants’ case evaluation sanctions motions were untimely. The same outcome was reached in *Meemic Ins Co v Detroit Edison Co*, 295294 (March 17, 2011) (O’Connell, KF Kelly, and Krause).

2. Case evaluation sanctions properly ordered

Hall v Bartlett, 288293, 290147 (March 29, 2011) (Sawyer, Fitzgerald, and Saad), held that, because plaintiff was without fault, Oaklawn and Dr Bartlett were jointly and severally liable. MCL 600.6304(6)(a). Thus, MCR 2.403(O)(4)(b) applied. Because the verdict was more favorable to plaintiff than the total case evaluation against Oaklawn and Dr Bartlett, plaintiff was

entitled to sanctions. MCR 2.403(O)(4)(b). Even assuming *arguendo* that the non-economic damages cap should have been applied to the jury verdict, the verdict would still be more favorable to plaintiff than the total case evaluation against Oakland and Dr Bartlett. The non-economic damages cap was applied to the judgment. That number was more than ten percent higher than Oaklawn and Dr Bartlett's combined case evaluation figure. The Circuit Court properly awarded plaintiff case evaluation sanctions against Oaklawn.

3. Summary disposition order does not stay or stop response period

In *Estate Development Co v Oakland Co Rd Comm*, 291989, 292159, 295968 (March 24, 2011) (Murphy, Stephens, and MJ Kelly), plaintiff appealed the Circuit Court's denial of its motion seeking case evaluation sanctions. The situation was complicated by the history of the case concerning the dates associated with case evaluation, the date of the order granting defendant's summary disposition motion, and the later reversal of that ruling by the Court of Appeals. The issue was whether entry of the order granting defendant's summary disposition motion during the 28 day case evaluation response period excused Defendant from further participation in the case evaluation process and from having to make an acceptance-rejection decision before the response period expired, such that defendant could not be sanctioned after plaintiff's claim was reinstated by the Court of Appeals and plaintiff obtained a more favorable verdict than the case evaluation. Defendant argued it did not have to respond to the case evaluation figure once the Circuit Court granted defendant's summary disposition motion. The Court of Appeals ruled that defendant's obligation to the case evaluation process still existed and that case evaluation sanctions could be awarded against defendant after there was an unfavorable verdict to defendant.

This case raises the question of why did the Circuit Court issue an order granting summary

disposition in the middle of the case evaluation response period? Was it done with the hope or intent of negating the pending case evaluation process?

4. Michigan Court of Appeals says panels operate with limited information and time

Although *Jones v Beacon Harbor Homes, Inc*, 293789, 294550 (March 1, 2011) (Hoekstra, Fitzgerald, and Beckering), did not directly concern case evaluation, the Court of Appeals made the interesting statement that:

Both the trial court and plaintiff cite to the case evaluation award in favor of plaintiff as evidence that plaintiff's claims were meritorious. However, case evaluation panels operate with limited information and time; therefore, evidence of a case evaluation award does not persuasively establish that a claim was not frivolous.

5. Appeal filing does not stay period for filing sanctions motion

Winston v Wayne State Univ, 292287 (December 21, 2010), held that the filing of an appeal does not stay the 28 day period for filing a case evaluation sanctions motion.

6. Denial of sanctions within Circuit Court authority

McDonnell v Colburn, 292601 (October 21, 2010) (Murphy, Beckering, and MJ Kelly), held that the case evaluation rule, MCR 2.403, does not provide that sanctions must be awarded if the monetary relief, apart from the equitable relief, does not result in a more favorable verdict for the rejecting party. Rather, it permits the trial court to award sanctions if (1) the monetary and equitable relief together is not more favorable to the rejecting party and (2) it is "fair" to award the costs "under all the circumstances." MCR 2.403(O)(5). According to the Court of Appeals, MCR 2.403(O)(5) provides that sanctions may be denied even where the relief is not more favorable to

the rejecting party if the trial court determines that the award would be unfair under the totality of the circumstances. The trial court had the discretion to refuse to award sanctions, even if the award met or exceeded the threshold, if it also determined that it would be unfair to award the sanctions. The Circuit Court repeatedly stated that sanctions were not appropriate because both parties overreached and attempted to gain more than they reasonably deserved. The Circuit Court stated that plaintiff's damages expert inflated the damages estimate far in excess of the evidence. The Circuit Court also stated that the parties would have been able to resolve their differences without litigation if they had not allowed their mutual antagonism to overrule reason. Given the facts of this case, the Court of Appeals concluded that the Circuit Court's denial of sanctions did not fall outside the range of principled outcomes.

7. Interest of justice does not exempt Detroit Symphony Orchestra from sanctions

Fowler v Detroit Symphony Orchestra, Inc, 293237 (September 28, 2010) (Murphy, Hoekstra, and Stephens), held that the fact that the Detroit Symphony Orchestra is supported by donations and provides a public service were not unusual circumstances to warrant application of the “interest of justice” exception. MCR 2.403(O)(1). A conclusion that the exception applies because of the philanthropic or beneficial nature of the services provided by a party would eliminate the incentive to settle for many litigants.

IV. MEDIATION

A. Michigan Supreme Court Decisions

There do not appear to have been any Michigan Supreme Court decisions concerning facilitative mediation.

B. Michigan Court of Appeals Published Decisions

There do not appear to have been any Michigan Court of Appeals published decisions concerning facilitative mediation.

C. Michigan Court of Appeals Unpublished Decisions

1. Circuit Court cannot always order mediation

In *Baker v Holloway*, 288606 (January 26, 2010) (Murphy, Jansen, and Zahra), respondent appealed the trial court's order denying her motion to terminate petitioner's ex parte personal protection order (PPO). Instead of receiving a hearing on the merits of whether the PPO should have been terminated, respondent was ordered to mediate her dispute with petitioner. Respondent claimed the Circuit Court erred by requiring her to enter mediation because she was entitled to a prompt hearing on the merits of the PPO. The Court of Appeals held that mediation may not be required as a condition to having a hearing on the merits of a PPO. The Court of Appeals vacated the order denying respondent's motion to terminate the PPO and remanded for an evidentiary hearing to determine whether the PPO should be terminated.

V. CONCLUSION

Michigan appellate courts have issued several potentially important decisions concerning alternative dispute resolution since early 2010. These decisions included:

1. *Vyletel-Rivard, id*, implied that the issue of how many motions to correct errors or omissions can be timely filed is not clear.
2. *Riley, id*, and *Lyddy, id*, emphasized that the precise wording of the arbitration agreement and its signature blocks can impact on who is bound by the agreement.
3. *Shay, id*, signified that the wording of the release in a multi-party case

evaluation acceptance is important and can be a trap in an environment where documents might be interpreted literally rather than holistically.

4. *Baker, id*, clarified that not all cases can be ordered to mediation.

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