

III. ALABAMA MEDIATION CASES

Supreme Court of Alabama

Holcim, Inc. operated a cement manufacturing plant in Theodore, Alabama. Industrial Services of Mobile, Inc. was a general contractor for silo work as of February 21, 2003. On February 23, 2003, Industrial's employee Ronald White fell through a hole from the second level of a silo. On October 2, 2003, White and his wife filed suit in Alabama state court against Holcim and two of its employees alleging negligence, willfulness and wantonness, and a loss of consortium claim. An amended complaint additionally alleged that Holcim acted negligently and/or wantonly in performing duties that it voluntarily undertook and that White was a third-party beneficiary of Industrial's and Holcim's agreement. The agreement provided that Industrial would indemnify and hold harmless Holcim. Holcim demanded that Industrial defend and indemnify it in the White action. Industrial's general liability carrier, First Mercury Insurance Company, appointed counsel to represent Holcim in the White action. Industrial's excess insurer, Ohio Casualty, disclaimed coverage for Holcim's demand of indemnity.

On May 24, 2006, the Whites and Holcim proceeded to court-ordered mediation. Holcim settled with the Whites for \$5 million: First Mercury contributed its policy limit of \$1 million; Holcim itself paid \$1 million; and nonparty Great American Alliance Insurance Company, one of Holcim's excess carriers, paid \$3 million. Ohio Casualty attended the mediation but Industrial did not. Neither Ohio Casualty nor Industrial contributed any funds to the settlement. Approximately one week before the mediation in the White action, on May 18, 2006, Ohio Casualty filed the instant declaratory judgment action in the United States District Court for the Southern District of Alabama against Holcim. Ohio Casualty sought a declaration that it had no duty to defend or indemnify Holcim in the White action under a commercial umbrella policy that Ohio Casualty issued to Industrial for the time period encompassing White's accident. Holcim filed a counterclaim against Ohio Casualty and joined Industrial, seeking to recover all or a portion of the \$4 million paid in the White action. Holcim alleged that Industrial had breached its Agreement to indemnify and hold harmless Holcim by failing to fund the settlement of the White action. In turn, Holcim alleged that Ohio Casualty had breached its contractual obligation by failing to recognize Holcim as an additional insured and by failing to contribute to the settlement. The United States District Court for the Southern District of Alabama, No. 06-00317-CV-WS-M, 2007 WL 2807570, William H. Steele, J., granted summary judgment for contractor and contractor's excess insurer on all claims. Site owner appealed. The United States Court of Appeals for the Eleventh Circuit, 548 F.3d 1352, certified two questions to the Alabama Supreme Court pursuant to Rule 18, Ala. R.App. P., regarding indemnity and combined or concurrent fault and whether the court could look to the underlying tort action to determine application of the indemnification provision. ” Holdings: The Supreme Court, Shaw, J., held that: (1) there is no barrier to an agreement between parties for an indemnitor to provide indemnity

where the indemnitor's own wrongs also contribute to the creation of the obligation, and (2) when determining liability under an indemnity provision, court may look beyond the complaint in underlying action to underlying facts shown by admissible evidence. Certified questions answered. 2009 WL 3805799 (Ala.) 11/13/09 COBB, AND WOODALL, STUART, SMITH BOLIN AND PARKER, concur. MURDOCK, J., concurred specially, with opinion. LYONS, J., concurred in part and concurred in result, with opinion.

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The Georgia firm of Jones, Morrison, Womack & Dearing, P.C. and the Alabama firms of Stokes, Clinton, Fleming & Sherling, and its successor firm, Stokes & Clinton, P.C. and Paul Clinton, Esq., represented SouthTrust in obtaining a judgment against Neal Greene and taking action to collect the judgment for which Green was not legally liable. Green suffered economic harm and the judgment against him was set aside. On June 26, 2001, Greene sued the Bank, but not the lawyers, alleging claims of malicious prosecution, abuse of process, negligence, wantonness, and outrage. On August 28, 2001, counsel for the Bank wrote a letter to Ben Stokes of the Stokes, Clinton firm putting them on notice that it would look to his law firm for indemnity. In April 2002, the Bank filed a motion for mediation, allowing the lawyers to participate without being named as third-party defendants in the action. That motion was granted. The lawyers did not participate in the mediation. On May 31, 2002, the Bank filed a third-party complaint against the lawyers, alleging claims under the Alabama Legal Services Liability Act ('ALSLA'), § 6-5-570 et seq., Ala.Code 1975, and seeking indemnity for any liability that the Bank might have to Greene. In May 2003, the trial court again ordered mediation. On July 25, 2003, the circuit court entered a summary judgment for the Bank on all counts of Greene's complaint except for the malicious prosecution claim. The lawyers moved for a summary judgment on the Bank's third-party claims and attached supporting briefs, arguing that the Bank was not, as a matter of law, entitled to indemnity from them. The Bank moved for a summary judgment on its third-party claims against the lawyers, and Greene moved for a summary judgment on his malicious-prosecution claim against the Bank. Following a hearing at which the trial court heard arguments of the parties, the trial court, on September 24, 2003, entered a summary judgment for the lawyers on the Bank's third-party complaint, and denied the motions by the Bank and Greene for a summary judgment. The court did not state the basis for its rulings. Shortly thereafter, the lawyers informed the mediator that they would not attend the mediation on October 1, 2003. One month later, on the eve of the trial scheduled for Greene's malicious-prosecution action against the Bank, the Bank settled with Greene for \$325,000. The circuit court subsequently dismissed Greene's complaint. The Bank sought two thirds of the settlement amount from the lawyers and filed a notice of appeal with the Court of Civil Appeals from the trial court's summary judgment in favor of the

lawyers on the indemnity issue. The Court of Civil Appeals reversed and remanded. The lawyers filed two different petitions for cert. One writ was initially granted, then quashed with the Supreme Court noting specifically that they did “not agree with the lawyers in this case that they were deprived of notice” of the Bank’s intent to seek indemnity. Further, that even though the lawyers argue that at the time the Bank settled with Green, the lawyers had been granted summary judgment on which they were entitled to rely in declining to participate further in Greene’s underlying action, that the summary judgment in the lawyers’ favor was not final at the time the Bank settled with Green and that no party had requested a certification of finality under Rule 54(b), Al. R. Civ. P. The court wrote: “The lawyers’ argument that they could rely on that judgment in declining to protect their interests by further participating in the case, for example, by attending the October 1, 2003, mediation, is unpersuasive.” On remand to the Mobile Circuit Court, the case proceeded to trial. At the close of the Bank’s case-in-chief, the lawyers moved for a judgment as a matter of law. Although the trial court did not enter a separate written order explaining its basis for doing so, the trial court orally granted the motions. The trial court stated that as to its claims against the lawyers, the Bank had failed to prove by expert testimony the applicable standards of care and that the lawyers had allegedly breached those standards of care. The Bank appealed. In the second round of appellate proceedings, the September 25, 2009 opinion from the Alabama Supreme Court affirmed in part, reversed in part, and remanded. SMITH, COBB, and LYONS, WOODALL, PARKER, MURDOCK, and SHAW, JJ., concur. STUART and BOLIN, JJ., concur in part and dissent in part. (Wachovia Bank and American Casualty v. Jones Morrison & Womack, P.C. et al. 2009 WL 3064785 (Ala.). Not Yet Released for Publication. ***

The Disciplinary Board of the Alabama State Bar, No. 05-225(A), found an attorney guilty of violating rules of professional conduct in regards to filing petition for administration of deceased's estate, which contained the false representation as to the rightful heirs of estate. Attorney appealed. The Supreme Court affirmed. In April of 1999, Robert Jesse Johnson died as a result of injuries he suffered while sitting in scalding hot bath water at the Conaway Boarding Home. Thereafter, Johnson's siblings- Beth Scroggins, Mike Johnson, and Brenda Thread-met with F.L.C. about the possibility of pursuing legal action against the owners of the boarding home. At some point during the meeting, the possibility of filing a wrongful death suit was discussed. F.L.C. informed the siblings that in order to proceed with a wrongful death action, the deceased's father, Robert Percy Johnson, would either have to initiate the suit or waive any and all legal rights relating to the deceased. At the meeting, the siblings informed F.L.C. that Robert Percy Johnson wanted to take action, but was prevented from doing so by his wife, the deceased's step-mother. After the meeting, F.L.C. did not hear from the siblings for an extended period of time. “In late 1999 or early 2000, F.L.C. was contacted by Beth Scroggins who advised him that Robert Percy Johnson had instructed the siblings to pursue a wrongful death action against the boarding home and its owners without his involvement. F.L.C. advised Mrs. Scroggins that he hoped Robert Percy Johnson would

sign a waiver or they would be forced to serve him with process. F.L.C. was subsequently informed that Robert Percy Johnson would not sign a waiver relinquishing his rights as sole heir and did not want to be served with anything. “On or about March 28, 2000, F.L.C. filed a Petition for Administration of an Estate in the matter of the estate of Robert Jesse Johnson. In the Petition for Administration of an Estate, F.L.C. identified Beth Scroggins, William M. Johnson, and Brenda Kaye Thread as the only heirs and next of kin of Robert Jesse Johnson. F.L.C. did not name or identify Robert Percy Johnson, the decedent's father, in the Petition for Administration of an Estate. The Petition for Administration of an Estate was signed under oath by F.L.C.'s client, Beth Scroggins.

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F.L.C. then referred the wrongful death action to attorney Mark Spear. After the initial filing of the Petition for Administration of an Estate, a number of probate proceedings were held. “In October of 2002, the wrongful death claim was mediated. During mediation, Robert Percy Johnson's existence was raised by defense counsel and there was a brief discussion that, technically, he was the sole heir. F.L.C. told Mr. Spear that they probably needed to get a waiver on the record and suggested that he and Mr. Spear ‘just plead him in and prove the waiver.’ The mediation of the wrongful death suit resulted in a settlement of \$150,000. After the mediation and settlement, F.L.C. filed a motion for approval of the settlement with the probate court. Mr. Spear informed F.L.C. that he believed that Robert Percy [Johnson] needed to be listed as the sole heir in the forms accompanying the motion for approval of the settlement. As a result, Robert Percy Johnson was listed as the sole heir in the motion for approval of the settlement [filed on December 4, 2002].

“In February of 2003, Robert Percy Johnson passed away. In March 2003, F.L.C. filed Petition for Order of Distribution. In the motion, F.L.C. argued that Robert Percy Johnson had either waived his status as an heir or that Mr. Johnson's wife was estopped from asserting his status as an heir. Opposing counsel later filed a motion opposing F.L.C.'s claim that Robert Percy Johnson had waived or was estopped from claiming a share of the settlement. Probate Judge Don Davis held a hearing on the matter on October 20, 2003. At that hearing, Judge Davis approved payment of a \$20,000 attorney's fee to F.L.C. after being informed by the parties that Mr. Johnson had been left off the original Petition as an heir. On November 26, 2003, Judge Davis entered an order declaring that Robert Percy Johnson was the sole heir and all proceeds of the wrongful death settlement were to be delivered to his estate. Judge Davis's ruling was appealed and later affirmed by the Alabama Court of Civil Appeals.

“On May 31, 2005, Judge Davis entered a show cause order requiring F.L.C. and Mrs. Scroggins to demonstrate why they should not be held in contempt of court for filing pleadings ‘that contained false information in that they did not disclose in the Petition for Letters of Administration the identity of Robert Percy Johnson ...’ and failed to disclose his existence to the Court until approximately twenty-two months later. F.L.C., Mr. Spear and opposing counsel, met with Judge Davis at his office shortly after the show cause

order was issued. Judge Davis asked F.L.C. if he would be willing to reimburse the estate of Robert Percy Johnson some money to resolve the matter. F.L.C. replied that he would. A few days later, Judge Davis called F.L.C. and opposing counsel into his office and stated that he would cancel the show cause hearing if F.L.C. paid the estate \$1,000 plus [its] expenses in the appeal. F.L.C. later paid \$1,060 to the opposing party. “On August 26, 2005, Judge Davis entered an order accepting the Petition for Final Settlement of the estate of Robert Jesse Johnson. In the order, Judge Davis found that F.L.C. was in contempt for the filing of a known false pleading with the Court and fined F.L.C. \$1,000 for being in contempt of Court. Judge Davis then noted that F.L.C. had already paid the estate \$1,000. F.L.C. and Scroggins subsequently appealed Judge Davis's order to the circuit court.

After the parties entered into a joint settlement agreement, the circuit court vacated Judge Davis's August 26, 2005, order and approved the final settlement of Robert Jesse Johnson's estate.”

On September 6, 2006, the Alabama State Bar (“the Bar”) filed charges against F.L.C. alleging that he violated Rule 3.3(a)(1), Ala. R. Prof. Cond. (“Candor Toward the Tribunal”), and the following subsections of Rule 8.4, Ala. R. Prof. Cond. (“Misconduct”): (a), (c), and (d). The Bar alleged that F.L.C. filed a false petition for the administration of the estate of Robert Jesse Johnson by failing to identify the decedent's father, Robert Percy Johnson, as the decedent's sole heir. Additionally, the Bar alleged that F.L.C. failed to notify the probate court of the existence of Robert Percy Johnson throughout the course of the proceedings in the probate court. On October 4, 2006, F.L.C. answered the charges and moved to dismiss them, arguing that they were barred by the applicable statute of limitations. The Board entered an order on May 24, 2007, denying F.L.C.'s motion to dismiss the charges against him. On April 24, 2008, F.L.C. and the Bar submitted a joint stipulation of facts and exhibits with the Board. On May 8, 2008, each party submitted a brief in support of its position. F.L.C. also moved the Board for a judgment as a matter of law at that time, arguing that the charges filed against him were barred by the applicable statute of limitations. On May 22, 2008, the Board entered an order finding that the charges against F.L.C. were timely filed and that F.L.C. was guilty of violating Rules 3.3(a)(1) and 8.4(a), (c), and (d), Ala. R. Prof. Cond. On November 18, 2008, F.L.C. agreed to accept a private reprimand and to pay restitution of \$10,000. F.L.C. also reserved the right to appeal the sole issue whether the charges filed against him were barred by the applicable statute of limitations.

On appeal, Justice Bolin wrote that F.L.C. had “misrepresented a matter to a court and thereafter continued to conceal the misrepresentation in proceedings before that court. F.L.C. admitted in the joint stipulation of facts that he knew that Jesse's father was the sole heir at law of Jesse's estate. Notwithstanding that knowledge, he prepared a pleading filed in the Mobile Probate Court that he knew to be false. Thereafter, “a number of probate proceedings were held,” and F.L.C. himself never advised the probate court in

any of those proceedings of the misrepresentation he made in the petition that he had prepared, that his client had signed, and that he had filed in the probate court. As stated earlier, the correction of the record came from counsel associated by F.L.C., not F.L.C.” AFFIRMED. F.L.C. v. ALABAMA STATE BAR 1080291 --- So.3d ----, 2009 WL 2841112 (Ala.) 09/04/09 BOLIN, COBB, C.J., and STUART, PARKER, MURDOCK, and SHAW, JJ., concur. LYONS, WOODALL, and SMITH, JJ., concur in the result.

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A&A Drywall Supply Company, Inc., and Chadwick Anderson sued Southland Bank for negligent supervision and training, breach of contract, fraud, negligence or wantonness in connection with its failure to make a loan. Following a jury trial, The Houston County Circuit Court entered judgment for prospective borrowers. Bank and Officer appealed, The Supreme Court Reversed and Remanded. In their application for rehearing, prospective borrowers cited Rule 8, Ala. R. App. P., Court arguing that the fact of mediation and its result are confidential and that the mediation program is supposed to be completely separate from the Court and the Clerk’s offices. A&A and Anderson requested that the members of the Court recuse themselves and appoint a special court to hear the appeal de novo. The application was overruled. The Court explained that Rule 8 does not prohibit a court from merely knowing whether a case was referred to appellate mediation and subsequently reinstated on the appellate docket. Rule 8, rather, prohibits the parties from referencing in their materials filed in the Court whether the appeal was referred to mediation and the outcome of the mediation. Rule 55(d), Ala. R. App. P., in fact, states that the fact that a settlement has or has not been reached as a result of mediation is not to be considered confidential. The Court noted that concern over the lapse of time between the filing of the notice of appeal and the release of the original opinion led it to include an explanatory statement that the case had been referred to appellate mediation. The Court finally noted that no member had access to any confidential information concerning the mediation, such as who took what position, what, if any, offers were made, or who was responsible for the mediation not resulting in a settlement. (Southland Bank v. A&A Drywall Supply Company, Inc., SC, 4/24/09, Per curiam, Cobb, Lyons, Woodall, Stuart, Smith, Bolin, Parker, Murdock, and Shaw concur, Houston County - CV-03-1082, --- So.2d ----, 2008 WL 5195187.)

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Thelma Eckles, an employee of the Morgan County Commission ("the Commission") sued Fort Dearborn Life Insurance Company ("Fort Dearborn") over a policy issued on her husband's life along with the agent that sold the Commission the policy. Fort Dearborn filed a third-party complaint against the Commission. The Commission filed a motion, citing Ala. Code 1975, 6-6-20(b)(2) and Rule 2, Alabama Civil Court Mediation Rules, asking the trial court to require the parties to submit all issues to mediation. The circuit court denied the motion and the Commission petitioned the Supreme Court for a writ of mandamus. Writ of mandamus issued. Ala. Code 1975, 6-6-20, provides that

mediation is mandatory upon motion of any party so long as that party pays the costs of mediation. This is also provided for in Rule 2 of the mediation rules. The circuit court thus exceeded its discretion in denying the Commission's request for mediation. "Although the circuit court has discretion to determine whether to stay any or all of the proceedings during mediation, it does not have the discretion to deny the Commission's motion for mediation." (Ex parte Morgan County Commission (In re: Eckles v. Fort Dearborn Life Insurance Company), 6 So. 3d 1145, SC, 10/10/08, Stuart, Cobb, Lyons, Bolin, and Murdock concur, 6 pages, Morgan Cty. County.)

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On May 22, 2004, Patricia Ann Gann ("Patricia") was fatally injured in an automobile accident in Gadsden in Etowah County. The accident occurred when the vehicle in which Patricia was a passenger was struck by a sport-utility vehicle ("SUV") driven by Hill, an agent of Hill Plumbing. Patricia was taken to Gadsden Regional for emergency care and then, later that same day, was transferred to UAB Hospital. Patricia remained at UAB Hospital until she died of her injuries on June 18, 2004. The charges for Patricia's treatment totaled \$23,817.25 at Gadsden Regional and \$415,229.12 at UAB Hospital. Under § 35-11-370, Ala.Code 1975, the hospitals had an automatic lien for all reasonable charges the hospitals incurred for Patricia's treatment, and each hospital attempted to perfect its lien pursuant to § 35-11-371(a), Ala.Code 1975. Gadsden Regional filed its hospital lien in the Etowah Probate Court on June 23, 2004. UAB Hospital filed its lien on June 30, 2004, in the St. Clair Probate Court and, in February 2005, filed a second lien, this time in Etowah County. A personal-injury action was filed in the Etowah Circuit Court on behalf of Patricia and against Hill, Hill Plumbing, and others seeking past and future medical expenses. Following Patricia's death, the complaint was amended to add a wrongful-death claim and to name David Gann as Patricia's personal representative. This Etowah action was subsequently sent to mediation, and, although neither hospital was a party to the action, the hospitals were invited to the mediation by court order because of their respective liens. All the parties to the Etowah action and UAB Hospital attended the mediation. UAB Hospital eventually withdrew from the process because it was unable to settle with Gann. The remaining parties reached a settlement and reduced their agreement to a memorandum; that memorandum provided: "Following mediation of this cause on November 30, 2005, it is hereby agreed that this action will be settled and the claims against [the Etowah defendants] for wrongful death under the first amended complaint dismissed with prejudice in consideration of the payment of the sum of \$700,000.00. Additional Terms of Settlement: "(1) [Gann] will dismiss all personal injury claims under the original complaint or complaint as amended with prejudice. "(2) [Gann] and his counsel will save and hold defendants harmless from all liens or subrogation claims, including but not limited to UAB Hospital and Gadsden Regional Medical Center and any expense, lawyers fees or costs necessary to defend same. "It is understood and agreed that the foregoing 'additional terms of settlement'

have been agreed upon by the parties with the mediator acting as scrivener. The parties agree to execute such releases and a stipulation of dismissal or other request for a dispositive order as may be appropriate.” The day after the parties reached this agreement, on December 1, 2005, Gann sought, and was granted, an order dismissing with prejudice the personal-injury claims against the Etowah defendants. On December 5, 2005, UAB Hospital moved the Etowah Circuit Court to intervene in the Etowah action. After conducting a hearing, the Etowah Circuit Court denied UAB Hospital's motion to intervene. UAB Hospital did not appeal that decision. Gann eventually signed a pro tanto settlement agreement and release with the Etowah defendants on January 16, 2006 (“the settlement”).

In July 2006, the hospitals filed in the Jefferson Circuit Court (“the trial court”) the present action against the Etowah defendants, alleging that the settlement impaired the hospitals' statutory hospital liens. On January 17, 2007, the hospitals amended their complaint to include the law firm of Cory Watson and Gann because the hospitals were intended third-party beneficiaries of the settlement and that both the law firm of Cory Watson and Gann breached the settlement agreement by failing to satisfy the hospitals' liens. The Gann parties moved the trial court for a summary judgment, arguing that the hospitals had failed to perfect their liens, that the hospitals' liens did not attach to the proceeds derived from a settlement of a wrongful-death claim, and that the hospitals' claims were barred by the doctrine of res judicata.

The trial court entered a summary judgment in favor of the Gann parties “as to the claims for impairment,” finding that “the parties to the settlement in the Etowah Action intended to attribute their settlement and the funds paid, only to the Gann wrongful death claims.” The trial court denied the Gann parties' motion for a summary judgment on the issues of res judicata and the hospitals' alleged failure to perfect their liens. The hospitals appealed.

The Alabama Supreme Court found that because the Gann parties had actual knowledge of the hospitals' liens at the time the Gann parties attended mediation and subsequently entered into the settlement, the hospitals' failure to provide constructive notice under 35-11-371(a), Ala.Code 1975, was immaterial to the validity and enforceability of the liens. Further, the Court found that under § 35-11-372, once a hospital has perfected its lien, no settlement is valid against that lien unless the hospital consents to the settlement.

The Gann parties also argued that even if the hospitals' liens were perfected, they were entitled to choose to dismiss the personal-injury claims and to pursue only the wrongful-death claim. The Alabama Supreme Court found that although a hospital lien does not attach to the proceeds of a wrongful-death claim, under the facts of this case, the hospitals' liens did, in fact, attach to the personal-injury claims. *See* § 35-11-370. The Court reasoned that Gann dismissed the personal-injury claims and released the Etowah defendants “from any and all present and future claims, demands, actions, causes of action, suits, damages, loss and expenses, of whatever kind or nature, for or on account of

anything relating in any manner whatsoever” to the May 22, 2004, accident. Therefore, the Gann parties settled not only the wrongful-death claim, but also the personal-injury claims. The Court found that the settlement was broad enough to encompass the personal-injury claims, and that because the hospitals' liens were perfected by actual knowledge; “no release or satisfaction of any action, claim, counterclaim, demand, judgment, settlement or settlement agreement, or any of them, [is] valid or effectual as against [the hospitals' liens]” unless the hospitals joined the settlement or executed a release of the liens. § 35-11-372, Ala.Code 1975, and the facts were that the settlement was made “in the absence of a release or satisfaction of [a hospital] lien” constitutes a prima facie case of impairment of the hospitals' liens; thus, the hospitals are entitled to institute a civil action for damages on account of such impairment under § 35-11-370.

However, in this case, the Alabama Supreme Court found that the settlement was signed on January 16, 2006, and the hospitals did not file their impairment claim against Cory Watson and Gann until January 17, 2007; therefore, the summary judgment in favor of these two defendants was affirmed because the hospitals' impairment claim against them was not filed “within one year after the date such liability [was] finally determined by [the] settlement[,] release[,] covenant not to sue[,] or by judgment AFFIRMED IN PART; REVERSED IN PART; AND REMANDED. Board of Trustees of the University of Alabama v. American Resources Insurance Company, Inc., 5 So. 3d 521, 9/19/08 (Ala. 2008) Appeal from Circuit Court, Jefferson County, No. CV-06-4216, SEE, COBB, C.J., and LYONS, WOODALL, STUART, BOLIN, PARKER, and MURDOCK, JJ., concur.

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Williams worked as a “switchman” for Railserve, Inc. (“Railserve”), a company that provides railroad switching services. On April 12, 2001, Williams was riding on the rear railcar of a train operating on the grounds of a lumber mill owned by Weyerhaeuser Company (“Weyerhaeuser”) and located in Pine Hill. The train was moving in reverse, and Williams was providing directions over a radio to the engineer operating the train's engine, Alex D. Young, who could not see the rear of the train. As the train neared a road crossing, a truck approached the crossing at a high rate of speed and failed to yield to the train. Williams activated an emergency brake in an attempt to stop the train and avoid a collision with the truck. The emergency brake caused the train to jerk, and Williams was thrown off the train and onto the tracks, where the train rolled over one of his legs, causing significant injury. Williams radioed Young for help, and Young contacted the guard shack at the lumber mill to send medical assistance. Gladys Dobbs, a nurse employed by Weyerhaeuser, responded with an ambulance. Dobbs later completed an occupational-injury report and recorded that the accident was reported at 8:05 p.m. On February 13, 2003, Williams sued Billy Barnes. In his complaint, Williams alleged that the truck that failed to yield and thereby contributed to the accident was owned and operated by Billy Barnes.

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In April 2004, counsel for Billy Barnes sent a proposed nonparty subpoena to counsel for Railserve, requesting worker's compensation documents relating to Williams's accident including, among other things, any statement obtained from Williams. In August 2004, counsel for Billy Barnes requested additional information not found in the worker's compensation documents, including whether anyone had obtained a statement from Williams. Williams was deposed in December 2004, and he testified that he had given no statement regarding the accident. Williams gave a detailed description of the truck that failed to yield at the crossing, stating that he was able to read the words "Billy Barnes Trucking," which were written in white and red letters. Williams further testified that the accident occurred sometime between 6:15 p.m. and 7:00 p.m. Williams stated that he could not immediately contact anyone on the radio for help, and that a period of time passed before he received any aid. Williams further stated that he first told someone that a Billy Barnes truck was involved when Rick Delloma-a Railserve employee-and an "insurance person" visited him at the hospital after the accident. Williams was then asked: "Q: ... Have you given any kind of verbal statement to anybody, that was recorded to your knowledge, about what happened?" Williams answered: "No." In June 2005, Railserve was served with subpoenas by Billy Barnes to disclose any statements or reports concerning the accident. In a letter dated July 20, 2005, counsel for Railserve responded to the subpoenas and indicated that he was "not aware of any non-privileged documents" that had not already been produced. Billy Barnes filed a motion to compel, seeking production of the privilege log. The trial court held a hearing on the motion on August 8, 2005. Counsel representing both Marmon and Railserve stated in open court that they were not aware of any such statements and that they had been told that none existed. Nevertheless, the trial court explicitly ordered Marmon and Railserve's counsel to turn over a privilege log and any recorded statements: "If there are any recorded statements ... if there are statements taken, if there is anything done ... in the way of an investigation of this accident, then I would require that those things be produced.... If somebody has been tape-recording conversations, and I require that the tape-recorded conversation be produced" Billy Barnes received a privilege log from counsel for Marmon and Railserve on August 9, 2005. On August 11, Billy Barnes filed two motions asking the trial court to compel production of certain materials listed on the privilege log, including a "Memo to the File" authored by Delloma regarding his investigation of the accident. Billy Barnes also filed a general request to compel Marmon to produce any statements relating to Williams's accident. Trial was scheduled to start on August 29, 2005. On August 19, 2005, the parties held a mediation conference. On August 22, a conference call was held with the parties and the trial court, during which Billy Barnes again argued its motions to compel. Billy Barnes's counsel "received the Memo to the File via facsimile at approximately 3:00 p.m. on August 22. There was no mention of any recorded statement having been taken from Mr. Williams...." Later that day, Billy Barnes and Williams agreed to a settlement in the amount of \$500,000. On August 23, 2005-the next day-counsel for Marmon and Railserve contacted Billy Barnes and indicated that

two audiotapes of recorded statements had been located and were being transcribed. On August 25, 2005, Billy Barnes received transcripts of recorded statements by Young and by Williams. In Williams's statement, which was apparently taken on April 18, 2001, several days after the accident, Williams stated: (1) that he was aware that his statement was being recorded and that it was being recorded with his permission; (2) that the accident occurred "close to 8:30"; and (3) that when he looked at the truck that caused the accident he "couldn't see a name" written on it.

On September 7, 2005, Billy Barnes filed a motion to set aside the settlement agreement and to restore the case to the trial docket. Williams filed an opposition to the motion to set aside, which moved the trial court both to enforce the settlement agreement and to order sanctions against Billy Barnes and its counsel. The trial court held a hearing and on September 30, 2005, denied the motion to set aside the settlement agreement. On October 7, 2005, the trial court granted Williams's motion to enforce the settlement agreement, holding that Williams did not commit fraud and that the settlement agreement was binding and enforceable. The trial court then entered a judgment in favor of Williams in the amount of \$500,000, the amount of the settlement. Billy Barnes appealed. The Supreme Court Reversed and Remanded finding that the defendant was entitled to rescind the settlement agreement due fraud.

In the main opinion, the Alabama Supreme Court found that at "the point in time at which the settlement agreement was ultimately executed in mediation on the eve of trial- Billy Barnes had taken every measure to ensure that Marmon or Railserve would produce any statement that either possessed. Indeed, it appears that no further legal process was available to Billy Barnes to require Marmon or Railserve to comply with the trial court's direct and explicit orders to produce such a statement. Billy Barnes had no cause to believe that Marmon or Railserve failed to comply with the trial court's discovery orders, and Billy Barnes possessed no other source of information that could demonstrate that Williams had given a statement. The fact that no statement was produced, coupled with Williams's testimony that he had given no statement, supports Billy Barnes's argument that, *at the time it entered into the settlement agreement*, it reasonably believed Williams's representation that no statement existed."

In the concurring opinion, Justice Murdock wrote "I can draw no conclusion other than that Williams committed intentional fraud. He noted "there is ample evidence affirmatively indicating that Williams intended to deceive Billy Barnes not only as to the existence of a prior recorded statement, but also as to the circumstances surrounding the accident." Further, he noted "that Williams's coworker, Alex Young, initially testified in an affidavit that the accident at issue occurred at approximately 8:00 p.m. In his June 30, 2005, deposition, however, after Billy Barnes had presented evidence that the last of its trucks left Weyerhaeuser's facility at 6:37 p.m., Young recanted his statement that the accident occurred at approximately 8:00 p.m." Further, "In his brief to this Court, Williams argues that he gave his prior recorded statement while under stress and while

under the influence of pain medication. He makes no such argument as to Young's recanted affidavit testimony.”

In Justice Cobb’s dissent, she wrote: “In order to establish a fraud claim, Billy Barnes was required to prove each of four elements: (1) a false representation (2) of a material existing fact, (3) reasonably relied on by the claimant, (4) who suffered damage as a proximate consequence of the misrepresentation . . . In this case, the trial court, sitting as the trier of fact in the hearing on the motion to set aside the settlement agreement, determined that Billy Barnes did not reasonably rely on the deposition testimony given by Williams. *Billy Barnes Enterprises v. Williams*, 982 So. 2d 494, (Ala.). 9/28/07 Circuit Court, Wilcox County, No. CV-03-18 Smith, J., SEE, LYONS, STUART, BOLIN, and PARKER, JJ., concur. Woodall, J., concurred in the result. Murdock, J., filed an opinion concurring in the result. Cobb, C.J., filed a dissenting opinion.

* * *

In a construction contract between the Fains and Dark Alexander & Company, Inc. (“Dark”), dated July 26, 2001, Dark agreed to serve as general contractor for the construction of a “lake house” for the Fains in Equality. Subsequently, Dark subcontracted the project to various entities, including Barber and Framco. Dark hired Framco for the framing and siding work, and it entered into an oral agreement with Barber to insulate the house. By February 12, 2002, the house was completed. On January 25, 2003, a water pipe located in a wall of the house froze, burst, and flooded the interior of the house, causing approximately \$63,500 in damage. CIC paid the Fains under the homeowner's insurance policy and sued Dark, Barber, and Framco, seeking to be subrogated to the rights of the Fains for approximately \$63,500. CIC settled its claims against Dark. Framco filed a motion alleging that CIC had agreed during a mediation session to settle its claims against Framco for \$1,000 and seeking an order enforcing the alleged settlement agreement. The trial court granted both motions. On appeal, CIC contended that the trial court erred in concluding that a valid and enforceable settlement agreement existed between it and Framco, and, consequently, in enforcing the alleged agreement. The Supreme Court of Alabama reversed and remanded the case on this issue (affirming others). Justice Woodall cited statutory authority and precedent in reaching the conclusion that the alleged agreement did not comply with Ala.Code 1975, § 34-3-21 and was thus unenforceable as a matter of law. “An attorney has authority to bind his client, in any action or proceeding, by any agreement in relation to such case, *made in writing, or by an entry to be made on the minutes of the court.*” *Cincinnati Insurance Companies v. Barber Insulation, Inc.*, 946 So. 2d 441 (Ala. 2006). 6/9/06 The Circuit Court, Coosa County, No. CV-03-46, Woodall, NABERS, C.J., and LYONS, SMITH, and PARKER,

* * *



ADOT needed to acquire certain rights in various parcels of privately owned property to complete a highway project known as Corridor X, designed to link Birmingham, Alabama, and Memphis, Tennessee. The parcel involved in this case contains approximately 120 acres and is located in Marion County, Alabama. The "Pearce Estate" owned the surface of the land; an investment group that owns property consisting of both surface land and mineral rights, owned the mineral estate to the 120 acres. The mineral estate, which the parties stipulated contains 374,000 tons of surface coal, is the subject of this dispute. Land Energy, Ltd. brought an inverse-condemnation action against the Alabama Department of Transportation.

After court-ordered mediation was unsuccessful, the jury found ADOT liable for inverse condemnation and awarded LE \$650,000 in compensatory damages; the court entered a judgment on the verdict. ADOT appealed arguing that its motion for a Judgment as a Matter of Law should have been granted, or, alternatively, that a new trial should be ordered because the trial court erred in various evidentiary rulings. The Alabama Supreme Court Affirmed. Relying on Rule 11 of the Alabama Civil Court Mediation Rules, ADOT characterized the charts and tables, created by Dr. McCarl, illustrating the location of the coal within LAND ENERGY's mineral estate and reflecting the total area, weight, and possible value of the coal within LAND ENERGY's mineral estate as: "the sole purpose of these documents was to facilitate a compromise and settlement of this case through mediation." and maintained that they were wrongfully admitted into evidence at trial. The record reflects that during ADOT's direct examination, the following occurred: Counsel - Have you come to an opinion as to whether or not the coal on the tract could be economically recoverable?- Yes - And how did you do that? - we looked at the geological information - did some drawing - put down to verify - looked at the high walls on the sides of the of the tract that have already have been indicated in the testimony so far. We went out there and actually looked at them - the drill hole information gave us how much rock there was over the coal. There's no question that there was coal there. It just was too deeply buried. During cross-examination of Dr. McCarl, counsel for LAND ENERGY showed him two of the tables and elicited from him, without objection, numerous details concerning the contents of the tables, relating to data relevant to Dr. McCarl's previous opinion testimony. During sidebar, ADOT stated "I don't remember that having been prepared for litigation. I will not say with contrary opinion what it was. We did prepare some documents for mediation to show positions. And if that was one of them, then we would certainly object to it appearing in this case. " "[Counsel for LAND ENERGY]: ... What I told [ADOT counsel] is when we started this case is, that I- we would be straight up with him. We would give him our coal reserves. I gave him our coal reserves, and then he invoked the right to - the privilege on any state stuff, make anything available. At mediation, I told [ADOT counsel] that I was disappointed that he had taken the position that every single thing that his experts did, he was going to argue confidentiality or privilege on where I had made a good faith proposal to him, trying to get this case settled early, gave him my coal reserves, a very

conservative estimate, and he then provided me with that. That is how I recall that I obtained those documents. "[Counsel for ADOT]: Okay. "[Counsel for LAND ENERGY]: But the document doesn't reveal anywhere on there about mediation or what was said - "[Counsel for ADOT]: But if it was prepared for that and we came to mediation to deal and to accept for mediation a position that was different from our answer and different from today, I don't - I don't think mediation is the place for that. We came - and if that's what took place, I don't think it should be - ".... "[The Court]: It has on here, see drill logs. There have been some drill logs admitted. I don't know if those are the ones that are referenced here. "[Counsel for LAND ENERGY]: They used three drill hole logs that [LAND ENERGY] had done. And they had two drill holes of their own. "[The Court]: But have all the drill logs or holes, has all that been admitted into evidence? "[Counsel for LAND ENERGY]: It has. "[The Court]: Okay. So it looks, to me, like [Dr. McCarl] is getting this from the drill log. "[Counsel for ADOT]: Let me ask something. Did you furnish this to me as part - of your [pretrial] disclosure? "[Counsel for LAND ENERGY]: Yes, I did." (Emphasis supplied.) The next morning counsel discussed the matter further with the court: "[Counsel for LAND ENERGY]: Your honor, I think we have one matter to take up beforehand. [The tables] are reports done by Dr. McCarl on April 18, about a week after his deposition. They were produced to me. I had an outstanding request of production for all of his reports regarding valuations. [Counsel for ADOT] gave these to me at the conclusion of the mediation after I discussed with him that I thought we had a gentlemen's agreement that we would swap valuation reports and try to get this case settled early. He never, at any time, said this is the subject of mediation or this is only - he gave me his expert's reports and some kind of compromised format. I assumed he was making good on his earlier promise and his - and my outstanding discovery request. ... ".... "[The Court]: Okay. Go ahead. What is your objection going to be? "[Counsel for ADOT]: My objection was that they were furnished in an attempt to come to a compromise at mediation and not that they would be any different in any numbers, but, they were done with respect to compromise an attempt at it. And if he wants to - you said yesterday that the documents wouldn't be admitted, but you could ask - he could ask the questions. I would like that. "[Counsel for LAND ENERGY]: ... I've gone back - we didn't mediate this case until June 15. You know, these are the expert reports I had been waiting on from my outstanding discovery request. There was never any these are just solely for med"[The Court]: My main concern is when [Dr. McCarl] said that, I did not want any - him to testify as to any mediation proceedings. I mean, you know - "[Counsel for LAND ENERGY]: And we won't ask him about that. "[The Court]: And I'm going to caution you [apparently addressing Dr. McCarl] with any - don't refer to mediation when you're - if it - in any of your answers." (Emphasis supplied.) Earlier Dr. McCarl had begun to state in the presence of the jury that he had prepared one of the tables for mediation, but counsel for ADOT cut him off with an objection before he could answer. When Dr. McCarl later attempted to broach the subject again, the trial judge cut him off, advising, "Your attorney, he's spoken." In its

briefs, ADOT acknowledged that LAND ENERGY would have been entitled to elicit the contents of the tables under Rule 705, Ala.R.Evid., "Disclosure of Facts or Data Underlying Expert Opinion": Under this state of the record (given the exclusion of Dr. McCarl's attempts to speak to the issue), it is not clear that the tables were prepared solely for the mediation. Counsel for LAND ENERGY understood that the tables were provided by ADOT's counsel "at the conclusion of the mediation," in response to LAND ENERGY's preexisting discovery requests. Thus, it has not been shown that the trial court exceeded its discretion in allowing the tables prepared by Dr. McCarl into evidence. AFFIRMED See, Brown, Woodall, and Stuart, JJ., concur. Alabama Department of Transportation v. Land Energy, Ltd., 886 So. 2d 787 (Ala. 2004). 2/6/04. Appeal from Montgomery Circuit Court (CV-00-777) HARWOOD, Justice.

* * *

After a divorce, the wife submitted to the husband seven credit card bills for him to pay. The husband refused to pay any of the bills, and the wife subsequently filed a "Motion for Rule Nisi," which alleged in pertinent part: "The Plaintiff would show under Paragraph Fifteen of the Judgment of Divorce, the balances on deposit in the Compass Bank savings accounts were to be expended to pay off the following accounts as each account existed on September 1, 1997:(1) the Plaintiff's individual Visa account, (2) the parties' joint Visa account, and (3) the Discover account. The Plaintiff has furnished the attorney for the Defendant statements for each of these businesses but the Defendant has failed and refused to make the payments as ordered in Paragraph Fifteen." (C.R.41.) Answering this allegation, the husband alleged: "Denied. During mediation in determining payment of bills, the Plaintiff disclosed the existence of two (2) Visa accounts, one joint and one personal, with a combined balance of approximately \$10,000. The Plaintiff was repeatedly asked if all obligations and amounts had been disclosed and the Plaintiff advised that all had been disclosed. Subsequent to the divorce the Plaintiff delivered seven (7) bills to Defendant's attorney as follows: Compass Visa \$1,270.98, Wachovia \$2,995.69, Visa Southtrust \$5,011.59, Visa \$3,468.71, Visa Bank America \$4,833.29, Visa Advanta \$3,516.898, and First Card \$6,049.61 for a total of approximately \$27,146.75. In addition to the unexpected number and amount, the top portion of the bills was removed making it difficult to determine which was the 'joint' account and which was the 'individual' account. Also, the bills showed charges past the September 1 cutoff date. In addition the Discover card bill was delivered with the top portion missing so no address was provided for payment. Also, the balance of the Discover card was represented at the mediation as being \$2,000 and the September balance was \$6,913.55." (C.R.46.) The husband asserted further that he "cannot pay all the bills until it is determined which two of the seven Visa Bills are to be paid and until an address for Discover is provided." (C.R.16-17.) The trial court then conducted a hearing to determine whether paragraph 15 of the divorce judgment required payment of the additional debts submitted by the wife from the parties' savings account or brokerage

account. At the hearing, the mediator who presided over the parties' settlement negotiations testified that one of the objectives of the negotiations was for the wife to be debt free after the divorce. He testified also that *only two Visa accounts* were discussed during the mediation and that those two accounts were not specifically identified by the bank to which each debt was owed, the account number, or the amount owed. The mediator acknowledged that the wife gave him a list of debts. According to the mediator, those are the debts stipulated in paragraph 15 of the divorce agreement. The husband's counsel then asked the mediator to review Defendant's Exhibit 2, a list of credit card debts identified according to the name of the bank to which each debt was owed and the amount owed-totaling \$27,146.75. Upon reviewing the exhibit, the mediator reiterated that only two Visa accounts were discussed during the mediation. He stated further that he was not able to identify those two accounts in Exhibit 2 because he was not aware of the names of the banks to which the debts discussed during the mediation were owed. When the trial court asked the mediator whether the five Visa accounts were contemplated in paragraph 15 of the agreement, the mediator maintained that only two Visa accounts were discussed during the mediation and that, according to the wife, those Visa accounts together had an approximate total balance of \$12,000. (R. 18-19.) When the wife's counsel asked the mediator whether paragraph 15 should have read that the Compass Bank savings account was to be used to pay, among the other accounts specified in the paragraph, all "individual accounts" held by the wife rather than a single "individual account" held by the wife, the mediator answered: "[T]hat's not what I recall nor do my notes reflect that. If I may, I was identified five charge accounts and there were two Visas, a Discover, a McRaes and a Gayfers." (R. 19.) The husband testified that he was aware of the wife's right to payment of the appropriate balances of the accounts stipulated in paragraph 15 of the divorce agreement, that he was aware that, at the time of the mediation, those balances totaled approximately \$12,000, and that he was not aware that the wife had any Visa accounts in her name except the one account stipulated in paragraph 15. The wife testified that, during the mediation, the parties discussed the parties' debts to be paid but did not identify the debts according to creditors, account numbers, or amounts owed. She denied telling the mediator that the total debt owed on the credit cards was \$12,000. The wife acknowledged that she read the settlement agreement before signing it, but stated that she interpreted paragraph 15 as specifying payment for *all* her Visa accounts, even though paragraph 15 specified payment of only one Visa account held by the wife. (R. 47.) The wife testified also that she believed approximately \$16,000 or \$17,000 was in the Compass Bank savings account at the time of the divorce. Trial court ordered the former husband to pay debts not stipulated by the settlement agreement. Former husband appealed. The Court of Civil Appeals affirmed, without opinion. Certiorari was granted. The Supreme Court, held that requiring the former husband to pay the former wife's credit card debts not covered by the divorce judgment was improper after the trial court lost jurisdiction. They remanded this cause to the Court of Civil Appeals Ex parte Littlepage 796 So.2d 298 Ala.,2001. On

appel from the Circuit Court, Mobile County, No. DR-96-501907. JOHNSTONE, MOORE, C.J., and HOUSTON, SEE, LYONS, BROWN, HARWOOD, WOODALL, and STUART, JJ., concur.

* * *

Margaret Ford sought workers' comp. alleging carpal-tunnel and a neck injury on her job at Cagles, Inc. At the benefit-review conference, the parties agreed that Ford would resign and withdraw her claim regarding the neck injury, and that Cagles would pay her \$11,000 in settlement of all claims relating to the carpal-tunnel injury. This settlement agreement signed by Ford, her counsel, Cagles and its counsel. Ford hired a new attorney, objected to a motion to enforce the agreement and asked the court to set aside the agreement. The trial court granted Cagles's motion to enforce the agreement. Ford appealed. The Court of Civil Appeals affirmed, without an opinion. Cert. was granted to resolve a question of first impression as to whether such an agreement was enforceable given that the court did not make a finding that the agreement was in the workers' best interest. "One of the features of the Ombudsman Program is the 'benefit-review conference,' which is a 'nonadversarial, informal dispute resolution proceeding' conducted by an ombudsman trained in dispute mediation. Section 25-5-292(b) provides that a settlement agreement entered into at a benefit-review conference is 'binding on all parties through the final conclusion of all matters relating to the claim, unless within 60 days after the agreement is signed or approved the court on a finding of fraud, newly discovered evidence, or other good cause, shall relieve all parties of the effect of the agreement.'" AFFIRMED. See, Johnstone, concurred in result, with opinion, joined by Cook. DeKalb County – CV 96-262. Ex parte Margaret FORD. (Re Margaret Ford v. Cagles, Inc.) 1981651. April 21, 2000.

Alabama Court of Civil Appeals – Cert denied by Alabama Supreme Court

In 2002, Denice S. Walton was employed by Beverly Enterprises-Alabama, Inc., d/b/a Beverly Meadowood Health & Rehabilitation ("BE-A"), as the director of housekeeping. Walton was injured in an automobile collision in the line and scope of her employment. Walton sued BE-A and its third-party workers' compensation administrator, Constitution State Services, LLC ("Constitution"), seeking workers' compensation benefits and damages for the tort of outrage based on the failure to pay benefits. While the workers' compensation action was pending, BE-A decided to subcontract its housekeeping services to Healthcare Services Group, Inc. ("HSG"). Walton left the employ of BE-A and became an employee of HSG on February 4, 2003. She continued to work for HSG at BE-A's Meadowood facility until she was dismissed from her employment on February 6, 2004. Meanwhile, BE-A, Constitution, and Walton mediated the workers' compensation action. On December 19, 2003, Walton executed a "release and receipt in full," which

read, in pertinent part: "In consideration of the sum of Sixty Five Thousand and no/100 Dollars (\$65,000.00) paid by or on behalf of Beverly Enterprises-Alabama, Inc. d/b/a Beverly Meadowood Health & Rehabilitation (incorrectly named in plaintiff's complaint as 'Beverly Healthcare') and Constitution State Services LLC, the receipt of which is hereby acknowledged, Denice S. Walton does hereby fully release and forever discharge Beverly Enterprises- Alabama, Inc. d/b/a Beverly Meadowood Health & Rehabilitation and Constitution State Services LLC and their officers, agents, attorneys, representatives, successors, assigns, affiliates, subsidiaries, parents, insurers, and related corporations and entities (hereinafter referred to as 'the Released Parties') of and from any and all claims, demands, causes of action, suits, and losses of every kind or nature, whether liquidated or contingent, which the undersigned may have or may have had at any time heretofore or may have at any time hereafter pertaining or relating to any matters or things occurring or failing to occur or in any manner connected with or growing out of the incident described in that certain civil action styled Denice S. Walton v. Beverly Healthcare, et al., Civil Action No. CV-02-1690, currently pending in the Circuit Court of Jefferson County, Alabama, Bessemer Division ('the Lawsuit'), and including, without limitation, all claims resulting from or arising out of the alleged incidents forming the basis of the Lawsuit that the undersigned has alleged against the Released Parties." Walton desired to pursue a third-party action against the driver of the automobile that had collided with the vehicle she was driving when she was injured. Because the December 2003 release did not contain language waiving BE-A's and Constitution's rights under Ala. Code 1975, § 25-5-11(a), to a portion of any recovery Walton might receive as a result of that third-party action, BE-A and Walton executed another release on March 5, 2004, containing such language. The March 2004 release contained the same basic provisions as the December 2003 release, but it also contained the additional language emphasized below: "In consideration of the sum of Sixty-Five Thousand and no/100 Dollars (\$65,000.00) paid by or on behalf of Beverly Enterprises-Alabama, Inc. d/b/a Beverly Meadowood Health & Rehabilitation (incorrectly named in plaintiff's complaint as 'Beverly Healthcare') and Constitution State Services LLC, the receipt of which is hereby acknowledged, and in further consideration of Beverly Enterprises-Alabama, Inc. d/b/a Beverly Meadowood Health & Rehabilitation's and Constitution State Services LLC's waiver of any subrogation interest that Denice S. Walton has against third parties, Denice S. Walton does hereby fully release and forever discharge Beverly Enterprises-Alabama, Inc. d/b/a Beverly Meadowood Health & Rehabilitation and Constitution State Services LLC and their officers, agents, attorneys, representatives, successors, assigns, affiliates, subsidiaries, parents, insurers, and related corporations and entities (hereinafter referred to as 'the Released Parties') of and from any and all claims, demands, causes of action, suits, and losses of every kind or nature, whether liquidated or contingent, which the undersigned may have or may have had at any time heretofore or may have at any time hereafter pertaining or relating to any matters or things occurring or failing to occur or in any manner connected with or growing out of the incident described in that certain civil

action styled Denice S. Walton v. Beverly Healthcare, et al., Civil Action No. CV-02-1690, currently pending in the Circuit Court of Jefferson County, Alabama, Bessemer Division ('the Lawsuit'), and including, without limitation, all claims resulting from or arising out of the alleged incidents forming the basis of the Lawsuit that the undersigned has alleged against the Released Parties. It is expressly understood and agreed that this release has no effect on any third party action allowed under the Workmen's Compensation Act, specifically that cause now pending against Amanda Bales and Nationwide Insurance Company, Ms. Walton's automobile insurer. "... "... Nothing herein is intended to benefit any entity not a party to the lawsuit, nor expand or extend any entity's right of subrogation beyond that recognized pursuant to Alabama law." In addition, both the December 2003 release and the March 2004 release contain the following integration or merger clause: "It is agreed and understood that this Release contains the entire agreement between the parties and is executed solely for the consideration expressed herein without any other representation, promise, or agreement of any kind whatsoever. It is further agreed that this Release supersedes any and all prior agreements or understandings between the parties hereto, whether oral or written, pertaining to the subject matter hereof, and that the terms hereof are contractual and not mere recitals." Subsequently, the employee brought an action asserting retaliatory discharge as a result of her workers' compensation claims. Summary judgment was entered for employer, and employee appealed. Employee argued that in signing the March 2004 release she did not intend to release the retaliatory-discharge and intentional-interference claims, which arose after the settlement of the workers' compensation action. The argument was based on a November 14, 2003, letter from the mediator, which stated that "BE-A and Constitution are waiving any claims which they may have to a lien under the workers' compensation act," and the "Petition for Lump Sum Settlement and Proposed Settlement" submitted to the trial court in the workers' compensation action on December 16, 2003, which states that BE-A and Constitution are "waiving the lien amount currently valued at \$16,320.00 of the third-party case." This parol evidence, Watson contends, proves that, although the December 2003 release did not contain the provisions regarding BE-A's and Constitution's waiver of their rights under § 25-5-11(a) contained in the March 2004 release, the parties intended BE-A's and Constitution's waiver of their rights under § 25-5-11(a) be part of the consideration for the December 2003 release. The Court found that the employee could have reserved the right to pursue other claims, but failed to do so and the March 2004 release contains typical release language and releases "any and all claims" related to the incident giving rise to the workers' compensation action. Denice S. Walton v. Beverly Enterprises-Alabama, Inc., d/b/a Beverly Meadowood Health & Rehabilitation, and Carolyn Disher Appeal from Jefferson Circuit Court, Bessemer Division (CV-04-1391) On Application for Rehearing THOMAS, Judge. Pittman, Bryan, and Moore, JJ., concur. Thompson, P.J., concurs in the result, without writing.

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Bruce Brian Daniels (“the husband”) and Jennifer Hubbard Daniels (“the wife”) were married in early 2001. One child, a daughter, was born of the parties’ marriage; at the time of the final hearing in this matter, the child was five years old. On January 4, 2006, the wife filed a complaint seeking a divorce from the husband and sole custody of the parties’ child. On February 15, 2006, the husband answered and denied the material allegations contained in the wife’s divorce complaint. The trial court subsequently ordered the parties to participate in mediation pursuant to § 6-6-20, Ala.Code 1975. On July 11, 2006, the parties entered into a settlement agreement. Husband later moved for a new trial and to set aside the mediation agreement and to continue final divorce hearing on grounds of emotional incapacity. The motions were denied. In reviewing the entire case, the Court of Civil Appeals noted that the evidence presented at the final divorce hearing demonstrated that the husband suffered from some form of mental illness, the evidence did not, as the husband suggests on appeal, demonstrate that his unemployment was involuntary. Further, the Court of Civil Appeals noted that the husband had undergone at least one mental evaluation before the final hearing, presented no evidence at trial regarding the status of his mental health. Daniels v. Daniels, 4 So. 3d 497, (Ala. Civ. App.). 10/5/07 The Circuit Court, Lee County, No. DR-06-03. Thompson, Bryan concurred in part, dissented in part, and filed opinion, in which Moore, J., joined. Certiorari quashed, Ala., 4 So.3d 484.

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J.M Cain, Jr., sued Charles L. Saunders, Jr. The action was related to Saunders's agreement to guarantee certain debts of Cain. Saunders moved for a summary judgment. On August 26, 1999, the trial court entered a partial summary judgment in favor of Saunders on three of Cain's claims, but it denied Saunders's motion for a summary judgment on Cain's breach-of-contract claim and his claim alleging failure to act in a commercially reasonable manner. On January 24, 2000, Cain and Saunders mediated the remainder of the action and reached an agreement; the parties executed a written settlement agreement. On April 25, 2000, Saunders filed a motion seeking to have the settlement agreement enforced. On June 14, 2000, the trial court conducted a hearing on Saunders's motion and heard ore tenus evidence. On June 15, 2000, the trial court entered a judgment "in accordance with" the terms of the settlement agreement. Cain appealed. The relevant portion of the parties' settlement agreement provides: "3. Mr. Saunders will transfer ownership of the 2 [MONY] policies (death benefit of \$19,022 and \$12,300) to Mr. Cain. Saunders waives and releases any claim to all policies identified in the August 14, 1991, document." During the June 14, 2000, hearing on his motion to enforce the parties' settlement agreement, Saunders objected to Cain's testimony regarding Cain's understanding of the cash values of the life-insurance policies; Saunders argued that the parties' settlement agreement was not ambiguous and that, therefore, parol evidence was not admissible. Saunders also objected to Cain's testimony regarding the positions the

parties took during the course of their mediation; he argued that that testimony was barred by Rule 11, Alabama Civil Court Mediation Rules, which provides that information used in a mediation is confidential. The trial court granted Saunders continuing objections to all of that testimony. The trial court stated that it would consider the testimony only if it determined that the parties' settlement agreement was ambiguous. At the June 14, 2000, hearing, Cain testified that he thought the two life-insurance policies referenced in paragraph 3 of the parties' settlement agreement had a total cash value of approximately \$20,000. In fact, the combined cash value of those two policies was less than \$10,000. Saunders testified that he also thought the life-insurance policies' cash values were higher. Cain testified that he would not have entered into the settlement agreement had he known the actual cash values of the two life-insurance policies. In its judgment, the trial court determined that paragraph 3 of the parties' settlement agreement was not ambiguous and that, therefore, the agreement was due to be enforced. The trial court entered a judgment incorporating the terms of the parties' settlement agreement. In his brief on appeal, Cain argues that the parties' settlement agreement should be set aside on the grounds of mutual mistake and because there was no "meeting of the minds." However, before the trial court, Cain did not seek to rescind or set aside the settlement agreement. He did not file any motion seeking such relief in the trial court, and he did not file any document in opposition to Saunders's motion to enforce the settlement agreement. At the June 14, 2000, hearing, Saunders objected to Cain's attempts to introduce parol evidence regarding the parties' beliefs regarding the cash values of the life-insurance policies. The trial court granted Saunders a continuing objection to that testimony. Thus, it cannot be said that the issue whether the settlement agreement should be rescinded or set aside was tried by the implied consent of the parties. See Rule 15(b), Ala. R. Civ. P. The Court of Civil Appeals interpret Cain's argument on appeal as addressing whether the trial court properly concluded that the settlement agreement was unambiguous and was due to be enforced. The Court concluded that the trial court correctly determined that the parties' settlement agreement was unambiguous and that, therefore, it was due to be enforced without regard to parol evidence regarding the parties' intentions or understandings in entering into the settlement. The Court noted that both parties were represented by counsel and each had ample opportunity to draft the settlement agreement in a manner to fully protect his rights. The Court also noted that there was no argument properly before it as to the impropriety of testimony of the parties' intentions in entering into the settlement during the course of their mediation.

In the dissent on the issue of the admissibility of parol evidence from the Parties' Mediation Yates notes that Saunders argues that the Alabama Civil Court Mediation Rules do not allow the introduction of the parol evidence upon which Cain relied at trial. Saunders cites the provisions of Rule 11 of those Rules. When an agreement is reached in mediation, however, and that very agreement is challenged in a subsequent court action as having been a result of fraud or mutual mistake occurring in the course of the mediation, the Alabama Civil Court Mediation Rules were not intended to prevent the

injured party from proving such fraud or mistake. The use of the mediation process does not immunize the resulting contract from scrutiny under otherwise- applicable substantive law pertaining to the enforceability of contracts. A careful examination of the language of Rule 11 supports this interpretation, particularly as it applies to the present case. Saunders relies primarily upon the concluding paragraph of Rule 11; however, it is that concluding paragraph that underscores the fact that Rule 11 contemplates that the views and admissions exchanged in the course of attempting to negotiate a mediated settlement will not be disclosed when that negotiation is unsuccessful. Specifically, the concluding clause of Rule 11 contemplates that there has been a "termination or failure of the mediation process." Thus, the parties are protected in any statements they make to one another in the course of attempting to settle their dispute if the mediation fails and they are forced to resort to a court action to resolve their underlying claims. In this regard, Rule 11 of the Alabama Civil Court Mediation Rules is comparable to Rule 408 of the Alabama Rules of Evidence. Rule 408 provides that evidence of offers or acceptances of particular consideration in return for the proposed compromise of a claim "is not admissible to prove liability for or invalidity of the claim or its amount" and that "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible." Ala. R. Evid., Rule 408. However, "[t]his rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." Id. In other words, Rule 408 does not preclude admission, in a subsequent judicial proceeding, of a compromise offer or a related statement proffered for some purpose other than the one specifically precluded (proof of validity or invalidity of the underlying claim). If the settlement agreement, itself, is being sued upon or asserted as a defense to a claim, Rule 408 does not apply. See 1 Charles W. Gamble, McElroy's Alabama Evidence ' 188.01(6)(e) (5th ed. 1996). Thus, Rule 408 does not prevent the use of representations made during the settlement discussions to establish that a resulting settlement was the product of fraud or a mutual mistake that occurred in those discussions. Similarly, Rule 11 of the Alabama Civil Court Mediation Rules does not prevent a trial court from admitting evidence of fraud or mistake occurring in the course of mediated settlement negotiations where, as here, the issue before the court is the impact of the alleged fraud or mistake on the resulting settlement agreement. Cain v. Saunders, 813 So. 2d 891(Al. Civ. App. 2001) Appeal from Tuscaloosa Circuit Court (CV-97-911) THOMPSON, Judge Pittman, J., concurs. Crawley, J., concurs in the result. Yates, P.J., and Murdock, J., dissent. Yates, Presiding Judge, dissenting. Cert denied.

Alabama Court of Civil Appeals

Husband brought action for divorce and wife counterclaimed, with each party seeking custody of their three children. Guardian ad litem was appointed to represent the three children, as well as mother's infant child with another father, which child was born during

the marriage. Judge Fuller ordered them to mediation, and while the case did not resolve at that time, after the trial was underway, the parties settled. Counsels read the terms into the record, and parties affirmed the terms were, in fact, their agreement. The Guardian ad litem recommended approval of the parties agreement. The Court ordered the parties to file settlement papers with the court within thirty days, and it also scheduled a compliance hearing. At the compliance hearing, mother appeared pro se and made an oral motion to set aside the settlement and proceed with trial. The court granted the motion. At trial, the Court entered a judgment of divorce, in which husband was awarded primary custody and wife was ordered to pay child support, Guardian ad litem fees, and attorney fees. Wife moved for a new trial which was denied, and she appealed. On appeal, wife argued that, "by imposing a total of \$15,340 in fees upon her, the trial court punished her for asking that the settlement agreement be set aside so that she could continue with the trial." Holdings: (1) award of primary custody to husband was warranted; (2) visitation award was warranted; but (3) circuit court exceeded its discretion in awarding attorney fees to husband. Affirmed in part, reversed in part, and remanded. (K.D.H. v. T.L.H. III. 3 So.3d 894 CCA, 08/15/08, Moore, Elmore County)

On June 14, 2005, the trial court entered a judgment of divorce for S.A.N. ("the mother") and S.E.N. ("the father"). The judgment awarded custody of the parties' two children to the mother, awarded the father certain visitation rights, including overnight visitation, and ordered the father to pay child support. On December 11, 2006, the father filed a petition seeking modification of the child-support provisions of the divorce judgment, as well as a judgment holding the mother in contempt for failing to abide by the visitation provisions of the divorce judgment. On April 5, 2007, after the mother had filed an answer to the father's petition, the trial court ordered the parties to mediation. The parties settled the case at mediation on May 17, 2007, by agreeing that they would submit a stipulation of facts to the trial court for its ruling on the sole issue of whether Ala.Code 1975, § 15-20-26, prohibits the father from visiting with the children. The parties stipulated that, on April 17, 2006, the father had pleaded guilty to the criminal offense of first-degree sexual abuse of the mother's minor sister, who had resided with the parties during their marriage. The parties also stipulated that the father had not sexually abused or otherwise committed a crime against the parties' children. The parties agreed that the father would not exercise visitation with the children until all appeals of the trial court's judgment had been exhausted. The parties also agreed that if the courts ultimately determined that the father's conviction precluded visitation, he would have no further visitation with the children. However, if visitation was allowed, the father would be allowed to visit with the children according to a specified schedule, which allowed visitation from 9:00 a.m. to 6:00 p.m. on Saturdays and Sundays, except Mother's Day, Father's Day, and every other Christmas Day, and otherwise as the parties mutually agreed. The parties also agreed that child support would be recalculated according to the child-support guidelines and that any

arrearage would be determined by the parties and submitted to the court. On July 5, 2007, the trial court entered a judgment awarding the father visitation according to the schedule outlined in the mediation agreement. The trial court incorporated the stipulations of the parties and determined that the father would not violate Ala.Code 1975, § 15-20-26(c), by exercising his visitation rights because he would not be establishing a residence or any other living accommodation with the children. The mother filed a notice of appeal on August 3, 2007. The Court of Civil Appeals found that the trial court correctly determined that §15-20-26(c) does not prohibit the father from visiting with the children as specified, however that the trial court failed to conduct a best interests hearing as to the mode, duration, and extent of visitation privileges as required by Alabama law in that an agreement of the parties affecting the welfare of a child is only to be given effect to the extent that it is in the best interests of the child and is otherwise not binding on the court. Hence, an agreement of the parties regarding visitation with a child has no effect unless and until it is proven that the visitation to which the parties agreed is in the best interests of the child. AFFIRMED IN PART; REVERSED IN PART; AND REMANDED. S.A.N. v. S.E.N., 995 So. 2d 175, (Ala. Civ. App.) 5/23/08 Appeal from Coffee County Circuit Court DR-04-45.02. MOORE, PITTMAN and THOMAS, JJ., concur. THOMPSON, P.J., concurs in the result, without writing. BRYAN, J., concurs in part and dissents in part, with writing.)

* * *

On February 24, 2005, employee sued employer alleging that she had been bitten by a dog while working in the line and scope of her employment; that, as a result of the dog bite, she had suffered an injury to her right arm; that the injury had arisen out of and in the course of her employment with the employer; that the employer had been given “timely and/or actual notice” of the alleged injury; and that she had suffered a permanent disability as a result of the injury. On August 8, 2006, the parties mediated the case before an “ombudsman,” pursuant to Ala.Code 1975, §25-5-290, and, as a result of that mediation, the parties entered into a settlement agreement regarding all pending issues whereby the insurance carrier would pay the employee a “compromise lump sum settlement of \$2,543.00 ... in full and final settlement of all permanent partial disability, permanent total disability, vocational disability, and vocational rehabilitation,” that future medical payments would remain open as provided under the Workers’ Compensation Act, § 25-5-1 et seq., Ala.Code 1975, that past medical payments would be closed, and that Dr. Caudill Miller, a Montgomery neurologist, would be the employee’s authorized treating physician. On October 6, 2006, less than 60 days after the agreement was signed, the employee filed a motion to set aside the settlement agreement. On December 26, 2006, the employer filed a motion to enforce the settlement, denying the statements made in the employee’s motion to set aside the settlement agreement, and asserting that, pursuant to Ala.Code 1975, § 25-5-292, the settlement agreement was binding because

the employee had not produced “evidence of fraud, new evidence, or other good cause” to justify setting aside the settlement agreement. Following ore tenus proceedings held January 5, 2007, and the submission of briefs by the parties, the trial court entered an order on February 9, 2007, concluding that “[the employee] has not been denied medical treatment, [and,] at best, scheduling errors were made.” As a result, the trial court denied the employee’s motion to set aside the settlement agreement. The employee filed a motion to alter, amend, or vacate the judgment on March 8, 2007; that motion was denied by operation of law on June 6, 2007. The employee appealed, arguing that the trial court erred in refusing to set aside the parties’ settlement agreement and in refusing to “review” the settlement agreement. The Court of Civil Appeals recognized the differences between a settlement mediated by an ombudsman and a settlement approved by the court, most notably that the latter actually has the same effect as any other civil judgment. *See* Ala.Code 1975, § 25-5-56., but nevertheless concluded that they justify similar appellate treatment and therefore the trial court had discretion to grant or deny a motion to vacate or set aside a settlement agreement mediated by an ombudsman and that the trial court’s judgment will not be reversed on appeal unless the trial court has exceeded its discretion. Further, the Court of Civil Appeals noted that a settlement agreement mediated by an ombudsman at a benefit-review conference is reviewed by a trial court only if a party submits a request to the trial court for approval within 60 days of signing such an agreement and at no point did the employee petition the trial court to approve the substance of the settlement agreement based on the best-interests standard set out in § 25-5-56 and § 25-5-83. Affirmed. *Lucille Berry v. H.M. Michael, Inc.*, 993 So. 2d 1, (Ala. Civ. App.) 5/9/08 Lee Circuit Court, No. CV-05-138. PITTMAN, BRYAN and THOMAS, THOMPSON concurs in result, without writing.

* * *

Jennifer T. McNeill (“the mother”) commenced a postdivorce action on June 26, 2001, by filing a petition seeking a finding of contempt against the father. The father also petitioned the trial court to find the mother in contempt. In addition, the mother and the father each filed pleadings seeking adjudications of disputes regarding the custody of their two minor daughters (“the children”), visitation, child support, and healthcare insurance for the children. In 2004, the parties resolved some, but not all, of their disputes by agreement, and their agreement was incorporated into an order entered by the trial court. Although that order is not in the record, it apparently awarded the mother primary physical custody of the children and awarded the father visitation. Thereafter, each of the parties filed pleadings claiming that the other party had violated the provisions of the order regarding visitation. The trial court held an evidentiary hearing and, on November 21, 2005, entered an order (1) directing that the parties and the children undergo psychological counseling and (2) suspending the father's visitation pending another hearing. In December 2005, the father moved the trial court to grant him temporary visitation. The trial court held an evidentiary hearing regarding that motion on

August 16, 2006, and, on the following day, entered an order granting the father temporary visitation. In October 2006, the father moved the trial court to enter a final judgment regarding visitation, and, on November 21, 2006, the trial court did so; however, both parties timely moved the trial court to alter, amend, or vacate the November 21, 2006, judgment. On January 17, 2007, within 90 days after the parties had moved the trial court to alter, amend, or vacate the judgment, the trial court entered an order vacating the November 21, 2006, judgment and ordering the parties to attempt to resolve their remaining disputes through mediation. The father then appealed to this court. Appeal dismissed. The order directing the parties to attempt to resolve their remaining disputes through mediation is not a final, appealable judgment because it did not completely adjudicate all matters in controversy between the parties. Because the parties timely moved the trial court to alter, amend, or vacate the November 21, 2006, judgment and the trial court entered its order vacating that judgment within 90 days after the parties had filed their postjudgment motions, the trial court had jurisdiction to vacate the November 21, 2006, judgment when it did so on January 17, 2007. Accordingly, the final judgment entered on November 21, 2006, is no longer valid. *McNeill v. McNeill*, 981 So. 2d 1158, (Ala. Civ. App.). 9/28/07 Limestone Circuit Court, No. DR-00-408.1, Bryan, J., THOMPSON, P.J., and PITTMAN, THOMAS, and MOORE, JJ., concur.

* * *

Dec. 30, 2005. Mobile Probate Court, No. 01-1960, [Don Davis, J.](#), The Court of Civil Appeals, [Crawley](#),

Lewis M. DeGeer, Jr., died testate on June 19, 2001, survived by nine children and four children of a deceased child. On November 6, 2001, the Mobile Probate Court issued letters testamentary to Carolyn McGallagher, DeGeer's daughter, whom he had appointed as the executrix of his estate and as the trustee of a testamentary trust. On November 28, 2001, the probate court authorized McGallagher to disburse to DeGeer's heirs the proceeds of a \$400,000 settlement in a wrongful-death lawsuit arising out of DeGeer's exposure to asbestos. Accordingly, McGallagher distributed \$40,000 to each of DeGeer's nine surviving children and \$10,000 to each of the four children of the predeceased child. On May 3, 2002, Deborah Marie Barbour, one of DeGeer's daughters, filed a petition to contest the will and a petition to remove McGallagher as the executrix and to appoint an administrator ad colligendum. On September 25, 2002, eight more individuals- four children and four grandchildren of De- Geer-were added as petitioners. The probate court conducted extensive hearings on the petition to remove McGallagher as the executrix- on December 11, 2002, April 3, 2003, and May 15, 2003. The evidence at those hearings tended to show that, before his death, DeGeer owned, either solely or as a joint tenant with the right of survivorship in McGallagher, between 30 and 40 low-income rental properties. Executrix appealed. With respect to payment of the mediator's

fee, McGallagher argues that Barbour and the copetitioners should be solely responsible because, she says, it was they who caused mediation to fail. The record does not disclose the reasons why mediation was unsuccessful. The record does disclose that both parties consented to mediation. Rule 2 of the Alabama Civil Court Mediation Rules states, in pertinent part: "Parties to a civil action may engage in mediation by mutual consent at any time. The court in which an action is pending shall order mediation when one or more parties request mediation or it may order mediation upon its own motion. *In all instances except where the request for mediation is made by only one party, the court may allocate the costs of mediation, except attorney fees, among the parties.* In cases in which only one party requests mediation, the party requesting mediation shall pay the costs of mediation, except attorney fees, unless the parties agree otherwise." We find no error in the court's allocating the costs of mediation. AFFIRMED IN PART; REVERSED AND JUDGMENT RENDERED IN PART. THOMPSON, PITTMAN, and BRYAN, JJ., concur. MURDOCK, J., concurs in part, concurs in the result in part, and dissents in part, with writing MURDOCK,

* * *

Rhonda Libb Mackey ("the mother") and Melvin R. Mackey ("the father") were divorced in 1994. The mother was awarded custody of the parties' two children, and the father was given certain visitation rights. The father was not ordered to pay child support. Subsequently, the father filed a petition to modify the divorce judgment. On November 10, 1998, the mother moved the court to refer the parties to mediation. The mother's motion specifically stated that "opposing counsel is opposed to mediation." The trial court directed the parties to mediation. Rule 2 of the Alabama Civil Court Mediation Rules states: "Upon motion of the parties concerned or by suggestion of the court or by agreement of the parties concerned, the court may enter an order directing parties to a pending action to proceed with mediation of one or more disputes in the lawsuit." The Committee Comment to Rule 2 states that "[p]articipation in the mediation process is strictly voluntary." On appeal, the Father contended that the trial court erred by referring the parties to mediation over his objection. The Court of Civil Appeals noted that the rule, however, has been superseded by statute. See *Ex parte Kennedy*, 656 So. 2d 365 (Ala. 1995) (holding that a legislative enactment supersedes a court rule). Section 6-6-20, Ala. Code 1975, effective May 17, 1996, which provides: "(b) Mediation is mandatory for all parties in the following instances: "(2) Upon motion by any party. The party asking for mediation shall pay the costs of mediation, except attorney fees, unless otherwise agreed." *Mackey v. Mackey*, 799 So. 2d 203 (Al. Civ. App. 2001) 5/4/01 Appeal from Madison Circuit Court (DR-94-414.02) On Rehearing Ex Mero Motu CRAWLEY, Judge OPINION OF FEBRUARY 9, 2001, WITHDRAWN; OPINION SUBSTITUTED; REVERSED AND REMANDED WITH DIRECTIONS. Yates, P.J., and Thompson, Pittman, and Murdock, JJ., concur.

IV. U.S. SUPREME COURT MEDIATION CASES

In 1994, a unanimous decision by the United States Supreme Court in the trademark infringement case of *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S.Ct. 1992, 31 USPQ2d 1010, (June 6, 1994), has a serious and important message for those settling litigation in Federal Court. In *Digital* the defendant had settled its trademark dispute with the plaintiff *Desktop*. The terms of the settlement agreement included a complete dismissal of the case. Nonetheless, shortly thereafter *Digital* found itself back in court for a full trial on the merits of the same dispute which it thought had been "settled".

The plaintiff *Desktop* applied to the court which had approved the settlement agreement to rescind that same agreement and to reopen the dismissed case. *Desktop* claimed that *Digital* had failed to disclose material facts during settlement negotiations, which if disclosed, would have resulted in *Desktop's* rejection of *Digital's* settlement offer. The trial court granted *Desktop's* application to set aside the settlement agreement and to reopen the litigation and place the parties back in court awaiting trial. Specifically, *Desktop* alleged that during the settlement negotiations *Digital* misrepresented the date it had acquired knowledge of *Desktop's* trademark. *Desktop Direct, Inc. v. Digital Equipment Corp.*, 993 F.2d 755, 757 (10th Cir. 1993). The District Court concluded, on unspecified grounds, that a fact finder "could" determine that if true this would be a material misrepresentation, warranting rescission.

Digital endeavored to avoid trial and protect and enforce its rights under the settlement agreement by attempting an immediate interlocutory appeal from the trial court's ruling. However, the Tenth Circuit Court of Appeals dismissed *Digital's* effort as involving an issue "insufficiently important" to warrant an immediate appeal as of right. *Id.* 993 F.2d 755, 758-760. This appellate ruling departs from those of several other Courts of Appeals: *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036, 1039-40 (11th Cir.), cert. denied, 113 S.Ct. 412 (1992); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 219-20 (5th Cir. 1991); *Janneh v. GAF Corp.*, 887 F.2d 432, 434-36 (2d Cir. 1989); cert. denied, 498 U.S. 865 (1990); but see *Tramstech Industries, Inc. v. A & Z Septic Clean*, 5 F.3d 51 (3d Cir. 1993), cert. pending No. 93-960. Those courts had recognized that a private settlement agreement provided a sufficiently final and important right which, in the interests of justice and judicial economy, ought to be decided at an early stage, as opposed to delaying vindication until after months and perhaps years of expensive and wholly unwarranted resumed litigation in the trial court.

Digital then sought review of the Tenth Circuit's ruling by certiorari to the U.S. Supreme Court, and that court accepted petition for review to resolve the evident differences of opinion among the several U.S. Courts of Appeals. The resulting Supreme Court decision is couched by the Supreme Court as a procedural one, concerning only the proper application of the federal statute which limits appeals as of right to "final" decisions only.

Speaking unanimously through Justice Souter, the Supreme Court firmly rejected Digital's contention that "the right not to stand trial" embodied in a private settlement agreement was sufficiently valuable and important to justify the availability of immediate appeal from the trial court's order which now jeopardizes the implementation of the agreement. Instead, Justice Souter states that "rights under private settlement agreements can be adequately vindicated on appeal from final judgment [i.e. only after a full trial on the merits]." 31 USPQ2d at 1013. The Court gave short shrift to Digital's argument that avoiding the expense and uncertainty of trial is usually a dominating motivation for any settlement of litigation. The Court at 1017 went on to point out that the public policy against piecemeal litigation (embodied in the finality requirement of the appeals statute, 28 U.S.C. §1291), cannot be "trumped routinely by the expectations or clever drafting of private parties." Id.

The Digital opinion did comment that an immediate appeal might still be available under another statute, 28 U.S.C. § 1292, which provides for permissive certification of an interlocutory appeal at the joint discretion of both the trial judge and the Court of Appeals. However, in Digital the trial judge either did not, or would not, certify that very question under the § 1292 procedure. Thus, the alternate discretionary route to the Court of Appeals was here, in fact, unavailable to Digital. Mr. Justice Souter does point out in a footnote an "important" right that can be privately contracted for in a settlement agreement and which the United States Courts will recognize as providing certain protection from trial. That right is embodied in the Federal Arbitration Act, 9 U.S.C. § 1, et. seq. specifically in a recently enacted amendment thereto, 9 U.S.C. § 16. These sections essentially do provide for an immediate appeal from any trial court order which rejects a party's assertion that resolution of a dispute belongs before a commercial arbitrator and not in a federal court.

After Digital it would seem that the clearest and most certain route to avoid post-settlement exposure to trial is to include a well-drafted arbitration clause in every settlement agreement which is designed to terminate with finality a litigation in the U. S. Federal Court system. This still does not mean that an ongoing dispute cannot or will not materialize, but it does appear to ensure that any such dispute will be resolved by arbitration and not by federal trial. Moreover, concern that an action in U.S. federal court could still lie on grounds similar to those raised by Desktop (i.e. of "fraud and misrepresentation in the inducement of the [settlement] contract", thus claiming complete rescission of the entire contract, including the arbitration clause), appears to have been answered in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398, 403-406 (1967) (a federal court may consider "fraud in the inducement" as a defense to an agreement to arbitrate only if the fraud relates specifically to the arbitration clause itself and not to the contract generally). See *Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1139-40 (9th Cir. 1991).

As a further precaution, a clear documentary record should be established of the informational exchanges between the negotiating parties and, if possible, a recitation in the agreement that the parties acknowledge they have satisfied themselves that they have sought and received with "due diligence" all information which they believe necessary to evaluate and enter into the terms of settlement. A propos of that, in California Torts by Levy, Golden & Sacks (Lexis Nexis—Matthew Bender) the authors make a recommendation that where in fact there is reliance upon a material representation, that it be expressed in the agreement. Thus at page 73-40 they state: “If a settlement agreement is entered into based on the representations of a party regarding certain facts and circumstances, it is prudent practice to include those representations in the written agreement to provide a basis for rescission if the material facts were misrepresented. Should the factual basis subsequently be discovered to be false, the factual statement may provide a basis for rescission of the contract on the grounds of fraud. For example, if a defendant represents that limited assets are available for settlement of a claim and the plaintiff relies on the representation in agreeing to the compromise of his claim, the plaintiff may later plead fraud as a basis for rescission of the settlement agreement if it is later discovered that the defendant had undisclosed assets.”

ADDITIONAL RESOURCES:

Listen to the recording of the oral arguments, review the full opinion and read the briefs at the following links:

http://www.oyez.org/cases/case/?case=1990-1999/1993/1993_93_405

<http://supreme.justia.com/us/511/863/case.html>

http://www.oyez.org/media/item?type=audio&id=argument&parent=cases/1990-1999/1993/1993_93_405

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