Cumberland School of Law
CLE by the HOUR - Mediation Law Update

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Alabama Mediation Law Update
December 29, 2009

The primary purpose of this session is to update you on developments in mediation law and policy applicable in civil trial matters. To do so, we must survey the state legislative, executive and judicial branches of government. The handout is a comprehensive reference source while the accompanying lecture is designed to highlight individual significant case law developments and their practical implications on advocates in mediation and mediation practitioners.

Alabama Case Dates / Totals

4 in 2009 6 in 2008 3 in 2007 1 in 2006 1 in 2005 1 in 2004 3 in 2001 1 in 2000

Supreme Court

11/13/09
09/29/09
09/04/09
04/24/09
10/10/08
09/19/08
09/28/07
06/09/06
02/06/04
02/16/01
04/21/00

Ct. Civ. App. – Cert. denied

9/12/08
8/31/01

Court of Civil Appeals

08/15/08
05/23/08
05/09/08
10/05/07
09/28/07
12/30/05
05/04/01

* An additional Alabama Supreme Court case from the 1997-98 term is overruled by statute - Morrison Restaurants, Inc. v The Homestead Village of Fairhope, Ltd. CV-96-2440 out of Mobile County dealt with a parties waiver of the right to mediate due to delay in asserting it.

Sources of Authority

Alabama Code

§6-6-20 Mandatory Mediation
§6-6-25 Mediator Confidentiality
§41-22-12(f) Administrative Procedures
§25-5-290 Workers' Comp. Ombuds
§12-25-32 Sentencing Reform Act of 2003
§15-22-1.1 Adult Offender Supervision
§44-2-10 Compact on Juveniles
§33-18-1 River Basin Compact
§39-1-1 Public Works
§38-12A-2 Foster Care

Rules of Civil Procedure
Civil Court Mediation Rules 8/1/92
Code of Ethics for Mediators 12/14/95
Commission on Dispute Resolution
Rules of Criminal Procedure
Rules of Evidence
Rules of Appellate Procedure
Rules of Appellate Mediation
Rules of Judicial Administration
Delay Reduction
Canons of Judicial Ethics
Rules of Professional Conduct

Attorney General Opinions

2003-213 – 8/12/2003
2000-___ - 5/19/2000

Executive Orders from the Governor

Number 42 03/18/98
Number 50 09/16/98
Number 07 03/20/03

Executive Orders from the Supreme Court

Mediator Ethical Opinions OPINION 001-05

Mediation: Another Method for Resolving Disputes

Published by

ALABAMA STATE BAR

WHAT IS MEDIATION?

Mediation is an informal process during which an impartial third party, the mediator, assists disputing parties in reaching a mutually acceptable agreement regarding their dispute. The mediation session is intended to identify pertinent issues, clarify any misunderstandings, explore solutions, and negotiate an agreement.

WHAT IS THE MEDIATOR'S ROLE?

The mediator is not a judge and does not render a decision or impose a solution on any party. Rather, the mediator helps those involved in the dispute talk to each other, thereby allowing them to resolve the dispute themselves. The mediator manages the mediation session and remains impartial.

HOW DOES MEDIATION WORK?

At the mediation session all parties present a summary of their points of view. Attorneys for the parties may be present. Typically, the mediator will then meet privately (caucus) with each party to explore more fully the facts and issues of each side. The caucus offers participants the opportunity to vent anger or frustrations outside the presence of the

opposing side. The mediator usually will continue to caucus alternatively with each party, carrying settlement proposals back and forth until an agreement is reached. The agreement is then reduced to writing, and signed by the parties.

HOW LONG DOES MEDIATION TAKE?

While the time required for mediation varies, the mediation session commonly involves less than half a day.

WHO PAYS FOR THE MEDIATION?

Expenses of the mediation are shared equally by the parties unless they agree otherwise. Parties should know in advance what the mediator charges.

WHAT ARE THE BENEFITS OF MEDIATION?

- Parties keep control over the outcome of their own problem.

- Disputes can be settled promptly. A mediation session can be scheduled as soon as both parties agree to use mediation to resolve the dispute.

- Mediation promotes better relationships through cooperative problem-solving and improved communication.

- Both facts and feelings are considered with the help of an impartial mediator.

- Mediation is private and confidential. The mediator and parties must maintain,

to the full extent required by law, the confidentiality of the information disclosed during mediation.

•Mediation is voluntary, and may be terminated at any time by a party or the mediator. Although in court-referred mediation the parties may be ordered to attend a mediation session, any agreement is entirely voluntary. In the absence of agreement, the parties retain their right to take the dispute before a judge or jury.

• Mediation costs may be significantly less than taking a case to court, especially if mediation is chosen prior to filing a lawsuit.

WHAT TYPES OF DISPUTES CAN BE MEDIATED?

- Landlord and Tenant
- Neighbor and Community
- Business and Customer
- Employer and Employee
- Divorce and Family
- Juvenile
- Negligence
- Products Liability
- Construction
- Contracts
- Personal and Real Property
- Small Claims
- Other Civil Matters

HOW DO I LOCATE A MEDIATOR, OR FIND OUT MORE ABOUT MEDIATION?

Ask your attorney, or contact the Alabama Center for Dispute Resolution. The Center maintains a statewide roster of mediators, and provides information on dispute resolution alternatives.

Alabama Center for Dispute Resolution
P.O. Box 671
Montgomery, AL 36101
(334) 269-0409

This pamphlet, based on Alabama law, is issued to inform, not to advise. It is published by:
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History of "OFFICIAL" Court-Connected ADR in Alabama

In 1994, The Alabama Supreme Court issued an order creating an entity to oversee the development of ADR in the State Court System

The Supreme Court Commission on Dispute Resolution is responsible for:

- Instituting necessary guidelines for the orderly progress ADR programs.
- Providing technical assistance, education and training to the bar, the judiciary and the public.
- Developing training procedures, qualification criteria, standards of conduct and utilization standards for mediators and other alternative dispute resolution neutrals.
- Oversight of the Center of Dispute Resolution.
- Coordination with the Administrative Office of Courts.
- Support of the Alabama State Bar in ADR areas.

http://www.alabamaadr.org

The "Commission"

2009/2010 Supreme Court Commission

Member / Appointed through

Tom Albritton, Esq. / Speaker of the House
Steven Benefield, Esq . / Alabama State Bar
Charles Boyd, Esq. / Alabama Trial Lawyers
Hon. Tommy Bryan / Court of Civil Appeals
Hon. Ralph Coleman / District Court
William D. Coleman, Esq. / Alabama State Bar
Hon. Aubrey Ford, Jr. / District Court
J. Noah Funderburg, Esq. / At Large
Hon. Hub B. Harrington / Circuit Court
Tony Higgins, Esq. / Alabama Defense Lawyers
Ms. Anne Isbell / At Large
Karl Kirkland, Ph.D. / At Large
Hon. Richard Lane / Circuit Court
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Debra Black Leo, Esq. / Alabama State Bar
H. Sonny Reagan, Esq. / Governor
Justice Harold See / Supreme Court
Sandra Speakman, Esq. / Attorney General
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2009/2010 Supreme Court Commission

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Rebecca Oates, Esq. / Court of Civil Appeals
Lynn DeVaugh / Court of Civil Appeals
Michelle Ohme, Executive Director / Appellate Mediation Program

The Alabama Center for Dispute Resolution

The Center is a non-profit corporation organized to "develop, implement, administer, assist, and manage ADR programs in the courts, neighborhoods, educational facilities and government agencies within the State of Alabama.

The Center operates under the supervision of the Alabama Supreme Court Commission on Dispute Resolution in conjunction with the Alabama State Bar Committee on Alternative Methods of Dispute Resolution.

As of October 1996, the Center was funded under the Alabama Supreme Court's budget.

Alabama Statutes - Mandatory Mediation Act

Mandatory Mediation Act - Effective Date. -- May 17, 1996.

§6-6-20. Definition; instances requiring mediation; sanctions; exceptions; etc.

(a) For purposes of this section, "mediation" means a process in which a neutral third party assists the parties to a civil action in reaching their own settlement but does not have the authority to force the parties to accept a binding decision.

(b) Mediation is mandatory for all parties in the following instances: (1) At any time where all parties agree. (2) Upon motion by any party. The party asking for mediation shall pay the costs of mediation, except attorney fees, unless otherwise agreed. (3) In the event no party requests mediation, the trial court may, on its own motion, order mediation. The trial court may allocate the costs of mediation, except attorney fees, among the parties.

(c) If any party fails to mediate as required by this section, the court may apply such sanctions as it deems appropriate pursuant to Rule 37 of the Alabama Rules of Civil Procedure.

Alabama Statutes – Mandatory Mediation Act – cont.-

d. A court shall not order parties into mediation for resolution of the issues in a petition for an order for protection pursuant to The Protection from Abuse Act, Sections 30-5-1 through 30-5-10 or in any other petition for an order for protection where domestic violence is alleged.
e. In a proceeding concerning the custody or visitation of a child, if an order for protection is in effect or if the court finds that domestic violence has occurred, the court shall not order mediation.
f. A mediator who receives a referral or order from a court to conduct mediation shall screen for the occurrence of domestic or family violence between the parties. Where evidence of domestic violence exists mediation shall occur only (1) Mediation is requested by the victim of the alleged domestic or family violence; (2) Mediation is provided by a certified mediator who is trained in domestic and family violence in a specialized manner that protects the safety of the victim; and (3) The victim is permitted to have in attendance at mediation a supporting person of his or her choice, including but not limited to an attorney or advocate.
g. Where a claim of immunity is offered as a defense, the court shall dispose of the immunity issue before any mediation is conducted.
h. A court shall not order parties into mediation in any action involving child support, adult protective services or child protective services wherein the Department of Human Resources is a party to said action. (Acts 1996, No.96-515,1.)

Alabama Statutes - Mediator Confidentiality Act

"Testimonial Immunity Bill"

Mediator Confidentiality Act - (Acts 2008 No. 387, §1,2,3) – Effective date May 16, 2008

§6-6-25. Definitions: legislative findings; compelled testimony, etc. mediators.

(a) For the purposes of this act, the following words shall have the following meanings: (1) MEDIATION. A process in which a mediator acts to encourage and facilitate the resolution of a dispute without imposing a settlement. (2) MEDIATOR. A neutral third party conducting a mediation, including any co-mediators, employees, agents, or independent contractors of the mediator or co-mediator, and any person attending or observing the mediation for purposes of training.

Alabama Statutes –Mediator Confidentiality Act – cont.-

(b) The Legislature finds that it is desirable to encourage public confidence in the use of alternative methods of dispute resolution by preventing a mediator from being compelled to testify or produce documents about a mediation.

(c) Except as otherwise permitted by the Alabama Civil Court Mediation Rules, a mediator shall not be compelled in any adversary proceeding or judicial forum, including, but not limited to, a hearing on sanctions brought by one party against another party, to divulge the contents of documents received, viewed, or drafted during mediation or the fact that such documents exist, nor shall the mediator be otherwise compelled to testify in regard to statements made, actions taken, or positions stated by a party during the mediation.

Civil Court Mediation Rules

Alabama Civil Court Mediation Rules – Effective 8/1/1992 as amended through May 1, 2009.

RULE 1. DEFINITION OF MEDIATION AND SCOPE OF RULES

(a) Mediation is an extra judicial procedure for the resolution of disputes, provided for by statute and by the Alabama Rules of Civil Procedure. A mediator facilitates negotiations between parties to a civil action and assists the parties in trying to reach a settlement, but does not have the authority to impose a settlement upon the parties.

(b) These rules shall apply: (1) In mediations ordered by the courts of this State as provided by statute or by the Alabama Rules of Civil Procedure; (2) In any other mediations by parties in a pending civil action in an Alabama court, other than the Alabama Supreme Court or Alabama Court of Civil Appeals, unless the parties expressly provide otherwise; and, (3) In other mediations if the parties agree that these Rules shall apply.

Alabama Civil Court Mediation Rules – cont.-

RULE 2. INITIATION OF MEDIATION; STAY OF PROCEEDINGS

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. Upon the entry of an order for mediation, the proceedings as to the dispute in mediation may be stayed for such time as set by the court in its order of mediation. Upon motion by any concerned party, the court may, for good cause shown, extend the time of the stay for such length of time as the court may deem appropriate.

Alabama Civil Court Mediation Rules – cont.-

RULE 3. APPOINTMENT OF A MEDIATOR

Upon an order for mediation, the court, or such authority as the court may designate, shall appoint a qualified mediator. The mediator appointed shall be agreed upon by the parties concerned, subject to the qualifications provisions of Rule 4, except that if the parties do not agree upon a mediator, then the selection of the mediator shall be in the discretion of the court or its designated authority. A single mediator shall be appointed unless the parties or the court determines otherwise.

RULE 4. QUALIFICATIONS OF A MEDIATOR

In court-ordered mediations, the mediator shall have those qualifications required by statute or by the Alabama Supreme Court Mediator Registration Standards or, in the absence of such statute or standards, the mediator shall have those qualifications the court may deem appropriate given the subject matter of the mediation. No person shall serve as a mediator in any dispute in which that person has any financial or personal interest, except by the written consent of all parties. Before accepting an appointment, the prospective mediator shall disclose to the parties any circumstances likely to create an appearance of bias or likely to prevent the mediation from commencing within a reasonable time. Upon receipt of such disclosure, the parties may name a different person as mediator. If the parties disagree as to whether a prospective mediator should serve, the court shall appoint the mediator.

RULE 5. VACANCIES

If any mediator becomes unwilling or unable to serve, the court shall appoint another mediator. The appointment of a successor mediator shall be by the same procedures and upon the same terms as an initial appointment.

RULE 6. ASSISTANCE AND SETTLEMENT AUTHORITY

Any party not represented by an attorney may be assisted by persons of his or her choice in the mediation. Each party, or that party's representative, must be prepared to discuss during mediation sessions the issues submitted to mediation and, unless otherwise expressly agreed upon by the parties or ordered by the court before the first mediation session, someone with authority to settle those issues must be present at the mediation session or reasonably available to authorize settlement during the mediation session.

RULE 7. TIME AND PLACE OF MEDIATION

The mediator shall fix the time of each mediation session. The mediation sessions shall be held at any convenient location agreeable to the mediator and the parties or as otherwise designated by the court.

RULE 8. IDENTIFICATION OF MATTERS IN DISPUTE

A mediator may require each party concerned, within a reasonable time before the first scheduled mediation session, to provide the mediator with a brief memorandum setting forth the party's position with regard to the issues that need to be resolved. The mediator shall not distribute the memoranda to the parties without their consent. At the first session, the parties shall produce all information reasonably required for the mediator to understand the issues presented. The mediator may require either party to supplement this information.

RULE 9. AUTHORITY OF MEDIATOR

The mediator does not have authority to impose a settlement upon the parties, but the mediator shall attempt to help the parties reach a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties, to communicate offers between the parties as the parties authorize, and, at the request of the parties, to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided the parties agree to the mediator's obtaining such advice and assume the expenses of obtaining it. Arrangements for obtaining such advice shall be made by the mediator or by the parties. The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties (see Rule 13(a)(2)).

RULE 10. PRIVACY

Mediation sessions are private. An alleged victim of domestic or family violence may have in attendance at mediations a supporting person of his or her choice. In all other cases, persons other than the parties and their representatives may attend mediation sessions only with the permission of the parties and with the consent of the mediator.

RULE 11. CONFIDENTIALITY

(a) All information disclosed in the course of a mediation, including oral, documentary, or electronic information, shall be deemed confidential and shall not be divulged by anyone in attendance at the mediation except as permitted under this Rule or by statute. The term "information disclosed in the course of a mediation" shall include, but not be limited to:

(1) views expressed or suggestions made by another party with respect to a possible settlement of the dispute;
(2) admissions made by another party in the course of the mediation proceedings;
(3) proposals made or views expressed by the mediator;
(4) the fact that another party had or had not indicated a willingness to accept a proposal for settlement made by the mediator; and
(5) all records, reports, or other documents received by a mediator while serving as mediator.

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-*cont.*- **RULE 11. CONFIDENTIALITY**

(b) The following are exceptions to the general rule stated in Rule 11(a):

(1) A mediator or a party to a mediation may disclose information otherwise prohibited from disclosure under this section when the mediator and the parties to the mediation all agree to the disclosure.

(2) Information otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in mediation.

(3) The confidentiality provisions of this Rule shall not apply:

(i) to a communication made during a mediation that constitutes a threat to cause physical injury or unlawful property damage;

(ii) to a party or mediator who uses or attempts to use the mediation to plan or to commit a crime; or

(iii) to the extent necessary if a party to the mediation files a claim or complaint against a mediator or mediation program alleging professional misconduct by the mediator arising from the mediation.

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-***cont.***- **RULE 11. CONFIDENTIALITY**

(c) A court shall neither inquire into nor receive information about the positions of the parties taken in mediation proceedings; the facts elicited or presented in mediation proceedings; or the cause or responsibility for termination or failure of the mediation process.

(d) A mediator shall not be compelled in any adversary proceeding or judicial forum, including, but not limited to, a hearing on sanctions brought by one party against another party, to divulge the contents of documents received, viewed, or drafted during mediation or the fact that such documents exist nor shall the mediator be otherwise compelled to testify in regard to statements made, actions taken, or positions stated by a party during the mediation.

RULE 12. NO RECORD

There shall be no record made of the mediation proceedings.

RULE 13. TERMINATION OF MEDIATION

(a) The mediation process may be terminated at any time after the initial mediation session by any party to the mediation. It also may be terminated by the mediator. Court-ordered mediations shall be terminated by filing with the court one of the following:

(1) Notice that the parties concerned have executed a settlement agreement. Such a notice shall be signed by all parties concerned or by their attorneys; or

(2) A written declaration signed by the mediator stating that in the mediator's judgment further efforts at mediation will not contribute to a resolution of the dispute among the parties (see Rule 9).

(b) Mediation also shall be terminated by the expiration of the period of any court-ordered stay provided by Rule 2.

(c) The fact that mediation has once been terminated as to a particular dispute shall not bar the entry of a later order to mediate that dispute.

RULE 14. INTERPRETATION AND APPLICATION OF RULES

The mediator shall interpret and apply these rules insofar as they relate to the mediator's duties and responsibilities. In other respects, they shall be interpreted and applied by the court.

RULE 15. EXPENSES, MEDIATOR'S FEE, AND DEPOSITS

(a) Expenses. The expenses of a witness for a party shall be paid by the party producing the witness. All other expenses of the mediation, including necessary travel and other expenses of the mediator, the expenses of any witnesses called by the mediator and the cost of any evidence or expert advice produced at the direct request of the mediator, shall be borne equally by the parties unless the parties agree otherwise, or unless the court directs otherwise.

(b) Mediator's Fee. A mediator shall be compensated at a reasonable rate, agreed to by the parties, or as set by the court. The mediator's fee shall be borne equally by the parties, unless they agree otherwise, or unless the court directs otherwise pursuant to Rule 2.

(c) Deposits. Before the mediation process begins, each party to the process shall deposit with the mediator such an amount of the anticipated expenses and fees as the court shall direct or the mediator reasonably requires. When the mediation process has been terminated, the mediator shall render an accounting, requiring payment of additional expenses and fees by the appropriate parties, or returning any unexpended balance to the appropriate parties.

Other Rules

- Rule 16(c)(7) of the Alabama Rules of Civil Procedure dealing with Pretrial Conferences, scheduling and management requires the court to address "the possibility of settlement or the voluntary use by all parties of extrajudicial procedures to resolve the dispute, including mediation conducted pursuant to the Alabama Civil Court Mediation Rules"

- Sanctions for failure to abide by a Court's mediation order are governed by Rule 37 of the Al Rules of Civil Pro. (per Mandatory Mediation Act)

- Alabama Rules of Judicial Administration, Rule 42 **-** Judicial Volunteer Program - established for use in the circuit courts and the district courts in Alabama - Effective March 1, 2000, addresses court mediators.

- Settlement resulting in joint dismissal with or without prejudice at the trial level is governed in part by case law, and in part by procedural rules, such as Alabama Rule of Civil Procedure 41(a)(1)(ii) and Ala.Code 1975, § 34-3-21.

- The Ala Rules of Appellate Pro. & Appellate Mediation Rules govern settlement agreements reached while the case is at the appellate level.

Alabama Mediation Cases

Supreme Court of Alabama

Holcim (US), Inc. v. Industrial Services of Mobile, Inc. 11/13/09
Wachovia & American Cas. v. Jones Morrison & Womack, P.C. 09/29/09
F.L.C. v. Alabama State Bar 09/04/09
Southland Bank v. A&A Drywall Supply Company, Inc., 4/24/09
Ex parte Morgan County Commission 10/10/08
Trustees U. of A. v. American Resources Ins. Co., Inc. 9/19/08
Billy Barnes Enterprises v. Williams 9/28/07
Cincinnati Ins. Companies v. Barber Insulation, Inc. 6/9/06
Alabama Department of Transportation v. Land Energy, Ltd., 2/6/04
Ex parte Littlepage 2/16 /01
Ex parte Margaret Ford 4/21/00

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

Walton v. Beverly Enterprises-Alabama, Inc., and Carolyn Disher , 9/12/08
Daniels v. Daniels, 10/5/07
Cain v. Saunders, 8/31/01

Alabama Court of Civil Appeals

K.D.H. v. T.L.H. III., 08/15/08
S.A.N. v. S.E.N., 5/23/08
Lucille Berry v. H.M. Michael, Inc., 5/9/08
McNeill v. McNeill, 9/28/07
McGallagher v. DeGeer, 12/30/05
Mackey v. Mackey, 5/4/01

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* An additional Alabama Supreme Court case from the 1997-98 term is overruled by statute - Morrison Restaurants, Inc. v The Homestead Village of Fairhope, Ltd. CV-96-2440 out of Mobile County dealt with a parties waiver of the right to mediate due to delay in asserting it.

Alternatively

Supreme Court of Alabama

Silo / Personal Injury / Certified Questions Case (Holcim - 11/13/09)
Collections / Lawyer Malpractice Case (South Trust -09/29/09)
Scalding /Probate Lawyer Misbehavior Case (F.L.C. - 09/04/09)
Business Loan / Recusal /Appellate Mediation Challenge Case (A&A Drywall - 4/24/09)
Life Insurance / Mandatory Mediation Case (Eckles /Morgan County-10/10/08)
Hospital Lien / P.I. W.D. + Sticky Lawyers (UAB Hospital -9/19/08)
Train versus Switchman / Liars + Bullies and Cry Baby Lawyer Case (Billy Barnes -9/28/07)
Lake House Case (Barber Insulation - 6/9/06)
Corridor X / Admissibility of Stuff Used in Mediation (AL DOT v. Land Energy-2/6/04)
Visa Bills / Mediator Testimony (Littlepage - 2/16 /01)
Workers' Comp Ombuds (Ford - 4/21/00)

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

Workers' Comp / 2 Releases / Retaliatory Discharge Case (Beverly Enterprises 9/12/08)
Divorce / Mental Incapacity (Daniels v. Daniels 10/5/07)
Debt Guarantor / Cash Value / Parole Evidence Case (Cain v. Saunders 8/31/01)

Alabama Court of Civil Appeals

Divorce / Set Aside Agreement Reached in Trial Case (K.D.H. v. T.L.H. III 08/15/08)
Divorce / Sex Offender Visitation Case (S.A.N. v. S.E.N. 5/23/08)
Dog Bite / Workers' Comp Case (Lucille Berry 5/9/08)
Divorce / Mediation Order not Appealable Case(McNeill v. McNeill 9/28/07)
Failure of Mediation and Cost Allocation / Estate Case (McGallagher 12/30/05)
Divorce / Voluntary or Mandatory? Case (Mackey v. Mackey 5/4/01)

Holcim (US), Inc. v. Industrial Services of Mobile, Inc.

Certified questions answered. 2009 WL 3805799 (Ala.) 11/13/09 COBB, AND WOODALL, STUART, SMITH BOLIN & PARKER, concur. MURDOCK, concurred specially, with opinion. LYONS, concurred in part and concurred in result, with opinion.

- Holcim, Inc. operated a cement manufacturing plant in Theodore, Alabama.
- Industrial Services of Mobile, Inc. was a general contractor for silo work .
- Ronald White, Industrial's employee, fell through a hole in a silo.
- White and his wife sued Holcim and two Holcim employees.
- 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 .
- The Whites and Holcim went to court-ordered mediation and settled for $5 million.
- First Mercury contributed policy limit of $1 million. Holcim paid $1 million. One of Holcim's excess carriers, Great American, paid $3 million.
- Ohio Casualty attended the mediation but Industrial did not. Neither Ohio Casualty nor Industrial contributed any funds to the settlement.
- Ohio Casualty filed the instant declaratory judgment action in the US District Court for the Southern District of Alabama, which granted summary judgment for Industrial. Holcim appealed. The US Court of Appeals for the Eleventh Circuit, certified two questions to the Alabama Supreme Court. Part of the answer to question two "when determining liability under an indemnity provision, court may look beyond the complaint in underlying action to underlying facts shown by admissible evidence. "

Wachovia Bank and American Casualty v. Jones Morrison & Womack, P.C. et al. 2009

AFFIRMED IN PART, REVERSED IN PART, REMANDED. Mobile County. Smith, Cobb, Lyons, Woodall, Parker, Murdock and Shaw, concur. Stuart and Bolin concur in part and dissent in part.

•The Georgia firm of Jones, Morrison, Womack & Dearing, P.C. and the Alabama firm of Stokes, Clinton, Fleming & Sherling, and its successor, Stokes & Clinton, P.C. and Paul Clinton, represented SouthTrust in obtaining a judgment against Neal Greene and taking action to collect the judgment for which Green was not legally liable. The judgment was eventually set aside, but Green suffered economic harm.
•Greene sued the Bank alleging malicious prosecution, abuse of process, negligence, wantonness, and outrage. The Bank put the lawyers on notice.
•It also filed a motion for mediation, allowing the lawyers to participate without being named as third-party defendants in the action, which was granted. The lawyers did not participate in the mediation. The Bank filed a third-party complaint against the lawyers, alleging claims under the Legal Services Liability Act, and seeking indemnity for any liability that the Bank might have to Greene.
•The trial court *sua sponte* ordered mediation.
•All of Greene's claims against the Bank, except malicious prosecution were disposed of by summary judgment. All of the Bank's claims against the lawyers were also disposed of by summary judgment with no stated basis. A short time later, the lawyers informed the mediator that they would not attend the October 1, 2003, court ordered mediation.

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Wachovia Bank and American Casualty v. Jones Morrison & Womack, P.C. et al. –cont.-

•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 Bank sought two thirds of the settlement amount from the lawyers.
•The Bank 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, the Court noted that even though the lawyers argue that at the time the Bank settled with Green, they had been granted summary judgment , it was still subject to revision, not final and no party had requested a certification 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, the case tried in the Mobile Circuit Court and at the close of the Bank's case-in-chief, the lawyers moved for a judgment as a matter of law. The trial court orally granted the motion stating 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. On September 25, 2009, the Alabama Supreme Court affirmed in part, reversed in part, and remanded the case back to Mobile Circuit Court.

F.L.C. v. The Disciplinary Board of the Alabama State Bar

AFFIRMED 09/04/09 Bolin, Cobb, and Stuart, Parker, Murdock, and Shaw, concur. Lyons, Woodall, and Smith, concur in the result. Mobile County

•Robert Jesse Johnson died of scalding injuries he suffered at the Conaway Boarding Home. His siblings wanted to sue, but his father, Robert Percy Johnson either did not or was prevented from doing so by his current wife.
•F.L.C. filed a Petition for Administration for Robert Jesse signed by a sibling in which he listed only the siblings as next of kin.
•F.L.C. referred the wrongful death action and it was eventually mediated and settled for $150,000. 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. filed a motion for approval of the settlement. Wrongful death claim counsel informed F.L.C. that he believed that the father needed to be listed as the sole heir in the forms. Robert Percy died and shortly thereafter.
•F.L.C. filed Petition for Order of Distribution in Robert Jesse's estate. Judge entered an order declaring that Robert Percy was the sole heir. F.L.C. appealed Judge's ruling, which was affirmed by the Alabama Court of Civil Appeals.
•Probate Judge entered a show cause order. The Alabama State Bar filed charges and found against F.L.C. He appealed. Justice Bolin wrote that F.L.C. had "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."

Southland Bank v. A&A Drywall Supply Company, Inc.,

Application for Rehearing Overruled. 4/24/09, Per curiam, Cobb, Lyons, Woodall, Stuart, Smith, Bolin, Parker, Murdock, and Shaw concur – Houston County

- A&A Drywall Supply Company, Inc., and Chadwick Anderson requested that the members of the Court recuse themselves and appoint a special court to hear the appeal de novo.
- Applicants argued 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.
- The Court wrote 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.
- The Court explained that 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.
- The Court noted that 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 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.

Ex parte Morgan County Commission
(In re: Eckles v. Fort Dearborn Life Insurance Company)

WRIT ISSUED 10/10/08, Stuart, Cobb, Lyons, Bolin, and Murdock concur, Morgan County.

•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.
•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.“

Board of Trustees of the University of Alabama v. American Resources Insurance Company, Inc.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED. 9/19/08 Jefferson County. See, Cobb, Lyons, Woodall, Stuart, Bolin, Parker and Murdock, concur.

•Patricia Ann Gann was a passenger in a vehicle struck by a SUV driven by an agent of Hill Plumbing. She was taken to Gadsden Regional for emergency care and then, later that same day, was transferred to UAB Hospital, where she remained until her death.

•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.

•The personal-injury action filed in the Etowah Circuit Court 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.

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Board of Trustees of the University of Alabama v. American Resources Insurance Company, Inc. - cont.-

• The mediation 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.

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Board of Trustees of the University of Alabama v. American Resources Insurance Company, Inc. - cont.-

- The hospitals filed in Jefferson County against everyone, including the law firm of Cory Watson. The trial court entered summary judgment finding that "the parties . . . intended to attribute their settlement and the funds paid, only to the Gann wrongful death claims." The hospitals appealed.
- The Alabama Supreme Court found that the hospitals' failure to adhere to the statute was immaterial to the validity and enforceability of the liens because the parties had actual knowledge of the liens when they attended the mediation and entered into the settlement. Therefore the settlement was not valid against their liens without their consent to the settlement.
- The Court also 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 because the settlement was broad enough to encompass the personal-injury claims and Gann did in fact dismiss 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.
- The Court concluded that the hospitals are entitled to institute a civil action for damages on account of impairment under § 35-11-370.

Billy Barnes Enterprises v. Williams

REVERSED and REMANDED 9/28/07 Smith, See, Lyons, Stuart, Bolin, and Parker, concur. Woodall, concurred in the result. Murdock, filed an opinion concurring in the result. Cobb, filed a dissenting opinion.

•Williams worked as a "switchman" for Railserve, Inc. He was providing directions over a radio to the engineer operating the train's engine while the train was moving in reverse. Young could not see the rear of the train and as the train neared a road crossing, a truck failed to yield and Williams activated an emergency brake in the rear car. The train jerked, threw Williams off and rolled over his legs. Williams sued alleging that the truck who failed to yield was owned and operated by Billy Barnes.

•Counsel for Billy Barnes attempted to obtain through written discovery any statements obtained from Williams. He deposed Williams. He wrote letters to Counsel for Railserve. He filed a motion to compel. He challenged the privilege log. He made verbal requests in a hearing regarding the discovery dispute. The Court ordered recorded statements or statements taken in the investigation to be produced. Counsel filed two additional motions to compel.

•Trial was scheduled for August 29, 2005.

•On August 19, 2005, the parties held a mediation conference.

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Billy Barnes Enterprises v. Williams – cont. -

• On August 22, 2005, a conference call was held with the parties and the trial court, during which Billy Barnes again argued its motions to compel relative to the privilege log. As a result, Billy Barnes's counsel received the Memo to the File via facsimile at approximately 3:00 p.m. in which there was no mention of any recorded statement. Later that same day, the parties executed the $500,000 mediated settlement agreement.

•On August 23, 2005, counsel for 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.

•Billy Barnes moved to set aside the settlement agreement. Williams filed an opposition and 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, denied the motion to set aside the settlement agreement, granted Williams's motion to enforce, then entered a judgment in favor of Williams in the amount of $500,000. Billy Barnes appealed.

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Billy Barnes Enterprises v. Williams – cont. -

•The Supreme Court Reversed and Remanded.

•In the main opinion, the 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. 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."

•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.

Cincinnati Insurance Companies v. Barber Insulation, Inc.,

AFFIRMED IN PART, REVERSED IN PART, REMANDED 6/9/06 Coosa County. Woodall, Nabers, Lyons, Smith and Parker

•In a construction contract for a lake house in Equality between the Fains and Dark Alexander & Company, Inc., Dark agreed to serve as general contractor.
•Dark subcontracted with Framco for the framing and siding work, and it entered into an oral agreement with Barber to insulate the house.
•The house was completed in winter and the following winter, 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.
•The parties voluntarily mediated resulting in CIC settling its claims against Dark, but Framco filed a motion alleging that CIC had agreed during mediation to settle its claims against Framco for $1,000 and seeking an order enforcing the agreement. The trial court granted both motions.
•On appeal, the Supreme Court reversed and remanded the case on the settlement 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.* "

Alabama Department of Transportation v. Land Energy, Ltd.,

AFFIRMED Harwood, See, Brown, Woodall, and Stuart, concur. 2/6/04. Montgomery County

•ADOT needed to acquire rights in parcels of privately owned property to complete Corridor X. Approx. 120 acres located in Marion County consisted of surface land owned by an estate and surface and mineral rights owned by an investment group, Land Energy, Ltd. It brought an inverse-condemnation action against the AL Dept. of Transportation for 374,000 tons of coal.

•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. Relying on Rule 11 of the Alabama Civil Court Mediation Rules, it maintained that the charts and tables created by its trial expert illustrating various aspects of the coal were wrongly admitted into evidence at trial because "the sole purpose of these documents was to facilitate a compromise and settlement of this case through mediation."

•The record reflects that during ADOT's direct examination of their trial expert, 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?

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- 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, counsel 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 his 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. " Land Energy stated: " ... What I told 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 him 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. " ADOT: "Okay." Land Energy: But the document doesn't reveal anywhere on there about mediation or what was said – -cont-

•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 - “

•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. Land Energy: “They used three drill hole logs that Land Energy had done. And they had two drill holes of their own.” Court: “But have all the drill logs or holes, has all that been admitted into evidence? “ Land Energy: “It has. “ Court: Okay. So it looks, to me, like [Dr. McCarl] is getting this from the drill log. “ "ADOT: “Let me ask something. Did you furnish this to me as part - of your [pretrial] disclosure? “ Land Energy: “Yes, I did.“

•The next morning counsel discussed the matter further with the court: Land Energy: “Your honor, I think we have one matter to take up beforehand are the 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. 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. ... “

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Alabama Department of Transportation v. Land Energy, Ltd.,

The Court: “Okay. Go ahead. What is your objection going to be? “ 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. ".... 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 - “ 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.”

•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“

•: The Alabama Supreme Court concluded that under this state of the record, 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 its preexisting discovery requests.

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REMANDED. Mobile County , Johnstone, Moore, and Houston

Ex parte Littlepage

•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,"

•In his answer, 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." 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."

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Ex parte Littlepage

•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.

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Ex parte Littlepage

•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."
•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. 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 husband to pay the debts. Husband appealed. The Court of Civil Appeals affirmed, without opinion. Cert. 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.

Ex parte Margaret Ford

AFFIRMED. See, Johnstone, concurred in result, with opinion, joined by Cook. DeKalb County – CV 96-262.

•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.' "

Denice S. Walton v. Beverly Enterprises-Alabama, Inc., d/b/a Beverly Meadowood Health & Rehabilitation, and Carolyn Disher

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

2008 APPLICATION FOR REHEARING DENIED Jefferson County, Bessemer Div. Thomas, Pittman, Bryan, and Moore, concur. Thompson, concurs in result.

•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 Meadowood Health & - cont.-

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.

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Denice S. Walton v. Beverly Enterprises-Alabama, Inc., d/b/a Beverly Meadowood Health & Rehabilitation, and Carolyn Disher

•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

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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."

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Denice S. Walton v. Beverly Enterprises-Alabama, Inc., d/b/a Beverly Meadowood Health & Rehabilitation, and Carolyn Disher

•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.

Daniels v. Daniels

Alabama Court of Civil Appeals – Cert. quashed By the Alabama Suprme Court

10/5/07 Lee County, No. DR-06-03. Thompson, Bryan concurred in part, dissented in part, and filed opinion, in which Moore, J., joined. Certiorari quashed.

•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.

. **Cain v. Saunders**

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

AFFIRMED. Cert denied. Tuscaloosa Circuit Court. Thompson, Pittman, concurs. Crawley, concurs in the result. Yates, and Murdock.

•J.M Cain, Jr., sued Charles L. Saunders, Jr. over Saunders's agreement to guarantee certain debts of Cain. The trial court 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.

•Cain and Saunders mediated, and executed a written settlement agreement. 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 a hearing on Saunders 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.

-Cont.-

. **Cain v. Saunders**

•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. Cain appealed. 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, the Court of Civil Appeals interpreted 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 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. Further, before the trial court, Cain did not seek to rescind or set aside the settlement agreement and did not file any document in opposition to Saunders's motion to enforce the settlement agreement. 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. -cont.-

. **Cain v. Saunders**

•In the dissent on the issue of the admissibility of parol evidence from the Parties' Mediation, Yates notes that when an agreement is reached in mediation, 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. . . . 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.

K.D.H. v. T.L.H. III

Alabama Court of Civil Appeals

AFFIRMED IN PART. 08/15/08, Moore, Elmore County

•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.

•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.

S.A.N. v. T.L.N

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 Coffee County 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.)

•S.A.N. and S.E.N. divorced with custody of the parties' two children to the mother with overnight visitation and child support to father. Father sought modification of the child-support provisions, as well as a judgment holding the mother in contempt for failing to abide by the visitation provisions of the divorce judgment.
•The trial court ordered the parties to mediation and the parties resolved the case by agreeing to a stipulation of facts to be provided 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.

S.A.N. v. T.L.N

- 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.
- 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.
- 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.

Ala.Code 1975, § 15-20-26(c),

§ 15-20-26. Adult criminal sex offender -- Prohibited residence locations, etc.

". . . (c) No adult criminal sex offender shall establish a residence or any other living accommodation where a minor resides. Notwithstanding the foregoing, an adult criminal sex offender may reside with a minor if the adult criminal sex offender is the parent, grandparent, or stepparent of the minor, unless one of the following conditions applies:

(1) The adult criminal sex offender's parental rights have been or are in the process of being terminated as provided by law.

(2) The adult criminal sex offender has been convicted of any criminal sex offense in which any of the offender's minor children, grandchildren, or stepchildren were the victim.

(3) The adult criminal sex offender has been convicted of any criminal sex offense in which a minor was the victim and the minor resided or lived with the offender at the time of the offense.

(4) The adult criminal sex offender has ever been convicted of any criminal sex offense involving a child, regardless of whether the offender was related to or shared a residence with the child victim.

. . . "

Lucille Berry v. H.M. Michael, Inc.,

AFFIRMED. 5/9/08 Lee Circuit Court, No. CV-05-138. PITTMAN, BRYAN and THOMAS, THOMPSON concurs in result, without writing.

•Workers' Comp. for a dog bite. Ombudsman facilitated settlement agreement : 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.
•Less than 60 days after the agreement was signed, employee filed a motion to set aside, employer filed a motion to enforce.
•Ore tenus proceedings and briefs followed and the trial court denied the motion to set aside the settlement agreement. Employee appealed.
•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, but concluded that they justify similar appellate treatment . 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.

McNeill v. McNeill

9/28/07 **APPEAL DISMISSED** Limestone, DR-00-408.1, Bryan, Thompson, Pittman, Thomas, Moore, concur.

•The McNeills divorced, had a long history of post divorce actions including cross motions for contempt, disputes regarding the custody of their two minor daughters, visitation, child support, and healthcare insurance for the children. An off the record agreement was reached and the court awarded the mother primary physical custody of the children and awarded the father visitation. Further disputes arose and the trial court held an evidentiary hearing entered an order (1) directing that the parties and the children undergo psychological counseling and (2) suspending the father's visitation pending another hearing. The trial court later held another evidentiary hearing regarding and entered an order granting the father temporary visitation. A final judgment regarding visitation was entered on November 21, 2006.
•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 .
•The court found that 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.

McGallagher v. DeGeer

AFFIRMED IN PART; REVERSED AND JUDGMENT, RENDERED IN PART., Mobile Probate Court. Crawley, Thompson, Pittman, Bryan, concur.

•Lewis M. DeGeer, Jr., died testate survived by nine children and four children of a deceased child. McGallagher was appointed as executrix and trustee in the will, and the Court issued letters testamentary to her. A will contest was filed by 5 children and 4 grandchildren along with a petition to remove McGallagher arising out of a dispute over $400,000 in asbestos related wrongful death proceeds and DeGeer's 30 to 40 rental properties.

•The probate court conducted extensive hearings and Judge Davis removed executrix and ordered her to provide an accounting and final settlement of her administration of the estate.

•Executrix appealed.

•Among other things, McGallagher asserted that the court erred by ordering her to pay one-half of the mediator's fee. McGallagher argued that the petitioners should be solely responsible for the mediator's fee because she says, it was they who caused mediation to fail.

The Court found no error in the allocation of costs and noted that the record does not disclose the reasons why mediation was unsuccessful. The record does disclose that both parties consented to mediation.

Mackey v. Mackey

5/4/01 Madison County (DR-94-414.02) On Rehearing Ex Mero Motu Crawley, **REVERSED AND REMANDED WITH DIRECTIONS**. Yates, Thompson, Pittman, and Murdock, concur.

•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.

•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.

•On appeal, the Father contended that the trial court erred by referring the parties to mediation over his objection. The Committee Comment to Rule 2 states that "[p]articipation in the mediation process is strictly voluntary."

•The Court of Civil Appeals noted that the rule, 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. "

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