2006

Murlyn Craig Reese v. Tingey Construction and/or Freemont Compensation Insurance Grop, LWP Claims Solutions, Inc. Real party in Interest and Petitioners : Brief of Appellant

Utah Court of Appeals

IN THE UTAH SUPREME COURT OF THE STATE OF UTAH

MURLYN CRAIG REESE, Plaintiff-Respondent, v. TINGEY CONSTRUCTION AND/OR FREEMONT COMPENSATION INSURANCE GROUP, Defendants-Respondents, LWP CLAIMS SOLUTIONS, INC. Real Party in Interest and Petitioners.	BRIEF OF REAL PARTY-IN-INTEREST AND PETITIONER, LWP SOLUTIONS, INC. Case No. 20060594-SC

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UTAH R. APP. P. 24(A)(1) STATEMENT OF ALL PARTIES

1. Murlyn Craig Reese, Plaintiff and Respondent.

2. Tingey Construction Defendant and Respondent.

3. LWP, Solutions, Inc. real-party-in-interest and Petitioner.

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I. STATEMENT OF JURISDICTION

This court has jurisdiction over this case by virtue of granting Petitioner LWP, Solutions Inc.'s Petition for Discretionary Interlocutory Appeal pursuant to Utah Rules of Appellate Procedure Rule 5.

II. ISSUES PRESENTED FOR REVIEW & STANDARD OF REVIEW

1. Whether the Utah Rules of Court-Annexed Alternative Dispute Resolution require that agreements reached in the course of mediation be reduced to some form of writing.

"Statutory Construction is a question of law and is reviewed by the Court de novo. When interpreting court rules, we apply our rules of statutory construction with an understanding that rules, like statutes, are passed as a whole and not in parts or sections. [O]ur primary goal is to evince the true intent and purpose of the rule-making body and to render all parts [of the rule] relevant and meaningful." Cox v. Krammer, 76 P.3d 184, 187 (Utah Ct. App. 2003) (internal quotations and citations omitted)(alterations original).

2. Whether Utah Code Annotated § 78-31b-8 (2002) requires that all discussions among participants at a mediation be kept confidential so that such mediation discussions cannot be used to prove the existence of an alleged oral agreement.

"Matters of statutory construction . . . are questions of law that we review for correctness." Anderson v. United Parcel Service 96 P.3d 903, 906 (Utah 2004).

3. Whether the trial court erred when it interpreted Utah Revised Statute Section 78-31b-8, as recognizing "confidential" and "non-confidential" components of mediation discussions. "Matters of statutory construction . . . are questions of law that we review for correctness." Id.

III. PRESERVATION OF ISSUES IN TRIAL COURT

The issues set forth herein were preserved in the trial court by virtue of a request to immediately certify the trial courts ruling for interlocutory appeal. R213: 45:24 – 46:6. When the trial court denied the request, Petitioner filed its Petition for Discretionary Interlocutory Appeal pursuant to Utah Rules o f Appellate Procedure Rule 5. R205.

IV. DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES & REGULATIONS

Utah Code Ann. § 78-31b-8 (2002).

Utah Rules of Court-Annexed Alternative Dispute Resolution, Rule 101.

Rule 408 of the Utah Rules of Evidence.

V. STATEMENT OF THE CASE

The trial court ordered that LWP Solutions, Inc.'s ("LWP") counsel be deposed and forced to testify regarding statements and negotiation that took place

within the confines of mediation in direct violation of Utah Code § 78-31b-8 (2002) which deems all mediation discussions confidential. The purpose of this deposition was to prove the existence of an oral agreement between LWP and Mr. Reese that Mr. Reese alleged was reached and which LWP denies. LWP filed a petition for discretionary interlocutory appeal pursuant to Rule 5 of the Utah Rules of Appellate Procedure, which this Court granted.

LWP Solutions, Inc. asks this Court to reverse the trial court's ruling and find that all mediation discussions are confide ntial and cannot be revealed to third parties even if introduced to prove the existence of an oral contract. Moreover, LWP asks that the Court find that the rules regulating Alternative Dispute Resolution ("ADR") require mediation participants to reduce t heir agreements to written form so as to avoid disputes such as the one between Mr. Reese and LWP. Allowing participants to enforce alleged oral agreements made within the confines of mediation would undermine the confidentiality requirements of mediation and would contravene ADR rules that allow participants to disengage in settlement discussions at any time prior to the execution of a written document. Moreover, allowing for an exception to confidentiality to prove oral agreements would create an exception that swallows the rule.

A. NATURE OF THE CASE

This case involves statutory construction of Utah Code Ann. § 78-31b-8; the Utah Rules of Court-Annexed Alternative Dispute Resolution, Rule 101; and Rule 408 of the Utah Rules of Evidence so as to determine whether the rules of confidentiality surrounding mediations precludes the introduction of evidence from within a mediation to enforce a purported oral agreement reached therein. The trial court erroneously allowed Mr. Reese to introduce evidence regarding an alleged oral agreement and this Court should reverse and remand with direction that Mr. Reese's Motion to Enforce Settlement be dismissed with prejudice for lack of admissible evidence in support thereof.

B. COURSE OF PROCEEDINGS BELOW & DISPOSITION

Plaintiff Murlyn Craig Reese filed a motion to enforce a settlement agreement that he alleged was reached during a mediation with Defendant, Tingey Construction and LWP Solutions, Inc., third-party lien holder and real party in interest. A hearing was held on Mr. Reese's motion to enforce. R213. At the hearing, LWP asserted that Rule of Evidence 408, Rule 101 of the Utah Rules of Court-Annexed Alternative Dispute Resolution and Utah Code Ann. § 78-31b-8 prohibited the disclosure of discussions made during a mediation. R213: 3:25; 6:20. The trial court was not persuaded by LWP's arguments and found that there were "confidential" and "non-confidential" components of mediation and that Mr.

Reese was free to introduce evidence regarding the "non-confidential" portions of mediation. LWP renewed its objections and asked the court to certify the matter for interlocutory appeal and the trial court denied this request. R213:45:24 -46:6. The trial court provided Mr. Reese with the option to either call LWP's counsel to the stand at that very moment or depose her at a later date. R213:43:25-44:12. Mr. Reese chose to depose LWP's counsel and the hearing concluded. R213:44:13 -15.

Subsequently, LWP filed a motion to intervene seeking to clarify its role in the suit and to ensure that it had standing to appeal the trial court's ruling. R135. Mr. Reese objected to LWP intervening in the suit. R157.

LWP also submitted a proposed order to the court in an attempt to solidify the breadth of the court's ruling. In this proposed order, LWP made it very clear that LWP's counsel would not be required to testify in violation of attorney-client privilege. R150-152; R170-73. Mr. Reese again objected. R140.

During the hearing, Mr. Reese's counsel purported that one of his secretaries who sat near the foyer during the mediation among the parties overheard LWP's counsel speaking with her client and could testify in support of an oral agreement. R213: 40:6-12. Mr. Reese also sought leave to testify about the conversations that he "overheard." *Ibid.* LWP filed a motion with the court seeking exclusion of this evidence on the ground that it was protected by attorney-client privilege and this privilege was not waived by an eavesdropper. R.8 fn 2 – R9; R170-73.

Despite LWP's objections, the trial court executed the proposed order tendered by Mr. Reese. R179-181. This order did not explain with any detail the scope of the deposition of LWP's counsel. R179-181. Most importantly, the executed order was silent on the issue of whether LWP's counsel would be required to violate attorney-client privilege and testify about her discussions with her client. R179-181. It also failed to rule on the issue of whether opposing counsel's secretary would be allowed to testify about what she claims she overheard LWP's counsel say. R179-181.

The court also failed to rule on LWP's motion to intervene in the suit prior to entering the above-described order. R135; R138 and R197-198. As a consequence, LWP was forced to file a motion for extraordinary writ to protect its interest. R195. As a precaution, LWP also filed a motion for discretionary interlocutory appeal and a motion to quash the deposition notice for Ms. Acosta, LWP's counsel.[1] R185-187. Ultimately, the trial court allowed LWP to intervene in the suit and LWP's petition for discretionary interlocutory appeal was granted by the Court. R197-198; R205-206.

[1] LWP Solutions, Inc. also filed a Petition for Extraordinary Writ and Rule 8A Emergency Relief Petition. R.195. This request was denied by the Utah Supreme Court. R202.

VI. STATEMENT OF FACTS

On or about May 24, 2000, Mr. Reese was invovled in a work-related accident when he fell from a third-story balcony while attempting to raise a toolbox from the ground using an electrical cord. R2. Mr. Reese had leaned on a temporary railing while attempting to raise his tools. R2. The temporary railing gave way and Mr. Reese fell. He sustained significant injury to his leg. R2. As Mr. Reese was in the course and scope of his employment, all medical expenses related to this injury were covered by Mr. Reese's employer's workers compensation insurance. R69. The insurance carrier retained LWP Solutions, Inc. ("LWP") to administer the payment of workers compensation benefits to Mr. Reese and to pay medical bills as they were incurred.[2]

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[2] LWP Solutions, Inc. would like to clarify its role in this litigation as there appears to be come confusion. LWP is not an insurance provider but is a third-party administrator that has been hired by the Utah Property and Casualty Guarantee Association ("UPCIGA"). UPCIGA has taken over payment of Mr. Reese's workers compensation claim in light of the fact that the workers compensation insurance company, Fremont Compensation Insurance Group/Freemont Indemnity Group, was liquidated in 2003. See Utah Code Ann. § 31A-28-202 et seq. (2006)(setting forth the role that UPCIGA plays in circumstances involving insolvent insurers). While LWP has been making payments to Mr. Reese and to others on his behalf, the money for such payments has been provided, at least in part, by UPCIGA or are funds to which UPCIGA is entitled to as a result of Fremont's liquidation. Accordingly, UPCIGA has a lien on proceeds recovered by Mr. Reese in his litigation against Tingey Construction. LWP is acting as UPCIGA's agent in this matter and is afforded the same protections and obligations as UPCIGA pursuant to Utah Statute.

Subsequently, Mr. Reese retained his own counsel and filed suit against Tingey Construction ("Tingey"). R2. In that suit, Mr. Reese argued that Tingey had negligently constructed the temporary railing and that had the temporary railing been properly constructed, he would not have fallen. R2. Tingey defended the suit by stating that Mr. Reese was at fault and that his recovery was reduced by his own negligence. R16.

In the fall of 2005, Mr. Reese contacted LWP and asked for a break down of the money it had paid to Mr. Reese in workers compensation benefits and medical bills. Mr. Reese then asked if LWP would reduce the amount of its lien so as to facilitate settlement of Mr. Reese's suit against Tingey. At Mr. Reese's urging, LWP agreed to participate in a mediation of the dispute between Tingey and Mr. Reese that was to occur on December 30, 2005. R127. Paul Felt acted as the mediator.[3] R77.

Near the end of the mediation, LWP was presented with a Memorandum of Understanding that purported to set forth the terms of the agreement with the parties. LWP refused to sign because the memorandum contained a term to which

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[3] Over objection and at the trial court's insistence, LWP submitted an affidavit of its counsel recounting the events that took place at the mediation from her perspective. R126-13. The submission of this affidavit at the hearing should not be seen as a waiver of LWP's objection to being asked to provide testimony regarding what occurred at the mediation. LWP introduced this evidence only because the trial court insisted. LWP has taken caution to limit reference to the any information contained in that affidavit.

LWP had not agreed. LWP's counsel advised Mr. Reese, Tingey and the mediator that there was no agreement with LWP. Tingey left the mediation and LWP and Mr. Reese remained to further negotiate a settlement. Ultimately, no resolution was reached and LWP left the mediation without executing the Memorandum of Understanding or any other written document. LWP informed Mr. Reese that no agreement had been reached prior to leaving.

Following the mediation, LWP wrote Mr. Reese several letters reiterating its position that no agreement had been reached at the mediation. R91-94 Moreover, LWP cautioned Mr. Reese that pursuant to Lyons v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999), mediation discussions were confidential and could not be used by Mr. Reese to enforce any alleged oral agreement. R91-92. Despite LWP's warnings that the content of the mediation was confidential, Mr. Reese filed a Joint Motion to Enforce Settlement.[4] R54.

The trial court heard oral argument on the motion to enforce settlement on May 22, 2006. R213. At the hearing, LWP reasserted its argument that the parties had not reached any agreement. LWP further argued that Mr. Reese was

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[4] Below, Mr. Reese made much of the fact that Tingey Construction Inc. ("Tingey") joined in the motion to enforce. LWP had very little contact with Tingey during the mediation and never discussed the terms of any purported settlement with Mr. Reese with any representative of Tingey. Consequently, Tingey can only testify about what Mr. Reese told it or about its own suppositions; but it possesses no first-hand knowledge of any discussion between LWP and Mr. Reese. Its joinder in the motion to enforce is of limited significance.

prohibited from revealing confidential mediation discussions pursuant to Uta h Code Ann. § 78-31b-08.

The trial court found as follows: "Mediation discussions contain both "confidential" and "non-confidential" discussions and that LWP's counsel would be deposed about the mediation. R179-181. The trial court held that "the scope of the deposition shall consist of the content of the mediation, including the process of the mediation and conversations and agreements that were made during the mediation." R179-181. LWP sought an interlocutory appeal to prevent its counsel from being deposed and to preserve the confidentiality of the mediation among the parties. R206.

VII. SUMMARY OF ARGUMENT

Mediation discussions are confidential pursuant to Utah Code Ann. § 78-31b-08, Rule 101 of the Utah Rules of Court-Annexed Alternative Dispute Resolution, and Rule 408 of the Utah Rules of Evidence. The trial court erred when it ordered that LWP's counsel could be deposed regarding confidential mediation discussions. The courts are not to delve into confidential mediation discussions to determine whether an oral agreement was reached during mediation. The bright-line rule is that oral agreements made during a mediation will not be enforced by the courts and that parties need to protect themselves and reduce all agreements to some form of writing prior to the end of the mediation. See Lyons

v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999). LWP refused to execute any "Memorandum of Understanding" that was presented to it at the end of the mediation because the memorandum contained a term to which it did not agree. LWP communicated its refusal plainly to the others at the mediation. This is conclusive proof that the parties do not have an enforceable agreement since parties to mediation may withdraw at any point prior to the executi on of a written summary of the agreement.[5]

VIII. ARGUMENT

In his motion, Mr. Reese attempts to enforce a settlement agreement that was never reached. It appears that the Plaintiff and the Defendant came to some sort of resolution during the mediation, but it is clear that no such agreement was reached with LWP. R88. Prior to leaving the mediation on December 30, 2005, counsel for LWP made it clear to all involved that LWP did not agree to the terms of the settlement set forth in the document drafted b y the mediator, Paul Felt. R88.

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[5] If required to do so, LWP could introduce evidence to show that there was no meeting of the minds between LWP and Mr. Reese. The lack of a meeting of the minds between the parties is evidenced by LWP's refusal to execute the document presented to it at the end of the mediation on the grounds that it contained a term to which it did not agree. Upon review of this document and the specific language therein, LWP recognized immediately that Mr. Reese had incorrectly set forth an agreement between the two parties. LWP notified the participants immediately of the error but Mr. Reese insisted that this term had been fully discussed even though LWP was certain that the term had not been discussed. The parties failed to reach any meeting of the minds and the alleged oral agreement is unenforceable on this ground as well.

LWP's counsel refused to execute the written agreement because it contained a term to which LWP did not agree. *Ibid.*

Mr. Reese argues (1) that LWP is not entitled to the benefits of confidentiality in Utah Code Ann. § 78-31b-8 because it was not a "party" to the suit and because the portion of the mediation needed to prove the existence of an oral agreement is not confidential, and (2) that no written document is necessary to bind a party to alleged agreements made in mediation, because other jurisdictions enforce oral agreements in mediation.

Mr. Reese is mistaken in each assertion and the trial court erred in allowing him to introduce evidence regarding an alleged oral agreement and erred in ordering that LWP's counsel be deposed regarding confidential mediation discussions. This Court should reverse the trial court's ruling that LWP's counsel be deposed regarding confidential mediation discussions. The Court should remand with direction that Mr. Reese's motion to enforce be dismissed with prejudice for lack of admissible evidence to support his claim.

A. LWP's Participation in the Mediation Entitles it to Treat all Portions of the Mediation as Confidential.

1. *Both the Benefits and the Burdens of Confidentiality Apply to LWP.*

Below, Mr. Reese argued that Utah Code Ann. § 78-31b-8 (2) did not apply to LWP. Mr. Reese argued that the confidentiality requirement set forth in Section

78-31b-8(2) only prohibited admission of confidential statement at a subsequent "trial of the **same** case or **same** issues between the **same** parties." R213:14:9-24.

Mr. Reese's legal argument is flawed. Utah Code Section 78-31b-8 does provided at (2) that "[n]o evidence concerning the fact, conduct, or result of an ADR proceeding may be subject to discovery or admissible at any subsequent trial...," but it also provides that confidentiality applies to all persons present at the mediation, including lien holders such as LWP. Id.

Subsection (4) provides "no person attending an ADR proce eding . . . may disclose or be required to disclose any information obtained in the course of an ADR proceeding." Id. The plain language of this statute states that the facts, conduct, or result of a mediation are confidential. There is no limit as to w ho is bound by the mandate of confidentiality because the legislature used the word "person," not parties, as Mr. Reese argues.

Moreover, if the Court were to adopt Mr. Reese's reasoning it could be argued that LWP would not be entitled to the benefits of confidentiality under Utah law because it was not named as a "party" to this suit at the time of the mediation. This is an absurd result and is not what the Legislature intended. As the plain language of § 78-31b-8(4) provides, everyone who participate s in mediation must adhere to the confidentiality requirements.

2. *All Mediation Discussions Are Confidential*.

Similarly, there is no basis in law or fact to support the trial court's finding that there are "confidential" and "non confidential" portions of mediation. R178. The plain language of § 78-31b-8 states that mediation is confidential. The statute does not distinguish between aspects of mediation as the trial court found or as Mr. Reese argues. Instead, all mediation discussions are treated as equally confidential.

Furthermore, both the trial court and Mr. Reese ignore the fact that the Utah Court of Appeals has previously ruled that mediation discussions are confidential and did not distinguish between "confidential" and "non-confidential" portions of mediation in making its ruling. In Lyons v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999), the Utah Court of Appeals addressed the confidentiality of statements made during a court-ordered mediation. In that case, the parties had been sent to mediation on appeal. See id. at 1143. The Appellant subsequently filed a motion with the appeals court seeking to enforce an agreement allegedly reached during mediation or, in the alternative, for return of monies tendered in furtherance of settlement. See id. The Court of Appeals refused to hear the motion on the ground that it does not hear new evidence. See id. The issue regarding the enforcement of the settlement was remanded to the trial court for hearing. See id

at 1143-44. The Court of Appeals discussed at length the procedure to be followed on remand. See id. at 1144.

The Court stated as follows:

> In the course of proceedings on remand, pursuant to the prior order of this court, neither counsel nor parties may disclose to any court, in argument, briefs, or otherwise, statements or comments made during the initial mediation conference or in related discussions involving the appellate mediator thereafter. We interpret this prohibition to apply equally to notes or other memoranda of such statements or comments. This restriction applies with equal force to the appellate mediator in the unlikely event that she should be asked to participate in any way in the proceeding on remand.

Id. at 1144 (footnote omitted)(emphasis original). The Court in Lyons stated, "'guarantee of confidentiality is essential to the proper functioning of a . . . settlement conference program.'" Id. at 114 (quoting Clark v. Stapleton Corp., 957 F.2d 745, 746 (10th Cir. 1992)). "'[P]articipants must trust that matters discussed at a conference will not be revealed to the judges.'" Id.

The same reasoning applies to the case at bar. Mr. Reese, in error, revealed to the trial court the content of confidential settlement negotiations between LWP, himself and Tingey. Pursuant to the reasoning in Lyons, Mr. Reese may not rely upon such evidence in pursuing his motion and may be admonished or sanctioned by the Court for doing so.

LWP agreed to participate in the mediation between Tingey and Mr. Reese because it realized that its lien would impact settlement between the parties. It negotiated in good faith throughout the mediation, but a resolution was not reached. That LWP failed to sign any written agreement drafted by Mr. Reese is conclusive evidence that no agreement was reached. R88. LWP agreed to participate in this mediation because it trusted that all statements made therein would be kept confidential unless agreed to by the parties.

Thus, the trial court erred in interpreting § 78-31b-8 as not prohibiting the introduction of evidence to prove a purported oral agreement reached during mediation. "Matters of statutory construction . . . are questions of law that" are "review[ed] for correctness." Anderson v. United Parcel Service, 96 P.3d 903, 906 (Utah 2004). Accordingly, this Court need provide no deference to the trial court's interpretation of § 78-31b-8. The plain language of § 78-31b-8(4) provides that all participants to mediation are bound by the obligation and benefit of confidentiality. Similarly, there is no language in the statute that supports the trial court's distinguishing between "confidential" and "non-confidential" mediation discussions. The trial court's interpretation of § 78-31b-8 is in error and should be reversed.

Interestingly, Mr. Reese does not dispute that Lyons v. Booker, 982 P.2d at 1143, is binding precedent that mediation discussions must remain confidential.

Mr. Reese merely states that LWP's counsel is not ordered to discuss confidential mediation discussion, but instead, is ordered to discuss non-confidential mediation discussions. R213:14:9-24. This argument begs the question and ignores that the Utah Legislature, in § 78-31b-8, and the Utah Court of Appeals, in Lyons, have determined that all mediation discussions are confidential.

Mr. Reese also argues that the trial court provided sufficient guidance regarding LWP's counsel's deposition because it directed that counsel need only testify about "non-confidential" statements. This begs the question of which statements are confidential. Moreover, the trial court has put LWP's counsel in the awkward and unnecessary position of being a witness in her own case. It is not clear the extent to which the trial court has abrogated the rule of confidentiality in mediations. By ruling that there are "confidential" and "non-confidential" components to mediation, the trial court has created a dispute in each case where mediation does not result in a written settlement agreement. It is now unclear what statements during mediation will be given protection and which ones will not since "the content of the mediation, including the process of the mediation and conversations and agreements that were made in the mediation" are discoverable. R179. The trial court's rule is unworkable. This is why § 78-31b-8 is most reasonably interpreted as a "bright line" rule that all mediation discussions are confidential.

If the trial court's ruling is allowed to stand, it would be unclear where the line will be drawn regarding discovery into discussions from a mediation. Will the mediator be compelled to testify in direct opposition to his or her oath? Will statements made by attorneys during mediation be discoverable and used at trial? Should LWP be allowed to depose Mr. Reese's attorney regarding the mediation? Should the attorneys be disqualified from representing their clients if they must testify regarding discussion in a mediation? Should written discovery regarding mediation be allowed? These questions highlight that the decision to require LWP's attorney to be deposed is a procedural error that has far reaching ramifications. The rules of mediation require confidentiality and require that agreements reached in mediation be reduced to writing so as to render these questions moot.

B. Utah Rules of Court-Annexed Alternative Dispute Resolution Makes Clear that the Agreements Made In Mediations Must Be Reduced to Writing to be Enforceable.

"Statutory Construction is a question of law and is reviewed by the Court de novo. When interpreting court rules, we apply our rules of statutory construction with an understanding that rules, like statutes, are passed as a whole and not in parts or sections. [O]ur primary goal is to evince the true intent and purpose of the rule-making body and to render all parts [of the rule] relevant and meaningful."

Cox v. Krammer, 76 P.3d 184, 187 (Utah Ct. App. 2003) (internal quotations and citations omitted)(alterations original).

1. Rule 101 of the Utah Rules of Court-Annexed Alternative Dispute Resolution Requires That Agreements be Reduced to Writing.

Mr. Reese improperly relies upon confidential statements and comments made during the course of the mediation to support his claim that an oral agreement was reached. The plain language of Rule 101 of the Utah Rules of Court-Annexed Alternative Dispute Resolution mandates that agreements reached during mediation be reduced to writing. vcRule 101 provides:

> [I]n the event that a settlement to all issues is reached during the mediation conference, the participating parties or the mediator shall prepare, and the parties shall execute, a written settlement agreement and resolution of the action. In the event that a resolution of less than all of the issues is reached, the parties shall prepare and execute a stipulation concerning those issues that were resolved and identifying those issues that remain in dispute.

Id. This language unequivocally requires that agreements "shall" be reduced to writing. Id. Here, LWP refused to execute the document presented to it because it contained a term to which it did not agree. The agreement (if any) was not reduced to writing and is not enforceable pursuant to the plain language of Rule 101.

Moreover, such an interpretation of Rule 101 is consistent with other provisions of the rule that allow parties to disengage from mediation at any point

prior to when a document is signed. Rule 101 states in relevant part, "During the pre-mediation conference, the mediator shall inform the parties of their right to withdraw from the mediation process before a final settlement agreement is signed." Rule 101, supra. (Emphasis added).

Here, LWP informed all involved, before a final settlement was signed, that no agreement had been reached. LWP exercised its right to "withdraw from the mediation process" at a point prior to the execution of a written document. Id. LWP acted within the power granted it via Rule 101 when it refused to sign the proposed "Memorandum of Understanding" because it contained a term to which it did not agree. In essence, LWP disengaged from the mediation process without reaching a resolution.

Lastly, Rule 101 provides that "[t]he mediation conference should proceed in a fashion that furthers the goal of the mediation process, preserves confidentiality, and encourages candor on the part of the participating parties." Id. Obviously, the rule intended for all discussions within mediation to remain confidential. There is no distinction made between "confidential" and "non-confidential" portions of the mediation as the trial court and Mr. Reese advance.

LWP acknowledges that requiring parties to draft and execute a "complete" settlement agreement at the close of each mediation would be an unreasonable burden; however, it is within custom and practice (and the ability of the parties) to

reduce the essential terms to writing and have all participants execute the document. The plain language of Rule 101 mandates this course of action.

Here, it became clear when reviewing the "Memorandum of Understanding" drafted by the mediator that the document contained a term to which LWP did not agree. R88. It was for this reason that LWP's counsel refused to sign the document. R88. Pursuant to Rule 101, LWP is free to withdraw from the mediation process at any time prior to execution of the written settlement agreement. Id. Most importantly, LWP immediately made it clear to all the parties involved that the written document contained a term to which it did not agree. LWP informed the Plaintiff, the Defendant and the mediator prior to the end of the mediation that LWP would not execute the written settlement agreement because it contained a term to which it did not agree. R88. It would be unconscionable for LWP to be bound to an agreement to which it did not agree.

2. *Rule 408 of the Utah Rules of Evidence Plainly States That Statements Made in Settlement Negotiations Are Not Admissible Evidence.*

Utah Rule of Evidence Rule 408, which is identical to the federal rule, excludes from evidence statements made in the course of settlement negotiations. Mr. Reese, Tingey Construction, LWP and each of their respective counsels participated in a mediation for the purpose of settlement of this suit. No statements or comments made by any of the parties to the mediation can be submitted as

evidence to the Court. All such evidence in the moving papers and supporting affidavits should be stricken.

The cornerstone of the mediation process is that all discussions that occur within the mediation are confidential. This promotes open dialo gue and, hopefully, settlement of the suit. Mr. Reese cited several cases to the trial court in its motion to enforce this purported settlement agreement but what Mr. Reese failed to note was that not one of the cases that he referenced as a basis for enforcing an oral agreement dealt with mediation. Mr. Reese has provided no legal support for his claim that an oral agreement (if one was actually reached, which LWP Solutions denies) can be enforced in the context of a mediation. The reason no such case exists, is because the rules regarding mediation are clearly set forth and require a written agreement in order for it to be binding. Otherwise, the rules would not allow for a party to a mediation to withdraw from the mediation at any given point in time prior to the execution of a written document. What Plaintiff fails to recognize is that when a party participates in a mediation, that party voluntarily suspends its constitutional right to a jury trial. Requiring a written agreement at the close of a mediation is a "safety net" that allows parties only to knowingly waive their right to a jury trial. This reasoning is supported by cases found in other jurisdictions.

C. Courts from Other Jurisdictions Likewise Treat Mediations as Confidential and This Court Should Follow Its Own Precedent and The Lead of Other Jurisdictions and Find All Mediation Discussions Confidential and Oral Agreements Not Enforceable.

In Vernon v. Action, 732 N.E.2d 805, 806 (Ind. 2000), the Supreme Court of Indiana addressed whether an agreement allegedly reached in a mediation, but not reduced to writing, was enforceable. The court concluded that "the mediator's testimony regarding the alleged oral settlement agreement was confidential and privileged and that it was not admissible pursuant to the A.D.R. Rules incorporated in the parties' written agreement to mediate." Id. at 806.

In Vernon, the parties participated in a voluntary pre-suit mediation pursuant to a written agreement that established the conditions of the me diation. "The agreement required confidentiality in conformity with state law and Supreme Court Rule," id. at 807 (footnote omitted), and incorporated the A.D.R. Rules.[6] An agreement was allegedly reached during the mediation but later the plaintiff denied the existence of such agreement. See id. at 806. The defendants filed a motion to

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[6] It appears that the A.D.R. rules do not apply to mediations in Indiana which are not "instituted pursuant to judicial action in a pending case." Vernon v. Action, 732 N.E.2d 805, 808, fn 5 (Ind. 2000). This inquiry is not relevant here because this mediation arose from an action pending in the third judicial district court. Also different from Utah, the A.D.R. rules in Indiana state that "'Mediation shall be regarded as settlement negotiations as governed by Indiana Evidence Rule 408.'" Id. at 808-09. While LWP argues that settlement discussion within the confines of mediation are subject to Evidence Rule 408 exclusion, nether the Utah statutes nor the A.D.R. rules of Utah are as explicit as the Indiana rules on this point. It is noteworthy, however, that legislatures from this jurisdiction made this explicit.

enforce settlement with the trial court. See id. The trial court allowed evidence from the parties regarding mediation discussion and the insurance adjuster for the defendant, the mediator, the attorneys and both parties testified about the mediation. See id. The trial court then concluded that the parties had reached an agreement during the mediation and enforced such agreement. See id. The plaintiffs appealed on the grounds that the trial court erred when it admitted the evidence "in contravention of the parties' mediation agreement, A.D.R. Rule 2.12, and Indiana Evidence Rule 408." Id.

The Indiana Supreme Court noted that "in general, settlement agreements need not be in writing to be enforceable. However, when a settlement is reached in mediation, the mediation rules require that 'it shall be reduced to writing and signed.'" Id. at 809 (internal citations omitted). The court noted that "[b]ecause of the nature of the mediation process and its significant and increasing role, considerable attention has been given to whether claims of oral mediation settlement agreements should be enforceable." See id. Relying upon comments made by participants at the National Conference of Commissioners on Uniform State Law, the appellate court acknowledged that the written agreement reached by participants was exempt from confidentiality requirements, however, oral statements made during the mediation were not exempt. See id. The Court reasoned as follows:

> [The exception from confidentiality for a final written document] is noteworthy only for what it does not include: oral agreements. The disadvantage of exempting oral settlements is that nearly everything said during a mediation session could bear on either whether the disputants came to an agreement or the content of the agreement. In other words, an exception for oral agreements has the potential to swallow the rule. As a result, mediation participants might be less candid, not knowing whether a controversy later would erupt over an oral agreement. . . . However, because the majority of courts and statutes limit the confidentiality exception to signed written agreements, one would expect that mediators and others will soon incorporated knowledge of a writing requirement into their practices.

Id. at 809-10 (citations omitted); see also Uniform Mediation Act, Section 6(a)(1)(2001) at http: //www.pon.harvard.edu/guests/uma/UMAfinal.pdf.

The Vernon Court adopted this reasoning. See id. The appellate court acknowledged the "importance of ensuring the enforceability of agreements that result from mediation," but it found other goals to be more important "including: facilitating agreements that result from mutual ass ent, achieving complete resolutions of disputes, and producing clear understandings that the parties are less likely to dispute or challenge." Id. at 810. The court reasoned that the goals of promoting settlement was "fostered by disfavoring oral agreem ents." Id. "Requiring written agreements, signed by the parties, is more likely to maintain mediation as a viable avenue for clear and enduring dispute resolution rather than one leading to further uncertainty and conflict." Id.; see also Clark v. Stapleton

Corp., 957 F.2d 745, 746 (10th Cir. 1992) (noting that for federal mediation program to work "participants must trust that matters discussed at a conference will not be revealed to the judges.")

Similarly, in In re Acceptance Insurance Company, 33 S.W.3d 443 (Tex. Civ. App. 2000), the court entertained a writ of mandamus to address the error of allowing parties to testify at trial regarding confidential mediation discussions. Relying upon a Texas statute, the court held that "communications made by a participant to mediation relating to the subject matter of the dispute are 'confidential, [are] not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.'" Id. at 452 (citations omitted)(modifications original). The court concluded that "[t]he trial court . . . abused its discretion by violating the confidentiality provisions of the ADR Act in requiring realtor's representative to testify about the manner in which she negotiated and her communications with other participants and with other representatives of realtor during the mediations." Id. at 454; compare to Reno v. Haler, 734 N.E.2d 1095, 1099 (Ind. Ct. App. 2000) (Where agreement within confines of mediation was enforced because the mediator had taken handwritten notes and the parties signed these notes in lieu of a more formal document, but still requiring some form of writing that "contain the terms to which the parties agreed".); Spencer v. Spencer, 72 N.E.2d 661 (Ind. Ct. App. 2001) (where

agreement within confines of mediation that was dictated by mediator at the end of the mediation but one party thought she would be given the chance to review this dictation prior to signature was found not enforceable until it had been si gned by the parties).

In Wilmington Hospital L.L.C. v. New Castle County, 788 A.2d 536 (Del. Ch. 2001), a hotel corporation brought suit against a county that refused to issue a certificate of occupancy. The parties mediated the dispute. Id. at 539 – 40. Subsequently, the hotel sought to enforce a settlement agreement that it claimed was reached in the mediation. The court relied upon local court rule to find that statements made in mediation were confidential and could not be relied upon by the party seeking to enforce the purported settlement agreement. Id. at 540. The court noted that the party seeking to enforce the settlement, "improperly introduces and relies on confidential written and oral communications made in connection with the mediation." Id. at 541. The court further noted that "it is inconsistent with the public policy favoring voluntary mediation for a court to entertain a motion to enforce a mediation settlement agreement that is not reduced to writing and signed by the parties to the mediation and the mediator." Id. The court continued that "[c]onfidentiality of all communications between parties or among them and the mediator serves the important public policy of promoting a broad discussion of potential resolutions. . . .With out the expectation of confidentiality,

parties would hesitate to propose compromise solutions out of concern that they would later be prejudiced by their disclosure." Id. Finally, the court stated as follows: "[I]t is consistent with the purpose of Rule 174 to interpret subpart (g) thereof as requiring that any settlement agreement between the parties to the mediation be reduced to writing and signed by them and the mediator as a condition for enforceability. As this proceeding itself well illustrates, it is reasonable to expect that such a bright-line rule is the best way to protect the confidentiality of the mediation when disputes arise over the terms of a putative settlement." Id. at 542-42.

In Ryan v. Garcia, 33 Cal.Rpt.2d 158, 159 (Cal. Ct. App. 1994), purchasers of a home who had sued for negligent construction and fraud sought to enforce a purported oral agreement reached during mediation. It appears that the mediator spoke with each party separately and only combined the group to announce that a settlement had been reached. See id. at 160. During this "joint" session, someone (not identified) recited the terms of the settlement and defendant's attorney was asked to reduce the agreement to writing. See id. However, "the parties later disagreed concerning the terms of the settlement and no written agreement was ever executed." Id. at 1008.

The court in Ryan considered whether the oral agreement to settle could be enforced. The court held that "'Confidentiality is absolutely essential to

mediation." Id. at 161 (citations omitted). "'Otherwise, parties would be reluctant to make the kinds of concessions and admissions that pave the way to settlement.'" Id. The party seeking to enforce the purported agreement argued that only statements "'in the course of mediation'" are protected and not statements made at the conclusion of the mediation. Id. (Citations omitted). The court was not persuaded and rejected the suggestion that it was suppose to decide which portions of the mediation were confidential and which were not. See id. The Court stated as follows:

> Judicial sifting of statements made at a confidential mediation to select those which can be used as evidence of an agreement contravenes the legislative intent underlying adoption [of ADR rules.] Indeed, the risk of this judicial sifting would deter some litigants from participating freely and openly in mediation. . . .To condone further judicial proceedings to enforce oral agreements made during mediation directly undercuts the effect of the statute intended by the Legislature.
>
> By using the broad phrase "in the course of the mediation" the Legislature manifested its intent to protect a broach range of statements from later use as evidence in litigation. To establish arbitrary bound aries within the general process of 'mediation,' with a vague delineation between what is included and what is not included, is contrary to that intent and may not be inferred from the language of the statute.
>
> . . .
>
> Furthermore, narrow interpretation woul d lead the trial courts to filer the mediation proceedings to determine if any portion of the proceeding crossed the line [into non-confidential]. This is the type of disclosure and use of statements made in mediation the confidentiality statute is meant to preclude.

Id. at 161.

Most importantly, the court noted that if oral mediation settlements were enforceable, it would be "costly and time-consuming." Id. at 162. Allowing for oral mediation settlement "permits full-blown trials to determine, in each mediation case, if there was an oral agreement and, if so, on what terms. [The ADR rules], however, provide[] broad confidentiality in the expectation of alleviating the need for ponderous judicial proceedings." Id.; see also Regents of the University of California v. Sumner, 50 Cal.Rptr.2d 200 (Cal. Dist. Ct. App. 1996) (noting that oral discussion after mediation had concluded was not subject to the same confidentiality protections as statements within mediation).

As is clear from each of these cases, courts from other jurisdictions believe that allowing enforcement of disputed oral agreements contravenes the public policy behind mediation.[7] As proposed by the court in Wilmington Hospital, a "bright-line" approach is most prudent. Failure to draw such a bright-line will put the trial court in the role as evaluator of mediation discussions so as to distinguish between those things which are confidential and those which are not. The district court in this case proposed that very rule in this case. As these courts in

[7] Obviously, there is no prohibition against the voluntary adherence to an oral agreement reached in mediation when there is no dispute between the parties. However, it is unlikely that court intervention would ever be necessary if the parties had no dispute so this question is unlikely to arise and is not before the court here.

Wilmington Hospital, Ryan, Vernon and In re Acceptance, eloquently stated, this is an unworkable rule.

IX. Conclusion

For each of the foregoing reasons, the trial court's order that Mr. Reese could introduce evidence to support an alleged oral agreement reached in mediation and that LWP's counsel could be deposed regarding confidential mediation discussions is in error and should be reversed. Section 78-31b-8 provides that all mediation discussions are confidential and does not allow for an exception to this confidentiality to prove the existence of an alleged oral agreement. Similarly, § 78-31b-8 does not make a distinction between "confidential" and "non-confidential" mediation discussions. LWP respectfully requests that the trial court be reversed and that this matter be remanded to the trial court with direction that Mr. Reese's motion to enforce be dismissed with prejudice for lack of admissible evidence in support thereof.

X. Oral Argument

This matter presents a matter of first impression for the Utah Supreme Court as only the Utah Court of Appeals has issued an opinion regarding the confidentiality of mediation discussions. See Lyons v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999). For this reason, oral argument on the matter is requested.

RESPECTFULLY SUBMITTED, on this 10th day of November 2006.

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XI. Addendum

Alternative Dispute Resolution Act

§ 78-31b-8. Confidentiality

(1) ADR proceedings shall be conducted in a manner that encourages informal and confidential exchange among the persons present to facilitate resolution of the dispute or a part of the dispute. ADR proceedings shall be closed unless the parties agree that the proceedings be open. ADR proceedings shall not be recorded.

(2) No evidence concerning the fact, conduct, or result of an ADR proceeding may be subject to discovery or admissible at any subsequent trial of the same case or same issues between the same parties.

(3) No party to the case may introduce as evidence information obtained during an ADR proceeding unless the information was discovered from a source independent of the ADR proceeding.

(4) Unless all parties and the neutral agree, no person attending an ADR proceeding, including the ADR provider or ADR organization, may disclose or be required to disclose any information obtained in the course of an ADR proceeding, including any memoranda, notes, records, or work product.

(5) Except as provided, an ADR provider or ADR organization may not disclose or discuss any information about any ADR proceeding to anyone outside the proceeding, including the judge or judges to whom the case may be assigned. An ADR provider or an ADR organization may communicate information about an ADR proceeding with the director for the purposes of training, program management, or program evaluation and when consulting with a peer. In making those communications, the ADR provider or ADR organization shall render anonymous all identifying information.

(6) Nothing in this section limits or affects the responsibility to report child abuse or neglect in accordance with Section 62A-4a-403.

(7) No records of ADR proceedings under this act [FN1] or under Title 78, Chapter 31a, Utah Uniform Arbitration Act, shall be subject to Title 63, Chapter 2, Government Records Access and Management Act, except settlement agreements

filed with the court after conclusion of an ADR proceeding or awards filed with the court after the period for filing a demand for trial de novo has expired.

Laws 1994, c. 228, § 10; Laws 2000, c. 288, § 7, eff. July 1, 2000; Laws 2004, c. 90, § 96, eff. May 3, 2004.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

RULE 101. CONDUCT OF MEDIATION PROCEEDINGS

(a) Selection of Mediator. The mediator shall be selected as provided in Code of Judicial Administration Rule 4-510(11).

(b) Pre-mediation Conference. Within 10 days following selection, and after consultation with the participating parties or their counsel, the mediator shall conduct a pre-mediation conference and schedule the place, date and time of the mediation conference. The pre-mediation conference may be conducted by telephone, with the parties individually, or together. During the pre-mediation conference, the mediator shall inform the parties of their right to withdraw from the mediation process before a final settlement agreement is signed. The mediation conference should be held within 45 days of the pre-mediation conference. The parties may agree to conduct discovery pursuant to paragraph (f). The mediator may request that the parties exchange and/or submit a disclosure statement prior to the mediation conference.

(c) Mediation Conference. The mediation conference shall commence at the place, date, and time agreed upon by the mediator and the parties. All parties shall be present, shall be prepared to discuss, and shall have the authority to fully settle, all relevant issues in the case. The mediator shall conduct the mediation

conference and determine the length and timing of sessions and recesses, and the order and manner of presentation of the issues. The mediation conference should proceed in a fashion that furthers the goals of the mediation process, preserves confidentiality, and encourages candor on the part of participating parties. The mediator should serve as a neutral facilitator, assisting the parties in defining and narrowing the issues and encouraging each party to examine the dispute from various perspectives, without undertaking to decide any issue, make findings of fact, or impose any agreement.

(d) Separate Consultation With Parties During the Mediation Conference. During the mediation conference, the mediator may meet or consult separately with one or more participating parties, or may divide the conference into groups of fewer than all the parties. Information disclosed to the mediator on a confidential basis during separate consultation shall not be disclosed to other parties without the disclosing party's consent.

(e) Settlement. In the event that a settlement to all issues is reached during the mediation conference, the participating parties or the mediator shall prepare, and the parties shall execute, a written settlement agreement and promptly file with the clerk of the court any documents appropriate for resolution of the action. In the event that a resolution of less than all of the issues is reached, the parties shall prepare and execute a stipulation concerning those issues that were resolved and identifying those issues that remain in dispute. Upon filing of the stipulation with the clerk, the case shall be withdrawn from the ADR program.

(f) Discovery. Discovery may proceed during the pendency of the mediation proceedings, except as stipulated by the parties. Subpoenas for the production of evidence by nonparties may be issued, served and enforced by the court as provided by the Utah Rules of Civil Procedure.

(g) Termination. If the mediator determines that the parties are unable to participate meaningfully in the process or that a reasonable agreement is unlikely to be achieved, the mediator may suspend or terminate the mediation process without explanation. The parties may terminate the proceedings at any time.

(h) Absent Parties. Upon written recommendation by the mediator or motion by any party, the court may order absent parties to show cause why they failed to attend the mediation conference and, if appropriate, why sanctions should not be imposed.

(i) Change to Arbitration. At any time prior to the conclusion of the mediation proceedings, the parties may agree to submit the matter to arbitration. Written notice signed by all parties and counsel of such agreement shall be sent to the Director. Selection of an arbitrator shall be governed by Code of Judicial Administration Rule 4-510(11). The parties may by agreement request that the mediator serve as an arbitrator.

(j) No interlocutory appeal may be taken from an order granting or denying a motion to refer a civil action pending on January 1, 1995 to the ADR program.

[Adopted effective January 1, 1995; amended effective November 1, 1996.]

X. Certificate of Service

I hereby certify that on the 13th Day of November, 2006, a true and accurate copy of the Appellate Brief of LWP Solutions, Inc. was served by hand delivery on the following:

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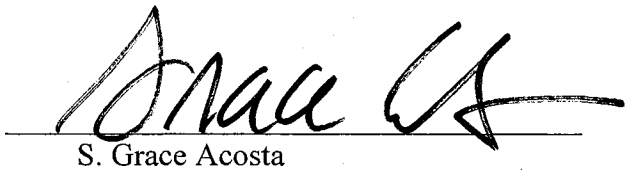

S. Grace Acosta