2006

Murlyn Craig Reese v. Tingey Construction, Inc., LWP Claims Solutions, Inc. Real Party in Interest and Petitioners : Brief of Respondent

Utah Court of Appeals

IN THE UTAH SUPREME COURT OF THE STATE OF UTAH

MURLYN CRAIG REESE, Plaintiff-Respondent v. TINGEY CONSTRUCTION, INC., Defendant-Respondent, LWP CLAIMS SOLUTIONS, INC. Real Party in Interest and Petitioners.	**BRIEF OF RESPONDENT MURLYN CRAIG REESE** CASE NO. 20060594-SC

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the appeal pursuant to Utah Code Ann. §§ 78-2-2(4) and 78-2a-3(3)(j) and pursuant to Utah Rules of Appellate Procedure, Rule 5, where LWP's Petition for Discretionary Interlocutory Appeal was granted.

ISSUES PRESENTED

I. Whether the Agreement Made Between Mr. Craig Reese and LWP, Regarding The Lien LWP Had On Any Settlement Proceeds, Was a Mediated Agreement and Should be Governed by Contract Law Rather Than Mediation Rules?

This Court should "review the district court's findings of fact under the clearly erroneous standard." *Soft Solutions, Inc. v. Brigham Young University*, 2000 UT 46, ¶12, 1 P.3d 1095.

II. Whether the Trial Court Properly Found the Discussions and Circumstances Involving the Separate Agreement Were Not Confidential, Where the Agreement Was Not Made By the Parties of the Mediation?

A trial court's application of law to facts will not be reversed absent an abuse of discretion. *Clark v. Clark*, 2001 UT 44, ¶ 14, 27 P.3d 538.

III. Whether a Settlement Agreement Is Enforceable Without a Writing Where the Agreement Was Made and Subsequently Had Been Relied On?

A trial court's application of law to facts will not be reversed absent an abuse of discretion. *Clark v. Clark*, 2001 UT 44, ¶ 14, 27 P.3d 538.

IV. Whether Rule of Evidence 408 applies to all discussions related to a mediation or to settlement statements only when they are used to prove liability as the rule indicates?

"The decision to exclude or admit evidence under Rule 408 will not be reversed absent a clear abuse of discretion." *State v. Tarrats*, 2005 UT 50, ¶16, 122 P.3d 581.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES & REGULATIONS

Utah Code Ann. § 78-31b-7.

Utah Code Ann. § 78-31b-8.

Utah Rules of Court-Annexed Alternative Dispute Resolution 101.

Utah R. Evid. 408.

STATEMENT OF THE CASE

This is a case where a third-party welched on an agreement it reached with a party to a lawsuit after it had been relied on in settling its case in mediation. Plaintiff Mr. M. Craig Reese ("Craig Reese") and third-party interested spectator LWP Claims Solutions, Inc. ("LWP") made a valid agreement on December 30, 2005. This agreement was made and reconfirmed outside of the mediation that took place between Craig Reese and Defendant Tingey Construction ("Tingey"). Craig Reese later relied on this separate agreement with LWP in settling its case with Tingey in the mediation. A written settlement agreement was drafted encompassing both the mediated agreement and the separate agreement. After a

mediated settlement was reached between Craig Reese and Tingey, parties to the case, and Craig Reese had relied on the prior agreement, LWP changed its mind and would not abide by the agreement. LWP has attempted to improperly hide a binding agreement behind its misapplication of the rules of mediation.

COURSE OF PROCEEDING BELOW

Craig Reese was injured during the course and in the scope of his employment. R2. He filed a lawsuit against the Defendant, Tingey, the general contractor at the job site where he was injured. R1. Both parties felt the matter could be resolved by mediation, and met with a mediator on December 30, 2005. R55. Craig Reese invited LWP, the workers compensation insurer, to be present during the mediation because LWP held a lien on any award Craig Reese might receive from Tingey because he had filed for and received worker's compensation benefits. R55. LWP was represented by Ms. Grace Acosta from Dunn & Dunn, P.C. R55. Although LWP was present with Craig Reese in the same room the majority of the time while he was mediating his claim against Tingey, LWP was not a party to the case. Opposition to Petition for Discretionary Appeal, p. 4.

While the two parties were mediating, Craig Reese and LWP made a separate agreement ("the agreement") in that LWP would cover payment of all of Craig Reese's ongoing and immediate medical expenses and compensation in return for the immediate payment of their full net lien and full settlement. R56-57; R70; R77-78. Relying on the agreement with LWP, Craig Reese then settled his case with Tingey at a lower settlement

price. R57. Later, Ms. Acosta informed the two parties that LWP would no longer abide by the separate agreement made with Craig Reese. R59; R71-72; R789.

Craig Reese and Tingey filed a joint motion to enforce LWP's agreement, LWP filed an opposition. R52. The district court established that LWP and all parties stipulated that the district court could hear and determine the matter to enforce the settlement agreement. R213, May 22, 2006 Hearing Transcript, p. 22. In LWP's opposition it asked the Court to strike all references, statements, and comments pertaining to the agreement made between LWP and Craig Reese and then to deny the Joint Motion for lack of evidence. R87.

The district court heard oral argument on May 22, 2006 and found the process and discussion regarding the existence of the separate agreement were not confidential and could be revealed to the court because they did not regard the facts or underlying allegations of the case between Craig Reese and Tingey. R179-81.

The district court summarized the issue as it understood it. R179-81. It was unopposed that the agreement made by LWP during the "settlement is a binding contract that the court has authority to bind... and the only opposition that I see to this is the fact that the information that would form the basis of this conclusion is all confidential and should be held out." R213, May 22, 2006 Hearing Transcript, pp. 4-5. During the hearing, the rules regarding confidentiality presented by LWP were discussed along with the policy behind each rule. R213, May 22, 2006 Hearing Transcript, pp. 4-5.

The policy behind the confidentiality of settlement proceedings was discussed and

balance with the effects of allowing parties to make a deal and later not abide by it. R213, May 22, 2006 Hearing Transcript, p. 16. The hearing explored the distinction between this case and others, concerning facts which might be revealed in a typical case. For example, if admissions of guilt like 'braking before the accident' were shared through the mediator it would be against the policy of mediation to allow such admissions to be brought forth in court. R213, May 22, 2006 Hearing Transcript, p. 18. The court understood the policy behind having an agreement in writing to ensure that the parties understood what they had agreed to. However, in this case, the problem was not that there was a misunderstanding, it was that LWP had changed its mind. R213, May 22, 2006 Hearing Transcript, p 20.

The district court recognized that the agreement between LWP and Craig Reese did not effect "the trial positions or strategies" of either party. *See* R213, May 22, 2006 Hearing Transcript, p. 14. The Court verified with the two parties, Craig Reese and Tingey, that if their case was to come before him on a bench trial that none of the evidence regarding the agreement with LWP would compromise the case. *See* R213, May 22, 2006 Hearing Transcript, pp.14-15. The district court clarified that "no facts, I believe, have been revealed here that would compromise either position." R213, May 22, 2006 Hearing Transcript, p. 29. However, Craig Reese did inform the court that not enforcing this agreement could prejudice the settlement opportunities of Craig Reese in that now Tingey knows the amount for which Craig Reese would settle his case. R213, May 22, 2006 Hearing Transcript, p.15.

After hearing all the argument and reviewing the law presented, the court opined that

this was a case where there were confidential and non-confidential discussions that took place. R213, May 22, 2006 Hearing Transcript, p.31. He clarified that the details of the separate agreement, which did not concern Craig Reese and Tingey, were non-confidential. R213, May 22, 2006 Hearing Transcript, p.31. As opposed to "the specifics of the case, that potentially could open liability to either side, [which] have got to remain under absolute confidentiality." R213, May 22, 2006 Hearing Transcript, p.31. The court recognized that the discussion regarding the mediation between the two parties could not be discussed and "none of that stuff's been discussed." R213, May 22, 2006 Hearing Transcript, p.30. "The only part that's been discussed was, do we have an agreement? Yes, we do. I agree. No, I don't agree." R213, May 22, 2006 Hearing Transcript, p.30.

Prior to the hearing Ms. Acosta acknowledged a tentative agreement, she had never denied the agreement, but only disputed whether or not it was final. R87-88; 91-92. During this hearing LWP presented a second Affidavit from Ms. Acosta. R87-88; 91-92. In this affidavit, Ms. Acosta discloses information that she argues is confidential. R126-31. In her affidavit, she fabricated that "at no time did Mr. Henriksen discuss with me whether LWP would waive its statutory right to an off set of all funds received by Craig Reese in his law suit...before future benefits would be paid" and that "at no time did we discuss the issue of when LWP's obligation to pay medical payments would resume." R127; 129. *See also* Utah Code Ann. §34A-2-106(5)(c). Ms. Acosta also asserts in the new affidavit that "ultimately, LWP agreed to reduce its lien...[and]...in order to contribute towards the settlement of the

suit, LWP reduced its reimbursement lien by almost 1/3." R129. This was not a concession as it is statutory that the workers compensation carrier pay the 1/3 attorneys fees claimed. R213, May 22, 2006 Hearing Transcript, p. 40-41; *see also* Utah Code Ann. § 34A-2-106(5).

Due to the new argument made by LWP, that they had never even discussed the agreement until she saw it on paper, the court held that it looks like we're going to have a tough time getting to a meeting of the minds without further discovery. R213, May 22, 2006 Hearing Transcript, p. 43- 44. The court ordered Ms. Acosta, to be deposed regarding the agreement she made with Craig. R180-81. The court gave a narrow scope for this deposition in that Craig Reese's counsel could only ask questions about the process of making the agreement, but restricted any questions about the underlying facts or allegations concerning the case between Tingey and Craig Reese. R181; R213, May 22, 2006 Hearing Transcript, p. 45. The court held that the parties can file with the court a Supplement Memorandum. R181; R213, May 22, 2006 Hearing Transcript, p. 44.

Without direction from the court, LWP took it upon itself to file a proposed order with the district court. R175. Similar to this appeal, LWP in the order inaccurately stated the court's finding, legal conclusions, and order. R145-52. LWP addressed themselves as an intervening party without authority to do so. (Only later did LWP file a Motion to Intervene that was granted. R197-98). LWP even stated at the hearing, that it was only an "interested spectator" in the case between Craig Reese and Tingey because of their "lien against the proceeds of any receipt." R213, May 22, 2006 Hearing Transcript, p. 44. LWP wrongly

proposed in its order more findings than the court had made. *See* R141; 144-45. Because LWP had mis-characterized much of the court's direction, Craig Reese filed an alternative Proposed Order on June 12, 2006 which was granted. R179-81. The court ordered Ms. Grace Acosta to appear and be deposed regarding the content of the agreement, clarifying that the scope of the deposition shall not consist of the facts of the case or the underlying allegations of the case. R180-81. The court ordered Craig Reese and LWP to subsequently file a Supplemental Memorandum. R181.

Pursuant to the court order given at the hearing, Craig Reese's counsel arranged for the deposition of Ms. Acosta on June 30, 2006. R166-67. On June 29, 2006, a half day before the scheduled deposition of Ms. Acosta, Craig Reese's counsel received by fax a motion from LWP for a continuance of the deposition or in the alternative to quash notice for the deposition. R185. LWP had been on notice that the deposition would be taken since the May 22, 2006 hearing, yet it waited until the day preceding the deposition to file its motion. R185. The Court discussed the issues of the deposition with counsel by phone and Craig Reese stipulated that the deposition would be continued until the district court resolved the issues raised by LWP in their motion. R194. Before the district court had the opportunity to resolve LWP's issues, this appeal was filed by LWP.

STATEMENT OF FACTS

Plaintiff Craig Reese was working for Interwest Mechanical, on May 24, 2000. R2. Interwest Mechanical is a subcontractor which was contracted by Tingey to install heating

and air-conditioning equipment in a series of apartment buildings under construction. R2. Craig Reese was injured while working within the scope of his employment. R2. Craig Reese filed a complaint against Tingey on May 18, 2004 and Tingey answered the complaint on June 14, 2004. R12.

Craig Reese and Tingey, agreed to alternatively settle their dispute by mediation to promote amicable relations and avoid the expensive cost of litigation. R55; R66; R77. Such mediation was completely voluntary and was not ordered by any court. R55; R66; R77. On December 30, 2005, the two parties to this action participated in a mediation conference with Paul S. Felt as the Mediator. R55; R66; R77. Craig Reese was present at the meditation along with his counsel, Mr. C. Richard Henriksen, Jr. R55. Mr. Joseph Minnock was present, representing Tingey, along with their insurance claims adjuster Ms. Sally Milburn. R55. Also present at the office was Grace Acosta, the attorney for the workers compensation insurer, LWP and their insurance adjuster (by phone); who has a subrogation interest on the proceeds of any settlement in this case. R55. Other office staff were present at the office, but like Ms. Acosta, were not involved in the mediation. R69; R77; R213, May 22, 2006 Hearing Transcript, p. 40. At the conclusion of the mediation conference, once the subrogation interest of LWP was settled, the two parties reached an agreement for the resolution of all issues in the case. R70; R7; R78.

During the mediation Craig Reese and Tingey were coming closer and closer in reaching a mutually acceptable settlement amount. Because of LWP's lien on any settlement

amount, Craig Reese, Tingey, and LWP knew at some point in the settlement process LWP would need to compromise its lien in some way in order for the case between Craig Reese and Tingey to settle. R56.

During the mediation the negotiations came to a stand still between Craig Reese and Tingey. *See* R56; R213, May 22, 2006 Hearing Transcript. Craig Reese asked, as he had done earlier, that LWP reduce the amount of their net lien so as to facilitate the mediation between the two parties. R56; R69. Ms. Acosta, after discussing this issue with her client by phone, advised Craig Reese that her client would not compromise the dollar amount of the lien. R56-57; R69. The negotiations between Craig Reese and Tingey continued and again later in that morning Craig Reese again asked LWP to compromise the amount of their lien. R56; R69. LWP again refused to lessen the amount. R56; R69. Craig Reese asked what concession LWP would make so this matter could be resolved. After Ms. Acosta spoke on the phone with her client, LWP, she again advised Craig Reese that her client would not compromise the amount of the lien but would make one concession. R56-57; R69-70. Ms. Acosta told Craig Reese and Counsel that in return for Craig Reese settling his case with Tingey without further litigation and paying LWP's full lien amount, LWP would continue to pay Craig Reese's medical expenses and compensation for his injury. R56-57; R70; R77-78.

This side agreement was confirmed several times by Craig Reese and his counsel. R56-57; R70; R77-78. Ms. Acosta knew that the reduction of Craig Reese's final settling

amount was strictly conditioned upon LWP's binding agreement to pay all of his continued medical expenses and compensation and she verified again the side agreement. R57; R70. Mr. Felt, the mediator, was not involved in mediating the agreement which was made between Craig Reese and LWP. R56-57; R70; R77-78. Mr. Felt was specifically contracted to mediate only the dispute between Craig Reese and Tingey. R55.

Mr. Minnock and Ms. Milburn, representing Tingey, were told of this separate agreement, in that LWP would pay all Craig Reese's ongoing medical expenses and compensation, but had no part in the agreement. R77-78. This side agreement was only applicable to the mediation in that Craig Reese would now compromise his offer and settle his case for the amount the Tingey offered and the two parties therefore would not proceed with any further litigation. R77-78.

Relying on this side agreement with LWP, Craig Reese accepted Tingey's final settlement amount and the case was fully settled between the two parties. R57; R70; R78. The mediation therefore concluded and both the mediation agreement between the two parties and the side agreement between Craig Reese and LWP were put into writing by the Mediator Paul S. Felt as follows:

A. The Defendant's insurers will pay the Plaintiff the sum of $XXX,XXX in full settlement of the above case.

B. In consideration for the above payment, Plaintiff will sign a Settlement Agreement and Release releasing and discharging Defendant from all claims which were made

or which could have been made in the above entitled litigation. Additionally, Plaintiff agrees to cause his attorney to sign a Stipulation and Motion for Order of Dismissal with Prejudice, which will forever end the above entitled litigation.

C. The Settlement Agreement and Release will contain a provision making Plaintiff responsible for the settlement and discharge of all liens, including the Workers Compensation lien, holding Defendant harmless therefrom. In consideration for receiving payment on its lien, the Workers Compensation insurer agrees to continue future benefits under its policy to the Plaintiff.

D. The parties understand and agree that more formal settlement documents, including Settlement Agreement and Release, will be signed by the parties at the time the settlement funds are received. R57-58; R70-71.

While Mr. Felt, was putting the two agreements into writing, Ms. Acosta informed the parties that her client would no longer abide by the earlier agreement they had reached of paying ongoing medical expenses. R59; R71-72; R78. LWP had changed its mind. *See* R59; *see also* R71-72; *see also* R78. Craig Reese, Tingey, and the Mediator argued to Ms. Acosta that it was too late for LWP to change their mind because that agreement had already been acted on in reliance by Craig Reese in his mediated agreement with Tingey. R59; R71-72; R78. Ms. Acosta at no time contended that the terms in the written agreement were inconsistent with the verbal agreement they had made while Craig Reese was in the process of mediating, that was not an issue. R59; R71-72; R78. Rather, Ms. Acosta merely asserted

that her client no longer desired to pay the ongoing medical expenses. R58-59; R71-72; R78; R87-88. Because at the conclusion of the mediation compromises had been made by both sides in reliance of this side agreement, once LWP had changed its mind, the mediation between Tingey and Craig Reese ended. R59; R71; R78.

Ms. Acosta remained in Craig Reese's Counsel's office for close to an hour during which she spoke with her client by phone and explained to LWP that she had already made the offer several times and Craig Reese had accepted it and relied upon it. R59; R72; R78. She explained it was too late to back out because they changed their mind. R59; R72; R78. She told LWP that it was a good deal for them. R72. This conversation was not confidential, it was made in the presence of Mr. Henriksen, Mr. Minnock, and other office staff. R59; R72; R78.

The following week letters were exchanged between LWP and Craig Reese. In the letter sent by LWP on January 5, 2006, LWP admits to making a "tentative agreement" during the mediation. R91-95. Ms. Acosta stated "I do not believe that my client is bound by any discussion or tentative agreement that we made at the mediation." R91. Ms. Acosta again agreed that there was an agreement made and that during the drafting of the agreement, before see saw or read the written understanding, her client changed its mind. R91-92. "[I]t was only when the terms of the agreement were <u>being</u> reduced to writing that I contacted my client for <u>final</u> approval and did not get such approval." R94 (emphasis added).

Because Craig Reese and Tingey had mediated a mutually satisfactory settlement in

reliance on the agreement between Craig Reese and LWP, they filed a joint motion to enforce the agreement on February 24, 2006. R54. At no point in the Motion or its supporting Memorandum were any facts, statements, or discussions regarding the mediation between the two parties revealed to the district court, the motion was focused only on the separate agreement made between Craig Reese and LWP. R54-79. LWP filed an opposition to the Motion to Enforce on March 7, 2006. R80. In LWP's opposition they asked the Court to strike all references, statements, and comments pertaining to the agreement made between LWP and Craig Reese and then to deny the Joint Motion to Enforce Settlement Agreement for lack of evidence. R88.

The district court heard oral argument on May 22, 2006, the Honorable Mark S. Kouris presided. R134. The district court found the process and details of the separate agreement were not confidential and could be revealed to the court because they did not regard the facts or underlying allegations of the case between Craig Reese and Tingey. R179-81. The district court allowed Craig Reese to depose Ms. Acosta regarding this agreement, but set strict limits and boundaries on the deposition. R179-81. After such deposition, LWP and the two parties were to file a supplemental memorandum in support of the motion to enforce LWP's agreement. R181.

SUMMARY OF THE ARGUMENT

Plaintiff Craig Reese and third-party, interested spectator LWP reached an agreement on December 30, 2005, outside of the mediation between the parties, Plaintiff Craig Reese

and Defendant Tingey Construction. "'Mediation' means a private forum in which one or more impartial persons facilitate communication between parties to a civil action to promote a mutually acceptable resolution or settlement." Utah Code Ann. § 78-31b-2(8). The agreement reached does not fall under the statutory definition of a mediation. LWP, at the time of the mediation, was not a party to the action. This separate agreement was reached without the assistance of a neutral facilitator. There was no lawsuit between the parties that needed a mutually acceptable resolution. Craig Reese's responsibility to pay LWP's lien on any proceeds in the litigation was statutory. Craig Reese asked LWP to attend the mediation to find out what his view was with regard to lien resolution. Therefore, the discussions as to the existence of the separate agreement between Craig Reese and LWP are not confidential because they did not take place while Craig Reese and LWP mediated an agreement.

Even an analysis of LWP's arguments set forth in its appeal reveal that the discussions as to the existence of an agreement between Craig Reese and LWP were not confidential. Utah Code Annotated Section 78-31b-8 is clear and unambiguous in that confidentiality only applies when the evidence is used in a "trial of the same case or same issues between the same parties." Utah Code Ann. § 78-31b-8(2). Craig Reese has not used the evidence in a subsequent trial between the parties in the same case. Nor does the evidence disclosed involve the issues of the case between Craig Reese and Tingey. Furthermore, Section 78-31b-8(4) allows parties to disclosed that which the parties agree to disclose. Here, both parties to the lawsuit, Craig Reese and Tingey, jointly filed the Motion to Enforce Settlement,

agreeing to the terms that would be disclosed as to the existence of an agreement.

Lyons v. Booker, the sole Utah case that LWP relies on is not applicable in this case. *Lyons* only applies to appellate mandated mediation between two opposing parties of a lawsuit. LWP was not a party to the case at the time the agreement was made. Also, the parties in *Lyons* disclosed specific details about the case. Here, Craig Reese and Tingey only disclosed enough information to establish the existence of an agreement.

The District Court gave careful and specific direction in carving out its order to allow Craig Reese to depose Ms. Acosta as to the existence of an agreement reached outside of the mediation. He ordered that the specifics of the case, concerning liability, money, fault, and facts had to remain "under absolute confidentiality." Yet, he concluded that the discussions between Craig Reese and LWP concerning the lien were not confidential, because those things did not go to the specifics of the case.

Utah case law and policy supports Craig Reese's argument that the agreement with LWP, although not signed in writing, can be enforced. The focal purpose of having confidentiality is to encourage a party to mediate a dispute rather then pursuing litigation. This assists two main interests: first, the enforcement of binding contracts made during a mediation; and second, it keeps out evidence anything which would hurt a party if they found it necessary to proceed to trial.

Utah Code Annotated Section 78-31b-7 does not require parties execute written settlement agreements at the conclusion of a mediation. This statute stays true to the policy

of encouraging settlement agreements in lieu of litigation. Permitting parties to void settlement agreements on a whim, works a significant deterrence contrary to the policy of encouraging settlement agreements. *D.R. v. East Brunswick Bd. of Educ.*, 109 F.3d 896, 901 (3d Cir. 1997).

Case law supports the notion that mediation agreements need not be in writing to be enforceable. In those instances where a settlement agreement was reached but not signed by the parties, the agreement may still be enforced provided the parties produce sufficient evidence concerning the attainment of an agreement and the mutually agreed upon terms. *Riner v. Newbraugh*, 563 S.E.2d 802 (W.Va. 2002).

Thus, this court should affirm the trial court's order with the specific instructions of allowing Craig Reese to depose Ms. Acosta and offer evidence to establish the existence of an agreement.

ARGUMENT

I. THE AGREEMENT MADE BETWEEN MR. CRAIG REESE AND LWP WAS A SEPARATE AGREEMENT AND SHOULD BE GOVERNED BY CONTRACT LAW RATHER THAN MEDIATION RULES.

The agreement made by Craig Reese and LWP regarding the lien which LWP held on any settlement proceeds was not a mediation agreement. Mediation is legally defined by the Utah Legislature in the Alternative Dispute Resolution Act. Utah Code Ann. § 78-31b-2(8). "Mediation means a private forum in which one or more impartial persons facilitate communication between parties to a civil action to promote a mutually acceptable resolution

or settlement." *Id.*

This section of the brief firmly establishes that the separate agreement between Craig Reese and LWP was not a mediation agreement where; first, the agreement was not mediated by "one or more impartial persons;" and second, it was not "between parties to a civil action," and third, there was no lawsuit between LWP and Craig Reese which required a "mutually acceptable resolution or settlement". *Id.* The following sources of law, all cited by the Appellant in its brief, are not applicable to the agreement between Craig Reese and LWP because the agreement was not a mediation agreement: A) Alternative Dispute Resolution Act, Utah Code Annotated § 78-31b-8, B) *Lyons v. Booker*, 1999 UT App 172, 982 P.2d 1142, and C) Rule 101 of the Utah Rules of Court-Annexed Alternative Dispute Resolution.

On December 30, 2005, Mr. Felt was hired by two parties of a civil action, Craig Reese and Tingey Construction, to mediate a personal injury case filed by Craig Reese against Tingey. R55. The two parties contracted for the services of Mr. Felt as the mediator and arranged the time for the mediation. Mr. Felt did not mediate the agreement between Craig Reese and LWP. LWP offered to cover the future and ongoing medical expenses and compensation of Craig Reese from that day forward if Craig Reese would immediately settle its case with Tingey and pay its total net lien. R56-57; R77-78. Craig Reese in consideration of this offer would pay the entire net workers compensation lien on this case and settle his case now for less with Tingey and would not proceed to trial. *Id.* Craig Reese and LWP

agreed upon this proposal and LWP knew that Craig Reese would act in reliance within minutes upon this agreement when he settled the case for less then he was formerly willing. *Id.* Before Craig Reese acted in reliance on this contract he verified with LWP that there was a meeting of the minds and asked specific questions regarding the deal. *See Sackler v. Savin*, 897 P.2d 1217 (Utah 1995). "An agreement of compromise and settlement constitutes an executory accord. is of no legal consequence that the parties have not signed a settlement agreement." *Mascaro v. Davis*, 741 P.2d 938, 942 (Utah 1987). Since an executory accord "constitutes a valid enforceable contract," basic contract principles affect the determination of when a settlement agreement should be so enforced. *Id.*; *see also In Re Adoption of E.H. v. R.C. and S.C.*, 2004 UT App 419; 103 P.3d 177.

A. The Alternative Dispute Resolution Act Is Not Applicable to the Separate Agreement.

Mediation first requires "a private forum in which one or more impartial persons facilitate communication." Utah Code Ann. § 78-31b-2(8). This agreement was made directly between LWP and Craig Reese, there was no impartial person facilitating communication. The agreement between Craig Reese and LWP was discussed and reached during breaks in the mediation between the parties, Craig Reese and Tingey, but this separate agreement was not mediated by the mediator or any other person. While waiting to hear from the mediator concerning his claim, Craig Reese and LWP made a separate and unrelated agreement concerning LWP's lien on any of the proceeds that Craig Reese might receive from Tingey. Pursuant to the plain meaning of the Alternative Dispute Resolution Act, this was not a

mediation agreement because there was no impartial mediator involved in the verbal agreement.

LWP was not a party of the civil action between Craig Reese and Tingey at the time the agreement was made. R55. Mediation must be "between parties to a civil action." Utah Code Ann. § 78-31b-2(8). Even by its own admission, LWP was only an "interested spectator" in the case between Craig Reese and Tingey because of their "lien against the proceeds of any receipt." R213, May 22, 2006 Hearing Transcript, p. 44.

Both Craig Reese and LWP's interests were generally aligned, because both sought to maximize the compensation from Tingey. Mediation is "to promote a mutually acceptable resolution or settlement." Utah Code Ann. § 78-31b-2(8). Craig Reese wants the maximum recovery, because LWP has a lien on any of the proceeds from this action. Therefore, in order for Craig Reese to personally recover any of the settlement, the settlement reached must be more than the lien that LWP holds. LWP desired the settlement recovery to be greater then its lien to recover the insurance costs it had paid. LWP and Craig Reese did not have adverse positions that required a "mutually acceptable resolution or settlement." *Id.* No part of the agreement falls under the statutory definition of a mediation and therefore the agreement would not be held to the burdens which apply to mediated agreements.

Although in this case, Craig Reese relied on this separate agreement with LWP in his later negotiation with Tingey, it was not a part of the mediation nor had anything to do with the services of Mr. Felt the mediator. This agreement was completely disconnected from the

claims Craig Reese had against Tingey and the mediation of those claims. LWP and Craig Reese formed an enforceable contract during the mediation process where there was an offer, an acceptance, consideration and action in reliance.

Utah Code Annotated Section 78-31b-8 is not applicable to the agreement where it only applies to ADR proceedings. Title 78 Chapter 31b, the Alternative Dispute Resolution Act, only governs ADR proceedings. Section 78-31b-8(1) unequivocally states "*ADR proceedings* shall be conducted..." (emphasis added). Furthermore, the section applies to proceeding which "facilitate resolution of the dispute." *Id.* There was no mediation between Craig Reese and LWP, and there was no dispute (at that time) to resolve; LWP was not even a party to the action.

This Court, earlier this month, addressed the proper manner to interpret statutes, they held: "our primary goal in interpreting these statutes is to evince the true intent and purpose of the Legislature." *Li v. Enterprise Rent-a-car of Utah*, 2006 UT 80, ¶9 (quoting *Lovendahl v. Jordan Sch. Dist.*, 2002 UT 130, ¶20, 63 P.3d 705). "We do so by first looking to the statute's plain language, and giving effect to the plain language unless the language is ambiguous." *Id.*; *See also State v. Burgess-Beynon*, 2004 UT App. 312, ¶ 7, 99 P.3d 383. "In conducting this plain meaning analysis, we read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Id.* (quoting *Miller v. Weaver,* 2003 UT 12, ¶ 17, 66 P.3d 592).

Utah Code Annotated does not deem all mediation discussions confidential, as LWP

attempts to argue. Nor did the Legislature intend the confidentiality of ADR proceeding to apply to "all discussions." This statute applies to "information obtained during an ADR proceeding" not to the facts regarding the process of a separate agreement. *Id.* at (3). LWP attempts to apply just section (8) regarding confidentiality; however, the provisions throughout the Act, make it is clear that this agreement does not fit within ADR defined mediation.

"We presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning." *State v. Barrett,* 2005 UT 88, ¶29. According to the statute, the confidentiality only applies when the evidence is used in a "trial of the same case or same issues between the same parties." Utah Code Ann. § 78-31b-8(2). Because the agreement was not mediated and did not apply to the ADR rules, Utah Code Annotated Section 78-31b-8 is not applicable.

B. *Lyons v. Booker* Is Not Applicable to the Agreement Made Between LWP and Craig.

LWP incorrectly relies on *Lyons v. Booker*, 1999 UT App 172, 982 P.2d 1142, to apply appellate mediation standards to a non-mediated separate agreement. In *Lyons*, the Court of Appeals mandated appellate mediation through the appellate mediation office to encourage two parties to settle their dispute and decrease the time required by a full appellate review. *Id.* LWP's reliance is misplaced as the case at hand is clearly distinguishable from *Lyons*. Neither the Reese v. Tingey case nor the agreement between Craig Reese and LWP was referred by the Court of Appeals to the appellate mediation. *Id.* at ¶3. There was no

mediation to save the time and costs required in a full appeal. *Id.* Furthermore, the agreement is not related in any way to the appellate settlement conference program. *Id.* at ¶11. Additionally, *Lyons* held that the "detailed and specific reference to discussions conducted during the mediation with the appellate mediation office of this court..." are not admissible because, "the court of appeals does not hear or consider new evidence."

C. Rule 101 of The Utah Court-Annexed Rules of ADR, Conduct of Mediation Proceeding, Is Not Applicable to the Agreement Made Between LWP and Craig.

Rule 101, Conduct of mediation proceeding, does not apply to the agreement made between Craig Reese and LWP, regarding the lien, where this agreement was not a mediated agreement. The rule specifically discusses the a) selection of the mediator, b) pre-mediation conference, c) process of the mediation, d) separate consultation, e) settlement, and f) discovery. Utah Court-Annexed Rules of Alternative Dispute Resolution 101.

LWP did not play a role in the above factors related to a mediation. The selection of Mr. Felt, the mediator, was made exclusively by the two parties of the case, Craig Reese and Tingey. *See* R55. LWP had no voice or interest in the selection of the mediator. The pre-mediation conference was between the two parties to the suit, Craig Reese and Tingey. During the mediation of *Reese v. Tingey*, the mediator conducted the conference between the two parties, but had no part in the agreement made by Craig Reese and LWP. This agreement was not mediated and it was never intended that it be mediated making the Court-Annexed ADR Rules inapplicable. *See* R56.

LWP has attempted to incorrectly apply one small part (subsection (e): regarding a written settlement agreement) of the Utah Court-Annexed Rules of Alternative Dispute Resolution 101 to the agreement Craig Reese made with LWP. Nonetheless, this rule was not applicable to the agreement and as discussed above, LWP's agreement was not discussed or involved in the "conduct of mediation proceedings" discussed in any of the other sections of the rule. LWP's agreement is not defined as a mediated agreement under the governing law in Utah Code Title 78 Chapter 31b, and the Utah Court-Annexed Rules of Alternative Dispute Resolution 101 - 104 do not apply.

"It is of no legal consequence that the parties have not signed a settlement agreement." *Mascaro v. Davis*, 741 P.2d 938, 942 (Utah 1987); *Goodmansen v. Liberty Vending Sys.*, 866 P.2d 581, 584 (Utah Ct. App. 1993). "It is a basic and long established principle of contract law that agreements are enforceable even though there is neither a written memorialization of that agreement nor the signatures of the parties." *Healthcare Servs. Group v. Utah Dep't of Health*, 2002 UT 5 ,¶ 14, 40 P.3d 591, 595; *Murray v. State*, 737 P.2d 1000, 1001 (Utah 1987). Moreover, "parties have no right to welch on a settlement deal during the sometimes substantial period between when the deal is struck and when all necessary signatures can be garnered on a stipulation." *Goodmansen*, 866 P.2d at 585 (Quoting *Brown v. Brown*, 744 P.2d 333, 336 (Utah Ct. App. 1987) (Orme, J., dissenting)).

The fact that LWP now "welches" and refuses to sign the written memorialization of that agreement has no consequence on the validity of their verbal contract. LWP's

intransigence and arguments merely try to hide a valid separate agreement behind it's attempted misapplication of the ADR rules. Consequently, the Court should find that the ADR rules do not apply where this valid separate agreement was not mediated, and therefore such agreement should be enforced under the laws applicable to verbal contracts. Permitting parties to void settlement agreements on a whim, because the agreement becomes unpalatable or the parties become greedier, "would work a significant deterrence contrary to the federal policy of encouraging settlement agreements." *D.R. v. East Brunswick Bd. of Educ.*, 109 F.3d 896, 901 (3d Cir. 1997).

II. THE TRIAL COURT PROPERLY FOUND THE DISCUSSIONS AND CIRCUMSTANCES INVOLVING THE SEPARATE AGREEMENT WERE NOT CONFIDENTIAL WHERE THE AGREEMENT WAS NOT MADE BY THE PARTIES TO THE MEDIATION.

Since the circumstances of this case involve a separate agreement between a party and a non-party, LWP's allegations of confidentiality are inapplicable and the court should dismiss this appeal based upon the arguments set for in Section I of Appellee's Brief. Notwithstanding, a deeper analysis of LWP's arguments lead this Court to the same conclusion. The discussions concerning the existence of this separate agreement are not confidential. Utah Code Annotated Section 78-31b-8 is clear in setting forth the limits indicating circumstances when mediation discussions are confidential and those circumstances do not apply in this situation. LWP's sole Utah case, *Lyons v. Booker*, which LWP relies heavily on, is inapplicable in this case. Finally, the district court was specific in its direction to the parties and to LWP to limit any discussion of confidential mediation

discussions, only allowing necessary limited discovery of the existence of a separate agreement between Craig Reese and LWP.

A. Following Section 78-31b-8 Which Clearly Sets Forth the Parameters of Confidentiality, the Discussions Disclosed to the District Court in this Case as to the Existence of a Separate Agreement Were Not Confidential.

Craig Reese properly disclosed non-confidential discussions concerning the existence of a separate agreement. According to the plain language of the statute, "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*. Utah Code Ann. § 78-31b-8(2) (2005) (emphasis added). It applies to "information obtained during an ADR proceeding," not to the facts regarding the process of a separate agreement. *Id.* at (3). If the legislature intended the confidentiality to cover "all discussions" they would have drafted the statute accordingly. *See generally State v. Barrett,* 2005 UT 88, 127 P.3d 682."Where statutory language is plain and unambiguous, we do not look beyond the language's plain meaning to divine legislative intent." *Lyon v. Burton*, 2000 UT 19, ¶15, 5 P.3d 616, 622. "Furthermore, where possible we construe statutory provisions so as to give full effect to all their terms." *Id.* "We presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning." *Barrett,* 2005 UT at ¶29.

LWP improperly states that Utah Code Annotated Section 78-31b-8 deems all mediation discussions confidential. (*See* Petition for Discretionary Appeal from Interlocutory

Order, page 2 ¶1, on file). LWP has grossly mis-characterized the district court by stating that it ruled "that settlement discussions made during the course of a mediation were not confidential and could be admitted into evidence." LWP further implies that the district court was making new law in regards to which information is confidential and which discussions are non-confidential. These allegations are not supported by the record or by the law.

The trial court properly ruled that evidence concerning a separate agreement made between LWP, a non-party to the mediation, and Craig Reese during a mediation between Craig Reese and Tingey was not confidential where the evidence was not being introduced in a trial of the same case or same issue or between the same parties.

Additionally, subparagraph (4) allows parties to disclose information obtained in the mediation, so long as the parties agree. Subparagraph (4) states, "*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." Utah Code Ann. 78-31b-8(4) (emphasis added). LWP misleads this Court in its quotation of subparagraph (4), to allege that no person may disclose any information obtained in an ADR proceeding. *See* Appellant's Brief, p. 13. LWP does not include the most important part of this subparagraph, the beginning, which allows parties to disclose those parts concerning which they agree ("*unless all parties and the neutral agree...*") to the extent necessary to prove the existence of an agreement.

Here, Craig Reese, the Plaintiff, and the Defendant Tingey were the only parties to the case attending the mediation. While the two parties were mediating, Craig Reese and LWP made a separate agreement ("the agreement") in that LWP would cover payments of all of Craig Reese's ongoing and immediate medical expenses and compensation in return for the immediate payment of their full lien by Craig Reese immediately without proceeding to trial. R56-57. Relying on the agreement Craig Reese then settled his case with Tingey at a lower settlement price. *Id.* Only later, did Ms. Acosta inform the two parties that LWP would no longer abide by the separate agreement made with Craig Reese. *Id.*

Following the mediation, Craig Reese and Tingey, the only two parties attending the mediation, filed a Joint Motion to Enforce the Settlement Agreement, wherein both parties agreed that there was an agreement and it should be enforced. By filing the motion jointly, both parties carefully consulted with each other as to what would be disclosed. The parties did not disclose anything that was confidential in nature, including liability, settlement amounts, theories of cases, etc. LWP insists on bright line rule that "all mediation discussions are confidential, yet Utah Code Annotated § 78-31b-8 already provides a bright line rule as set forth above.

B. The District Court Properly Followed Utah Case Law and Policy to Limit Discovery of Non Confidential Matters.

The focal purpose of having confidentiality is to encourage a party to mediate a dispute rather then pursuing litigation. The Court should "balance the need for mediation evidence in the specific case against the harm that disclosure would cause to the purposes

served by confidentiality." *Ellen E. Deason*, "Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality," 35 U.C. Davis L. Rev. 33, 102 (University of Illinois College of Law 2001) LWP requests that this court nullify such contract by allowing a party to "welch" out of a valid agreement and then conceal such agreement under the misapplication of the mediation principles.

LWP made a valid and enforceable agreement with Craig Reese in the midst of a mediation settlement which took place only between Craig Reese and Tingey. Only after it had been confirmed and reconfirmed this separate agreement did Craig Reese the proceed to lower his settlement proposal with Tingey and settle the case. LWP later "welched" on that verbal contract after Craig Reese had relied on that agreement to settle the case in the mediation with the Tingey, when the parties were gathering the necessary signatures. *Goodmansen v. Liberty Vending Sys.*, 866 P.2d 581, 585 (Utah Ct. App. 1993). It is now attempting to misinterpret Utah law to conceal evidence of the prior contract, including evidence of the offer, acceptance and the meeting of the minds that took place in the midst of the mediated settlement.

The policy behind the confidential treatment of mediation sessions is encouraging settlement agreements and promoting the effectiveness of the program. *See Deason,* 35 U.C. Davis L. Rev. 33. The effectiveness is promoted in two ways. First the parties will be more willing to make concessions, admissions and apologies if it is understood that such statements can not be later used against them in a litigation action. *See Id.* Second, that

confidentiality "is deemed necessary to foster the neutrality of the mediator." *Id.*

LWP is unnecessarily attempting to force this Court to choose between two competing interests, the law of contracts and the confidentiality requirements for mediation. This competing interest does not exist in this case and is not at issue. The statements made in the Joint Motion to Compel contain only the terms of the agreement. The courts have continuously listed terms of settlements with much greater detail in court opinions than those general facts given in the motion. *See Brighton Corp. v. Ward*, 231 UT App 236, ¶ 17, 31 P.3d 594, 598-99 (Court discusses the terms of the settlement agreement, including direct quotes of the parties); *Mascaro v. Davis*, 741 P.2d 938, 940 (Utah 1987) (Court discussed terms of settlement agreement including specific amount of land and specific dollar amount paid); *see also Tracy-Collins Bank*, 592 P2d 605, 606 (Utah 1979); *Goodmansen v. Liberty Vending Systems*, 866 P.2d 581, 582 (Utah Ct. App. 1993).

Utah case law is scarce concerning the issue of confidentiality of mediation discussions. LWP relies solely on *Lyons v. Booker* to argue that all mediation discussions are confidential. 1999 UT App 172, 982 P.12d 1142. However, *Lyons v. Booker* does not apply to this case. *See* In *Lyons*, the Utah Court of Appeals mandated mediation through the appellate mediation office to encourage the parties to settle their dispute and decrease the time required by a full appellate review. *Id.* at ¶ 3. Appellate mediations are dissimilar from other ADR Proceedings to the extent they are governed by a whole different set of rules. The Rules of Appellate Procedure govern the proceedings. According to the Rules of Appellate

Procedure, statements made during mediation conferences are confidential. *See* Utah R. App. P. 29(e). In the instant case, there was no appeal, no appellate court mandated mediation and the appellate mediation rules found in the Rules of Appellate Procedure do not apply.

Furthermore, unlike the Appellant in *Lyons*, Craig Reese was careful not to reveal "detailed and specific references to discussions conducted during mediation." *See* R179-81. A verbal contract was made between the Craig Reese and LWP. R56-57. LWP knew Craig Reese's final settlement with Tingey was conditioned upon LWP's prior agreement with Craig Reese. *Id.* Craig Reese relied upon this agreement when he later settled with Tingey. *Id.* Craig Reese's pleadings merely set before the court evidence that there was an offer made by LWP. *Id.* Craig Reese accepted this offer. *Id.* Both parties gave consideration. And Craig Reese then relied on this contract in settling the case with Tingey for less money. *Id.* The pleadings did not give any "detailed or specific" conversations or admissions. *See* R54-79.

The policy behind the confidentiality requirement of *Lyons* is not applicable to this case. The facts and discussions in dispute in this case are not between Craig Reese and Tingey, but between Craig Reese and a non-party, LWP. The mediation was to resolve the issues of liability and damages concerning Craig Reese's injuries and reach a settlement between Craig Reese and Tingey. Any facts or discussions about the agreement concerning the lien will not affect liability for Craig Reese's injuries and the separate agreement was not the purpose of the mediation process, nor was it mediated. "We must balance the public

interest in protecting the confidentiality of the settlement process *and the countervailing interests*." *In re Anonymous,* 283 F.3d 627, 637 (4th Cir. 2001) (emphasis added).

The district court carefully balanced the underlying policy of mediation, which is to encourage settlement of disputes without litigation. Two interests of mediation were discussed during the hearing. First, the enforcement of binding contracts made separately during a mediation; and second, keeping out evidence of anything which would hurt a party if they found it necessary to proceed to trial. Both interests are necessary if parties are to be encouraged to participate in negotiation and mediation. R213, May 22, 2006 Hearing Transcript, p. 6-7.

C. The District Court Gave Narrow, Careful and Specific Direction in Crafting out Its Order Allowing Craig Reese to Take the Deposition of Ms. Grace Acosta.

The district court gave careful and specific direction to the parties and to LWP in limiting the scope of the deposition to questions about the process but not any confidential comments or facts about the case. R213, May 22, 2006 Hearing Transcript, p. 45. The district court recognized that counsel had not gone out of bounds, The evidence of existence of a separate agreement acknowledging that there was a difference between confidential and non-confidential matters. *Id.* The district court informed LWP, during the deposition of Ms. Acosta, that it had the "complete right to object at any time if they felt the scope had gone into any area that might be tender concerning facts or otherwise." R213, May 22, 2006 Hearing Transcript, pp. 31-32.

In fact, the district court established that LWP and all parties stipulated that the district court could hear and determine the matter to enforce the settlement agreement. R213, May 22, 2006 Hearing Transcript, p. 22. The district court demonstrated that it understood the policy of confidential mediation when it asked counsel, "up to this point, given the information that we know in front of us, and everything that has been pled, do you believe that either one of your trial positions or strategies has been compromised based on the evidence that's been leaked out?" He continued, "if you have a bench trial, do you think that based on the facts that I'm the one that's read everything, I would still be in a position where I could hear the case?" R213, May 22, 2006 Hearing Transcript, pp. 14-15. The two parties of this case agreed that nothing was revealed to the court that would compromise either party's positions. *See* R213, May 22, 2006 Hearing Transcript, p. 14.

Craig Reese and Tingey did not reveal any confidential information to the court. They merely outlined the process of the mediation and discussed solely the facts regarding the agreement made by LWP. They did not reveal any facts, statements, or discussions regarding the case between Craig Reese and Tingey. Additional discovery (deposition of Ms. Acosta) regarding the agreement is necessary to rebut LWP's false representation that they had never even discussed the topic of the agreement and refused to abide by the verbal contract they had made. Craig Reese and Tingey have not breached any confidentiality. It is ironic to note that LWP agrees that all discussions should be confidential. However, LWP revealed in the district court and in their Statement of Facts in this appeal facts, statements and

discussions concerning the mediation and agreement and made specific references to discussions Ms. Acosta had with the parties regarding the agreement.

The district court addressed the difference between the conversations, discussions and admissions of the specifics of the case that potentially open liability to either side, as compared to the process of the agreement made by LWP with Craig Reese which has no relation to the underlying facts of the case. R213, May 22, 2006 Hearing Transcript, pp. 31-32. The court stated, "None of that stuff's been discussed. The only part that's been discussed was, do we have an agreement?" *Id.*

At the conclusion of the hearing LWP without being directed to do so, drafted the court's order. R140-43. This order, similar to the petition they made to this court, falsely mis-characterized the findings of fact, and the court's conclusions. *Id.* Although, the order drafted by LWP was far more favorable to the parties than the actual ruling Craig Reese, filed an objection and a proposed order with the true findings and conclusions. The trial court rejected the exaggerated order drafted by LWP and granted the accurate order written by Craig Reese. *Id.* Once again here, LWP has exaggerated the fact, findings, and orders of the district court. They have twisted the facts and mis-characterized the Judge's findings for their own end, which is to ultimately get out of the binding verbal agreement they made with Craig Reese.

Furthermore, the district court did not even order Ms. Acosta to be deposed about confidential matters. R179-81. The trial court determined that the separate agreement was

a different issue than the issue of liability between Tingey and Craig Reese. Therefore, the facts revealed to the court did not breach any confidentiality.

LWP has grossly mis-characterized the district court's order by arguing the trial court erroneously ruled that settlement discussions made during mediation were not confidential and were admissible. The trial court actually said, "...the specifics of the case, that potentially could open liability to either side [have] got to remain under absolute confidentiality. That includes things like the amount of money, the fault, the facts..." R213, May 22, 2006 Hearing Transcript, p. 31. The district court concluded that the separate discussions between Craig Reese and LWP regarding the lien were not confidential because, none of specifics of the case between Craig Reese and Tingey has been discussed. "The only part that's been discussed was, do we [LWP and Craig Reese] have an agreement?" R213, May 22, 2006 Hearing Transcript, p. 31.

III. AN ORAL SETTLEMENT AGREEMENT IS ENFORCEABLE WITHOUT A WRITING WHERE THE AGREEMENT WAS MADE AND SUBSEQUENTLY HAD BEEN RELIED ON.

A. A Settlement Agreement Is Not Required to Be in Writing to Be Enforceable.

Craig Reese and LWP entered into a legally binding verbal agreement on December 30, 2005. All of the necessary elements of the contract were met including, offer, acceptance, meeting of the minds, consideration, etc. Although LWP refused to sign the agreement memorialized by the mediator, this agreement is still enforceable as being separate from the mediation.

Utah Cases support this policy that parties should be prohibited from avoiding settlement agreements on a whim. Permitting parties to void settlement agreements on a whim, because the agreement becomes unpalatable or the parties become greedier, "would work a significant deterrence contrary to the federal policy of encouraging settlement agreements." *D.R. v. East Brunswick Bd. of Educ.*, 109 F.3d 896, 901 (3d Cir. 1997). The Utah Supreme Court articulated in *Tracy-Collins Bank and Trust Co. v. Travelstead*, 592 P.2d 605, 607 (Utah 1979), the policy to enforce settlement agreements by stating that a compromise or settlement of litigation is always preferable to the action or proceeding in the court where the compromise was affected; it is through that court the carrying out of the agreement should thereafter be controlled. *Id.* Otherwise the compromise, instead of being an aid to litigation, would only be productive of litigation as a separate and additional impetus. *Id.* Thus, Utah courts affirm the granting of a motion to compel settlement if the record establishes a binding agreement and "the excuse for nonperformance is comparatively unsubstantial." *Murray v. State*, 737 P.2d 1000 (Utah 1987); *Zions First Nat. Bank v. Jensen*, 781 P.2d 478, 479 (Utah Ct. App. 1989). Public policy encourages parties to settle their differences by agreement rather than litigation. When the parties freely enter into an agreement and the evidences establishes such, it should be enforced by the court rather than the parties being left to pursue litigation.

Moreover, Utah Code Annotated Section 78-37b-7 does not required a settlement agreement to be in writing. It states that "any settlement agreement between the parties as

a result of mediation may be executed in writing..." Utah Code Ann. § 78-31b-7(3)(a) (emphasis added). The plain language of the statute does not hold a settlement agreement invalid if not written, but merely indicates that it *may* be put in writing and enforced as a judgment.

C. Case Law from Other Jurisdictions Establishes That Mediation Agreements Can Be Enforced Even If Not Executed Signed Written Agreement.

Case law supports that mediation agreements need not be in writing to be enforceable. There is well founded law, supported by long-standing policy, that oral agreements reached in the course of mediation can be enforceable. "A trial court can determine the enforceability of a settlement agreement where one party refused to sign the Mediation Settlement Agreement by hearing evidence regarding the agreement and its terms." *Few v. Hammack Enters., Inc.*, 511 S.E.2d 665, 669-70 (N.C. Ct. App. 1999). "Parties to a mediated settlement are free to enter into a binding oral contract without memorializing their agreement in a fully executed document, even if they intend to subsequently reduce their agreement to writing." *Catamount Slat Prod., Inc. v. Sheldon*, 845 A.2d 324, 331 (Vt. 2003) (The court refused to enforce the settlement agreement only because the parties communicated an intent not to be bound until the parties executed a final executed settlement agreement.). "In those instances where a settlement agreement was reached but not signed by the parties, the agreement may still be enforced provided the parties produce sufficient evidence concerning the attainment of an agreement and the mutually agreed upon terms." *Riner v. Newbraugh*, 563 S.E.2d 802

(W.Va. 2002).

> "Accordingly, we hold that a settlement agreement reached during, or as the result of court-ordered mediation which does not fully comply with West Virginia Trial Court Rule 25.14 may be enforced by the circuit court where (1) the parties to the mediation reached an agreement; (2) a memorandum of that agreement was prepared by the mediator, or at his direction, incident to the agreement; (3) the circuit court finds, after a properly noticed hearing, that the agreement was reached by the parties free of coercion, mistake, or other unlawful conduct; and (4) the circuit court makes findings of fact and conclusions of law sufficient to enable appellate review of an order enforcing the agreement." *Id.*

In *Riner*, an oral mediated settlement was reached with the assistance of a mediator by telephone on August 31, 2000. *Id.* at 804. Subsequently, the mediator reduced the agreement to writing and the Riners signed it. *Id.* at 804-05. However, the Appellees chose not to sign that document, but prepared a lengthier document, that restated only some of the provisions of the mediation agreement, but also included other provisions not specifically addressed at the mediation conference. *Id.* at 805. The Riners refused to sign the new document prepared by the Appellees because it added new terms that were not agreed upon. *Id.* The Appellees filed a motion to enforce the settlement agreement it drafted. *Id.* The trial court granted the motion to enforce. *Id.* However, the appellate court reversed the lower court's decision, holding that no meeting of the minds took place with regards to the settlement agreement drafted by Appellees, given that the document included terms that "differ in substance" from those set forth in the oral mediation agreement. *Id.* at 810.

Also, in *Riner*, the court recognized that a mediator could testify as to the general issue of whether an agreement was reached. *Id.* at 808. In the instant case, the parties and

LWP only disclosed general information about the existence of a settlement agreement. The parties did not go into the specifics of the mediation negotiations or the negotiations between Craig Reese and LWP.

In *Kaiser Foundation Health Plan of the Northwest v. Doe*, 903 P.2d 375, (Or. Ct. App. 1995). the appellate court reversed the trial court's ruling and held that the oral mediation agreement should be enforced. It found "no authority that supports the proposition that settlements reached during mediation should receive special treatment or be analyzed differently from settlement reached in other settings." *Id.* at. 378.

LWP relies solely on cases where a mediation took place between actual opposing parties who were actively pursuing lawsuits against one another. The instant case is about one party and an interested spectator holding a lien on any resolution (who has subsequently intervened), working side-by-side, even as teammates, to maximize any compensation for Craig Reese. This case is distinguishable from those cases in that in that no mediation took place between Craig Reese and LWP.

LWP's reliance on *Vernon v. Acton*, 732 N.E.2d 805 (Ind. 2000) is misplaced. Again, this case is about a duty to enforce a contractual agreement and not about a mediation. In *Vernon*, an actual mediation took place between parties who were adversaries. *Id.* In *Vernon*, the parties actually signed a written agreement to mediate. *Id.* at 806. The written agreement required "confidentiality in conformity with state law and Supreme Court rules." *Id.* at 807-08. The Court observed that the *only* reason that the A.D.R. rules applied was because the

parties intended the Rules to apply. *Id.* at 808. "[B]ecause each of the parties intended to be governed by the A.D.R. mediation confidentiality rule, and to guide the bench and bar, we will analyze the mediation in this case as governed by the A.D.R. Rules." *Id.* "We note that the A.D.R. Rules would not have otherwise applied to this pre-suit mediation." *Id.*

LWP, as an interested spectator, and as an invitee, most likely did not sign a written agreement to mediate. LWP did not mediate. Craig Reese and the Defendant Tingey signed a mediation agreement, but did not agree to be bound by any Rules of ADR or by any statute. Furthermore, this case is distinguishable from *Vernon* in that the mediator in *Vernon* never even prepared a written version of the agreement, thus leaving to oral testimony the terms of the agreement. *See Id.* at 807. Here, the mediator prepared a written agreement. *See* R56-57. The agreement accurately memorialized the terms of the mediation as well as the separate agreement between Craig Reese and LWP. *Id.*

In *Vernon*, the parties stated specifics about discussions and events that took place at the mediation, including dollar amounts, where the court held that these were confidential. *Id.* at 806-07. Here, the parties and LWP have not revealed any specifics about the mediation. The parties have only revealed information as to the existence of the agreement. "This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of the mediation process. This rules also does not require exclusion when the evidence is offered for another purpose, such as providing bias or prejudice of a witness, or negating a contention of undue delay." *Id.* at 808. The court

held that proving the existence of an oral mediation agreement was in violation of their ADR confidentiality rule because it was explicitly subject to the state's Evidence Rule 408. *Id.* at 808-09. However, even if our ADR confidentiality Rules apply, they are not subject to Utah Rules of Evidence, Rule 408.

LWP improperly relies on *Wilmington Hospitality, L.L.C. v. New Castle County*, 788 A.2d 536 (Del. Ch. 2001). LWP mischaracterizes the holding of the case. The court held that the only communications that were confidential where those communications made by parties to a mediation that *related to the controversy being mediated. Id.* The Court of Chancery Rule 174 applied in this case, because the court referred the parties to mediation. *Id.* at 540. The Rule stated, "'communication made in or in connection with the mediation that relates to the controversy being made, whether made to the mediator or a party, ...is confidential' and is 'not subject to disclosure...'" *Id.*

In the instant case, the mediation was between Craig Reese and Tingey and not between the "interested spectator" LWP. Furthermore, the court did not "refer" the parties to mediation. The parties voluntarily opted to participate in mediation, thus, the rule, as stated in *Wilmington Hospitality, L.L.C.* would not apply. Lastly, and most importantly, the agreement reached between Craig Reese and LWP did not "relate to the controversy being mediated". The controversy being mediated, between Craig Reese and Tingey, concerned liabilities of the parties, theories of the case, and dollar amounts. There was no "controversy" between Craig Reese and LWP. The agreement between Craig Reese and

LWP concerned none of the above.

This case is also distinguishable from *Ryan v. Garcia*, 27 Cal.App.4th 1006 (Cal. Ct. App. 1994) heavily relied on by LWP in its brief. In *Ryan*, the mediation took place between two opposing parties. *Id.* Again, the agreement reached between Craig Reese and LWP was an agreement between a party and a non-party. Also, the parties voluntarily submitted to mediation, signing carefully and thoroughly drafted agreements to mediate, including specific provisions from California's Evidence Code concerning confidentiality of mediation agreements. *Id.* at 1008. The court focused on California's Evidence Code because the parties had expressly agreed in their agreements to mediate that they would adhere to those standards in the Evidence Code. *Id.* at 1009-11. The court held that the statements made by the mediator comprising the agreement were "in the course of mediation". *Id.* The court insisted on a broad interpretation of "in the course of mediation". *Id.*

Here, LWP most likely did not sign any agreement to mediate, because she did not attend the mediation for the purpose of mediating with the parties. The agreement made between Craig Reese was not made "in the course of mediation", it was made during the breaks of a mediation. No mediation occurred between Craig Reese and LWP, therefore, the process and discussions about which Ms. Acosta was ordered to be deposed were not made "in the course of mediation". In fact, they were made during breaks of the mediation between Craig Reese and LWP in anticipation of a separate agreement. Thus, the agreement between Craig Reese and LWP are not subject to the evidence standards, similar to those in

Ryan.

IV. UTAH RULE OF EVIDENCE 408 DOES NOT APPLY TO THE STATEMENTS REVEALED CONCERNING THE AGREEMENT MADE BY LWP REGARDING THE LIEN.

Clearly, Craig Reese and Tingey have not attempted to introduce any statements or comments made during discussions of the separate agreement or during the mediated settlement on any issue of liability for Craig Reese's injuries in any way. The evidence is being offered only to show that a valid and enforceable contract was made between Craig Reese and LWP. LWP was not a party to the claim and there was no pending civil suit against LWP at the time of the agreement. Therefore, Rule 408 is not applicable to the evidence introduced in the Joint Motion to Compel. LWP has misstated the rule and attempted to apply it out of context. "The decision to exclude or admit evidence under Rule 408 will not be reversed absent a clear abuse of discretion." *State v. Tarrats*, 2005 UT 50, ¶16, 122 P.3d 581. The rule specifically states that statements of compromise or made in compromise negotiations are "not admissible to prove liability." Utah R. Evid. 408. "This rule does not require the exclusion of evidence when such evidence is offered for another purpose." *Id.* Rule 408 is a rule of limited exclusion. "The clear language of rule 408 indicates that the rule is very narrow. *Child v. Gonda*, 972 P.2d 425, 429 (Utah, 1998).

Utah's rule is the federal rule, verbatim. *See* Fed. R. Evid. 408. "The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer

for another purpose is not within the rule." *See* Fed. R. Evid. 408, Advisory Committee's Notes. "The Committee recast the Rule so that admissions of liability or opinions given during compromise negotiations continue [to be] inadmissible, but evidence of unqualified factual assertions is admissible." *Id.* "The rationale underlying the common law rule that gave rise to Rule 408 was to exclude the offer of compromise only when it was tendered as an admission of the weakness of the offering party's claim or defense, not when the purpose is otherwise." AMJUR EVIDENCE § 516.

The Fed. R. Evid. 408, Advisory Committee's Notes state: "The intent is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim." *Id.* (quoting *Cates v. Morgan Portable Bldg. Corp.*, 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); and *Coakley & Williams v. Structural Concrete Equip.*, 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent of a release); and *Uforma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284 (6th Cir. 1997) (Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations)).

The discussions between Craig Reese and LWP regarding the agreement are not compromise negotiations applicable to Rule 408. "Courts have regarded discussions between

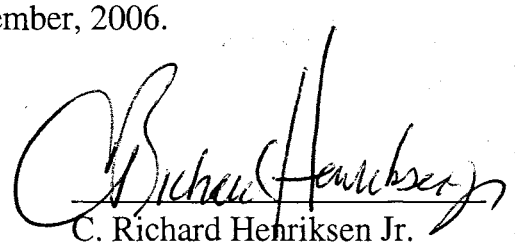
two parties as settlement negotiations where (1) after Craig Reese had filed an action the parties met to talk about their interpretation of the matter in dispute... and (2) it was contemplated that litigation might be necessary" AMJUR EVIDENCE §511 (quoting *Trans Union Credit Information Co. v Associated Credit Services, Inc.* 805 F.2d 188 (6th Cir. 1986)). "Where the point of threatened litigation has not been reached, communications between parties are not considered compromise negotiations." *Id.* (quoting *Big O Tire Dealers, Inc. v Goodyear Tire & Rubber Co.*, 561 F.2d 1365 (10th Cir. 1977); and *United States v. Peed* 714 F.2d 7 (4th Cir. 1983) (no civil suit was pending at the time the conversation seeking compromise took place)).

The separate agreement made by LWP and Craig Reese is not applicable to the plain language or common application of Rule 408, where the evidence is presented to prove the fact there was an agreement between LWP, a non party, and Craig Reese and was no threat of litigation.

CONCLUSION

For each of the foregoing reasons, Respondent Murlyn Craig Reese respectfully requests that the trial court's ruling that LWP's counsel be deposed regarding the separate agreement made with Craig Reese be affirmed. As an agreement was reached between Craig Reese and LWP, outside of the mediation between Craig Reese and Tingey, Respondent Craig Reese respectfully requests that this court instruct the trial court to hear evidence as to the existence of the separate agreement entered into on December 30, 2005 between Craig Reese and LWP.

DATED this 13 day of December, 2006.



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ADDENDUM 1

78-31b-7. Minimum procedures for mediation.

(1) A judge or court commissioner may refer to mediation any case for which the Judicial Council and Supreme Court have established a program or procedures. A party may file with the court an objection to the referral which may be granted for good cause.

(2) (a) Unless all parties and the neutral or neutrals agree only parties, their representatives, and the neutral may attend the mediation sessions.

(b) If the mediation session is pursuant to a referral under Subsection 78-3a-109(9), the ADR provider or ADR organization shall notify all parties to the proceeding and any person designated by a party. The ADR provider may notify any person whose rights may be affected by the mediated agreement or who may be able to contribute to the agreement. A party may request notice be provided to a person who is not a party.

(3) (a) Except as provided in Subsection (3)(b), any settlement agreement between the parties as a result of mediation may be executed in writing, filed with the clerk of the court, and enforceable as a judgment of the court. If the parties stipulate to dismiss the action, any agreement to dismiss shall not be filed with the court.

(b) With regard to mediation affecting any petition filed under Section 78-3a-305 or 78-3a-405:

(i) all settlement agreements and stipulations of the parties shall be filed with the court;

(ii) all timelines, requirements, and procedures described in Title 78, Chapter 3a, Parts 3 and 4, and in Title 62A, Chapter 4a, shall be complied with; and

(iii) the parties to the mediation may not agree to a result that could not have been ordered by the court in accordance with the procedures and requirements of Title 78, Chapter 3a, Parts 3 and 4, and Title 62A, Chapter 4a.

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 13 day of December, 2006 a true and correct copy of the foregoing **BRIEF OF RESPONDENT,** was hand delivered, to the following:

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