SELECT ALABAMA MEDIATION CASES

Alabama has developed a body of case law where an issue on appeal arises from a mediation, or from not ordering a mediation. Comments following case summaries are the authors, not necessarily the holdings of the courts.

*Divorce/Family Cases Noted by Asterisk**

*Johnson v. Johnson, 191 So. 3d 164 (Ala. Civ. App. 2015). In the circuit court after a complaint of divorce was filed by the wife, a mediation occurred and a settlement agreement was signed by the parties. It included child support and alimony in gross weekly, among other things, but did not include alleged pendent lite child support arrearages and pendente lite alimony arrearages that were awarded at earlier pendente lite hearing. Wife, wanting to avoid this agreement, filed a hand written motion seeking a hearing because she said the settlement agreement did not include all the terms that had been mediated and the mediator had pressured her into signing the agreement despite the fact that payment of the arrearages were not included. Husband filed to enforce the agreement. At the hearing, the court questioned parties and their attorneys and the mediator. Judge noted in the record that everyone had nodded their heads in agreement that the alleged arrearages had been a subject in mediation. Mediator denied pressuring wife and wife conceded she had read and signed the agreement. The court indicated that the wife should have addressed the arrearages in the settlement agreement or filed a motion seeking a finding of contempt for non-payment before the mediation. The circuit court enforced the settlement agreement and entered a judgment concluding that the settlement was voluntary, with no duress or coercion nor was there fraud or collusion. The court divorced the parties with no payment of arrearages. Wife appealed.

The issues on appeal are three: (1) Whether the circuit court violated confidentiality requirements under Rule 11c of the Alabama Civil Court Mediation Rules (court can't inquire into or receive information about the mediation) by inquiring into events that took place during mediation and having discussion with parties, their attorneys and the mediator; (2) Whether the circuit court erroneously failed to award pendent lite child support arrearages in the final judgment; (3) Whether the circuit court erroneously failed to award pendente lite alimony arrearages in the final judgment. The Court affirmed in

part and reversed in part, and sent the case back with instructions for the court to determine and award the pendent child support arrearages.

(1) The discussion with the parties, attorneys and mediator did not violate confidentiality but was one of the exceptions under 11(b)(1): "a mediator or a party to mediation may disclose information otherwise prohibited from disclosure under this section when the mediator and the parties to the mediation all agree to the disclosure." The court found that no one objected to the questioning, so there was no violation of confidentiality.
(2) It is well settled that pendent lite child support becomes a final monetary judgment on the dates they accrued, and are immune from change, the court can't forgive them or set aside arrearages. The circuit court erred by failing to determine the amount of arrearages, and award them.
(3) Pendente lite alimony is interlocutory and does not become a final judgement on the date it accrues. Held: "If a final judgment is entered while a pendent lite alimony arrearage remains unpaid, the final judgment relieves the payor spouse from paying the pendent lite alimony arrearages, unless payment of the pendent lite alimony arrearages is ordered in the final judgment." The final judgment abrogates a former interlocutory order. The Court overruled various cases and emphasized that the holding is only for pendente lite alimony arrearages, not installments of periodic alimony. Applying this to the case, the court found that the silence of the settlement agreement regarding the pendent lite alimony arrearages could be the basis to conclude that the parties mediated the issue or the wife abandoned her claim to the arrearages. The court was not in error by enforcing the settlement agreement, or by declining to order the payment of the pendent lite arrearages.

Southland Bank and Jimmy Adkinson v. A & A Drywall Supply Company,
21 So. 3d 1196 (Ala. 2009). In its application for rehearing in the Supreme Court of Alabama, A & A Drywall requested that members of the Court recuse themselves from the case and that a special court be appointed to hear the appeal de novo because the court must have been "aware of the confidential facts regarding the parties' appellate mediation." This was their conclusion because in the original opinion, the court, concerned about the lapse of time between the filing of the notice of appeal and the release of an opinion, was motivated to include an explanatory statement that the case was referred to appellate mediation which was ineffective. In overruling the application for rehearing, the Court cites to Rule 8, Ala. R. App. Med. about confidentiality, and says that the court is not prohibited from knowing that a case was sent to mediation because the record will show that the case has been returned to the court from the mediation docket. The Court went on to say that, "no member of this Court had access to any confidential information concerning the mediation, such as who took what position, what settlement offers, if any, were made, or who was responsible for the mediation not

resulting in a settlement." The Court also stated the necessity for mediation confidentiality, and that, "members of the Court, as a matter of internal procedure, do not have any access whatsoever to any information regarding the mediation of a particular case other than whether the case was referred to appellate mediation and whether it was subsequently reinstated on the appellate docket." *(My note: The Supreme Court of Alabama has said they do not have access to confidential mediation information. Rule 8, Ala. R. App. Med.)*

Ex Parte Morgan County Commission, 6 So. 3d 1145 (Ala. 2008)
The Commission, a third-party in a life-insurance beneficiary case, moved for mediation pursuant to 6-6-20 (b) (2), Ala. Code 1975, and the Morgan County Circuit Court denied the motion. The Commission then petitioned the Alabama Supreme Court for a writ of mandamus directing the circuit court to vacate its order denying the Commission's motion for mediation and to enter an order ordering mediation and appointing a mediator. The Supreme Court of Alabama granted the petition and issued the writ. The Court, citing §6-6-20 Ala. Code 1975, and Rule 2 of the Alabama Civil Court Mediation Rules found that the court had exceeded the scope of its discretion because, "Although a trial court has discretion as to whether to stay the proceedings during mediation, the trial court has to order mediation upon request of a party." *(My note: If one party requests mediation the court must order it. §6-6-20 Ala. Code 1975)*

Working v. Jefferson County Election Commission, 152 So. 3d 1230 (Ala. 2013)
In the first appellate effort in this case, the Supreme Court of Alabama found that the election to fill a vacancy on the Commission was invalid, and that Governor's Riley's appointment to fill the vacancy on the Commission was lawful, reversing the trial court. On remand, The Working plaintiffs, as the prevailing parties, requested attorney fees and then requested mediation of attorney fees and expenses. The trial court denied their request for mediation.
At 72 So. 3d 18 (Ala. 2011), the Supreme Court reversed the denial of the request to mediation, and again remanded the case to the trial court, citing the holding of Ex Parte Morgan County Commission, with directions to enter an order ordering mediation of the Working plaintiffs' claim for attorney fees pursuant to §6-6-20(b), Ala. Code 1975. The court reiterated that a trial court is *required* (emphasis by court to this term) to order mediation of a dispute upon the motion of any party. Additionally, JCEC raised the issue of state immunity for the first time on appeal, and the Court said this was an issue for the trial court to look at before ordering mediation pursuant to §6-6-20(g). Back below, the trial court looked at the immunity issue with respect to §6-6-20 (g) and denied mediation, finding defendants immune from liability for state-law claims, and not addressing at all the federal law claims.
Now in 2013, the Supreme Court of Alabama affirmed the trial court with respect to immunity and state-law claims, but stated that the trial court, "has not complied with this Court's mandate in Working II. Therefore, we are again compelled to remand this cause

with instructions that the trial court enter a new order addressing the Working plaintiffs' federal-law claims in compliance with §6-6-20 and this Court's mandate in Working II." *(My note: If one party requests mediation the court must order it. §6-6-20 Ala. Code 1975; where an issue of immunity is offered as a defense (state or federal) it is to be disposed of before any mediation is conducted. §6-6-20(g)*

*K.D.H. v. T.L.H., 3 So.3d 894, (Ala. Civ. App. 2008)
In this case, a husband brought action for divorce and wife counterclaimed, with each party seeking custody of their three children. A guardian ad litem was appointed to represent the three children as well as the mother's infant child with another father. (At the time the husband originally filed his complaint, the mother was pregnant with another man's child.) The parties went to court-ordered mediation, but did not come to agreement. Trial began, and on the third day, parties announced that they had reached a settlement. Counsel read the terms into the record, and parties affirmed the terms were, in fact, their agreement. Guardian ad litem approved terms as well. Parties were ordered to file settlement papers with the court w/in 30 days, and a compliance review hearing was scheduled.
At the compliance review hearing, mother informed the court that she had fired her previous counsel and that she did not agree to the terms of the agreement. She made an oral motion to set aside the settlement and proceed with trial. The court granted the motion and set a trial date. After that, things went down hill. The Elmore County Court awarded the father primary custody, mother had visitation (less than in the agreement of the parties), was to pay child support, to pay attorney fees to father, to pay part of guardian ad litem fees.

The mother moved for a new trial which was denied, and she appealed. At the appellate court the mother argued for custody, for more visitation, for no payment by her of child support, and no payment for guardian or father's attorney, and stated that, "by imposing a total of $15,340 in fees upon her, the trial court punished her for asking that the settlement agreement be set aside so that she could continue with the trial."

The Court of Civil Appeals left everything below alone except that it found that the trial court exceeded its discretion in ordering the mother to pay father's attorney-fees, and did not award the father attorney fees on appeal. *(My note: The ABA Journal reported on a study, August 11, 2008, which showed that most plaintiffs who reject settlement offers do worse at trial; it also showed that when defendants make such a mistake, their costs are higher.)*

Walton v. Beverly Enterprises-Alabama, Inc., 4 So.3d 537 (Ala. Civ. App. 2008).
Walton, the employee, was injured in an automobile accident within the scope of her employment. Ms. Walton sued seeking workers' compensation benefits & tort of outrage for failure to be paid such benefits. After parties went to mediation, Ms. Walton executed

a release agreement, then another release agreement to protect her third party suit against the driver of the other car. She released them from, "all claims resulting from or arising out of the alleged incidents forming the basis of the lawsuit...." Subsequently, she brought action against employer asserting among other things, retaliatory discharge as a result of her workers' compensation claims. In her appeal after a summary judgment in favor of Beverly, the employee argued that the two releases, considered together with other documents concerning the mediation of the workers' compensation action, created a latent ambiguity that required the consideration of parol evidence to determine the true intent of the parties in executing the second release. She argued that in signing the second release she did not intend to release the retaliatory-discharge and intentional-interference claims which arose after the settlement of the workers' compensation action. The second release however, was signed after employer had dismissed Walton from her employment. In affirming the summary judgment, the court held that the second release agreement between employer and former employee was supported by valid consideration so as to be enforceable, and parole evidence was not admissible to determine whether release agreements were intended to include employee's tort claims. *(My note: Advocates and parties need to watch out for language in releases. A mediator may want to suggest parties bring release provisions that they may want to use; parties should always draft releases and read any release closely.)*

James v. City of Russellville, 57 So. 3d 111 (Ala. Civ. App. 2010).
Contractor of a subdivision brought action against the City for breach of mediated agreement and promissory fraud. Contractor alleged that the City induced the contractor to enter into a mediated agreement then breached the agreement by failing to pave certain subdivision streets at a width of 20 feet. City had agreed to pave streets in the residential subdivision, "in accordance with normal city standards," and paved to a width of 18 feet. Appellant thought it should be 20 feet. The City won its motion for summary judgment below, and James appealed. James stated in his affidavit, that based upon his belief about subdivision street width for manufactured homes, he did not bargain for twenty foot streets because he thought that was a given. As a result, he did not extract any express statement from the City that it would pave the streets in his subdivision to a width of 20 feet. The Court affirmed the lower court's summary judgment. *(My note: Don't assume anything in a mediated agreement. If standards are involved, define them.)*

*Hull v. Hull, 41 So. 3d 815 (Ala. Civ. App. 2010) This is the 3rd time the parties have been before this court. (The case began in 2003 when husband was 73, and now he is 80.) In this third round, the wife filed to find husband in contempt for failing to comply with the mediation agreement that parties had signed at appellate mediation during the second time they were before the court (along with a few more issues). The court affirmed the trial court's contempt finding. Of course they looked at the mediation agreement to check compliance. *(My note: Even in appellate mediation parties sometimes do not comply with the mediated agreement.)*

*S.A.N. v. S.E.N., 995 So. 2d 175, (Ala. Civ. App. 2008)
Parties settled the case in mediation by agreeing they would submit a stipulation of facts to the trial court for its ruling on the sole issue of whether a section of the AL Code prohibits the father (a sex offender, not with his children, but with the wife's minor sister) from visiting with his children. Parties stipulated that the father had not sexually abused or committed a crime against the parties' children. Parties also agreed on a visitation plan to be implemented if the court found that the father was permitted visitation. The lower court found the father would be able to have visitation and awarded him visitation according to the schedule outlined in the mediation agreement. Mother appealed. The court of appeals found that a trial court was required to conduct a hearing to determine that such visitation is in the best interests of the child. The Court is not bound by the agreement of the parties, and it will only be given effect to the extent that it is in the best interests of the child. The case was remanded so the trial court could conduct a hearing for the purpose of establishing a visitation plan that serves the best interest of the children. (*My note: Visitation plans are subject to the court finding, after a hearing, that they are in the best interest of the child.).*

Berry v. H.M. Michael, Inc., 993 So. 2d 1 (Ala. Civ. App. 2008)
Parties mediated the case under the workers' comp mediation "Ombuds Program" (worker was bitten by a dog in the line of duty). Worker then moved to set aside the settlement agreement on grounds of fraud and newly discovered evidence, and the trial court denied the employees motion. Actually, the employee did not even attempt to prove that the employer or its agent had made any misrepresentation of material fact that had induced her to agree to the settlement. The Appellate court found both grounds without merit, holding that the employee failed to meet burden of proof in moving to set aside the agreement on fraud grounds, and the employee's allegation that she did not learn her injury was "chronic" in nature until a post-settlement examination did not support setting the agreement on basis of newly discovered evidence. The Court said that the movant must satisfy the trial court that the other party made some representation of material fact that reasonably induced the movant to enter into the mediated settlement agreement. (My note: *The party seeking to set aside a settlement agreement has the burden of proof.)*

Board of Trustees of the University of Alabama v. American Resources Insurance Company, Inc., 5 So. 3d 521 (Ala. 2008) In Etowah County, a mediated settlement agreement between estate of car passenger who died after being treated at defendant hospitals following car accident, the tortfeasor, and others, in underlying tort suit, impaired the hospitals' respective statutory hospital liens for all reasonable charges the hospitals incurred. At time of settlement all parties were aware of the hospitals' liens which had been perfected within allotted time. *(My note: Don't ignore liens if you are drafting a settlement agreement.)*

*Daniels v. Daniels, 4 So. 3d 497 (Ala. Civ. App. 2007)
The father filed a motion to set aside a mediated agreement and a motion to continue the final hearing alleging that he had not been physically or mentally well on the day of the mediation. Parties had been ordered to mediation by the Court, and entered into a settlement agreement whereby wife would have primary physical custody of the child, husband would receive supervised visitation, and pay child support. The trial court denied the father's motion. Appeals court affirmed. Father presented no evidence at the ore tenus proceeding about his mental health in support of his motion to set aside the mediated agreement. The trial court did not exceed its discretion. *(My note: Self-determination is an important part of mediation. Is the party able to participate in mediation in a meaningful way? The validity of a mediated agreement may be attacked later, on the same grounds as any contract: fraud, duress, unconscionability, the absence of bargaining ability.)*

*McNeill v. McNeill, 981 So. 2d 1158 (Ala. Civ. App. 2007)
In a post divorce action commenced by the mother, the court ordered parties to resolve the disputes through mediation. Father appealed this order to the Court of Civil Appeals. The Court held that the order directing parties to attempt to resolve their disputes through mediation is not a final appealable judgment that can be appealed because it did not completely adjudicate all matters in controversy between the parties. The Court dismissed the appeal because it lacked jurisdiction. *(My note: If parties are ordered to go to mediation, this is not an order that can be appealed.)*

Billy Barnes Enterprises v. Williams, 982 So. 2d 494 (Ala. 2007)
The defendant filed a motion to set aside a mediated agreement. Before signing the agreement, the defendant took every measure to ensure that plaintiff had produced all discovery documents upon which to base his settlement decision. In reality, plaintiff did not comply with the court's discovery orders. However, defendant believed the plaintiff's representation that no recorded statement existed regarding the personal injury action. This recorded statement would have helped defendant in mediation negotiations. Plaintiff actually possessed the recording, but did not turn it over in discovery. After defendant discovered this, he appealed the judgment of the trial court enforcing the settlement agreement. The Supreme Court of Alabama reversed, holding that the defendant was entitled to rescind the agreement procured by fraud. It noted that a settlement agreement is as binding as any other contract and that a settlement agreement may be reopened for reasons of fraud, accident or mistake. *(My note: This case sets forth the 4 elements necessary to establish that a mediated agreement is procured by fraud: a false representation, of a material existing fact, that the party relied on, and the party was damaged as a proximate result of the reliance.)*

Cincinnati Insurance Companies v. Barber Insulation, Inc., 946 So. 2d 441 (Ala. 2006). Settlements at trial level are governed by Ala. Code 1975, 34-3-21, "An attorney has authority to bind his client in any action or proceeding by any agreement in relation to such case, made in writing, or by an entry to be made on the minutes of the court." The parties disputed whether their attorneys actually reached a settlement in mediation, but the technical requirements never occurred because the mediated agreement was not made in writing nor made on the minutes of the trial court. *(My note: Attorneys who negotiate for clients put it in writing or read it into the court record.)*

Alabama Department of Transportation v. Land Energy, Ltd., 886 So. 2d 787 (Ala. 2004). Land Energy (LE) brought an inverse condemnation action against ADOT. After mediation was unsuccessful, the case went to a jury trial. Tables were introduced that ADOT said were prepared by its witness, Dr. McCarl, solely for use in the mediation between it and the mineral rights owner, LE. The trial court was not convinced. There was a jury verdict for LE, and the court denied ADOT'S motion for judgment as a matter of law. ADOT appealed, and one of the issues on appeal was that tables prepared for mediation were wrongfully admitted into evidence at trial contravening Rule 11, Confidentiality of the Civil Court Mediation Rules. It appears from the court record below that ADOT brought the tables to mediation to facilitate a compromise and settlement of the case through mediation. From LE's side, counsel said he had an outstanding request for production of documents and that counsel for ADOT never said the documents were the subject of mediation. According to counsel for LE they were given to him at the conclusion of the mediation. During trial there was an objection and sidebar about the admission of the charts, and a discussion of the same with objection the next morning. It appears the court's main concern was that it did not want Dr. McCarl to testify as to the mediation proceedings. During the trial Dr. McCarl had begun to state in the presence of the jury that he had prepared one of the tables for mediation, but counsel for ADOT cut him off with an objection before he could answer. When he attempted to broach the subject again, the trial judge cut him off, advising, "Your attorney, he's spoken." The Supreme Court could not find that the lower court had exceeded its discretion in the decision to admit the charts given the exclusion of Dr. McCarl's attempt to speak to the issue. *(My note: Documents prepared for use in mediation should be stamped with language that shows they were prepared for mediation and are confidential under Rule 11(a) and (a)5.)*

*Mackey v. Mackey, 799 So. 2d 203 (Al. Civ. App. 2001) Upon ex-wife's motion for mediation (re increasing child support), mediation was mandatory. *(My note: If one party requests mediation, mediation is mandatory.)*

*Littlepage v. Littlepage, 796 So. 2d 298 (Ala. 2001) After a divorce, former wife submitted seven credit card bills to the husband for payment. He refused to pay all of them because some were not stipulated in the mediated agreement incorporated into the

divorce (two Visa accounts were stipulated to be paid in the agreement, the wife's and a joint account, along with a Discover, a McRaes and a Gayfers card, but not five Visa accounts). The wife filed a rule nisi, alleging that the husband did not pay. Mediator was called to testify. He was not on the Alabama State Court Mediator Roster, nor was he trained. He testified (not using Rule 11 to avoid testifying). His testimony pretty much corroborated what the husband's attorney had presented, but the trial court ordered the husband to pay anyway, an additional $14,399.78. He appealed. The Court of Civil Appeals affirmed, but the Supreme Court reversed. "A court cannot modify property provisions in divorce judgments except to correct clerical errors, after 30 days from the final judgment." Hamilton v. Hamilton, 647 So. 2d 756, 759 (Ala. Civ. App. 1987). The Court continued that a property settlement incorporated into a divorce decree is final and not modifiable, except where fraud or duress. The Court also pointed out that there was no ambiguity in the agreement, because the wife's Visa was singular, and the other Visa was a joint account. *(My note: Parties need to make sure they include everything in the agreement, specifically and clearly, or the agreement may show up back in court)*

Cain v. Saunders, 813 So. 2d 891(Ala. Civ. App. 2001) Guarantor, Saunders, filed motion to have mediated agreement enforced and trial court entered judgment incorporating terms of parties' agreement. Debtor appealed, alleging that the settlement agreement should be set aside on the ground of mutual mistake. The Court of Civil Appeals held that the settlement agreement was unambiguous and that parol evidence was not admissible to alter the terms of the agreement. The dissents (by Yates and Murdock) make the case that this was mutual mistake of fact as to the underlying value of the assets to be transferred and that parol evidence should have been allowed. They cite Section 8-1-40, Ala. Code 1975, "specific performance cannot be enforced against a party to a contract…[i]f his assent was given under the influence of mistake, misapprehension or surprise." Additionally, the dissent by Murdock looks at Rule 11 and states that the Rules, "were not intended to prevent the injured party from proving such fraud or mistake." *(My note: Looks like using mediation testimony to prove fraud or mutual mistake may be allowed under Rule 11.)*

Harlan Home Builders v. Hayslip -- Was On Appeal from the Circuit Court of Tuscaloosa County CV-2008-900045 to the Alabama Supreme Court. A summary of what happened in the lower court:
Parties in this case went to pre-litigation mediation with their dispute. A handwritten purported "agreement" emerged from the mediation, but the parties' dispute continued. So, the plaintiffs below, and now appellants, Harlan Home Builders (and Chris Dobbs, Teresa Dobbs, and Dobbs Reality, LLC) filed for breach of fiduciary duty, interference with business relationship, breach of contract and more. Defendants below, and appellees, Chris Hayslip (and the Townes of North River Development Co.), argued that the claims were barred by the mediation agreement, or that alternatively they were required to be submitted back to the mediator as now an arbitrator. Hayslip also filed a

counterclaim in which he asserted plaintiff had breached the mediation agreement and he was entitled to damages, and specific performance.

Harlan Home Builders then filed for summary judgment arguing that the mediation agreement should be ignored, rescinded or reformed because it was induced by fraud or mistake which occurred during the mediation, and other reasons. Purportedly, during the mediation, Hayslip misrepresented the value of the project as being in excess of $14,500,000 when in fact the value was substantially less. This induced Harlan Home Builders to sign the mediated agreement. Hayslip denies any misrepresentation of a third-party's appraisal report.

The Tuscaloosa Court ordered post hearing briefs regarding the admissibility of fraud and/or mistake occurring in mediation. Appellants, Harlan Home Builders argued that evidence of fraud or mistake that occurred in mediation is and should be admissible to vitiate a mediated agreement just like any other settlement agreement. Appellee, Hayslip, argued that Rule 11 of the Alabama Civil Court Mediation Rules operates as an absolute bar to admission of such evidence.

The lower court ruled that Rule 11c prevented the court from considering any evidence of alleged fraudulent misrepresentations allegedly made by defendants/appellees during mediation. The court dismissed the fraud claims based upon alleged misrepresentations made during mediation. It then, at Harlan Home Builder's request, entered a final judgment pursuant to Ala. R. Civ. P. 54(b), and the case went up on appeal.
The Supreme Court of Alabama sent the parties to appellate mediation, to have another go of it! It did not settle, and a summary of the opinion follows.

Harlan Home Builders, Inc. v. Hayslip , 58 So. 3d 102 (Ala. 2010) The Court found that the trial court erred in certifying as a final judgment its order of dismissal of Harlan Home Builders' fraud claim stemming from the mediation because the Hayslip counterclaim was "so closely intertwined (with the Harlan Home Builders fraud claim) that separate adjudication would pose an unreasonable risk of inconsistent results." The Court said that Harlan Home Builders' fraud claim was a defense to specific performance of the mediation agreement. Thus, both claims have to hang in the lower court until resolved. Then one party may appeal. Meanwhile, this appeal was dismissed as being from a non-final judgment.
(My note: Fraud is a defense to specific performance of a mediated agreement.)

*Faellaci v. Faellaci, 98 So. 3d 521 (Ala. Civ. App. 2012) This post-divorce child support case had been to mediation, and the husband had attached the agreement to his motion to enforce the mediation agreement. After post judgment motions, wife appealed. Ct. of Civil Appeals dismissed the appeal. Circuit Court declined to award interest in husband's child support arrearage. Wife appealed. One of the issues was whether the

trial court considered inadmissible evidence relating to a mediation agreement when rendering its judgment of child support. The wife argued that the child support award must be reversed because the record shows that the trial court considered the parties' mediation agreement in determining the husband's child support obligation. The agreement said $4000 and the trial court set the support at that amount. As part of their decision, the Court determined that to the extent that the trial court relied on the parties' mediation agreement to determine husband's child support obligations, that was in error--but harmless. Court cited Rule 11(c) of the Alabama Civil Court Mediation Rules that a court cannot inquire into nor receive information about the positions of the parties taken in mediation. *(My note: I am still trying to understand the court on this one because the court did not receive information from the mediation, just a copy of the final agreement, a contract that was not confidential but part of the record. Only discussions, documents, etc. in and part of the mediation are confidential, not the final agreement, unless parties make the agreement confidential.)*

Purdue v. Green, 127 So. 3d 343 (Ala. 2012) This case deals with the Alabama Prepaid Affordable College Tuition Plan. Buyers and beneficiaries of the PACT program contracts brought a class action against the PACT Board asserting contract and Section 1983 claims, and seeking declaratory judgment. The Board counterclaimed for declaratory relief. Parties went to mediation, negotiated an agreement, and the Circuit Court of Montgomery County approved the proposed class action settlement agreement after a fairness hearing which was attended by the objectors. However, the objectors appealed, stating the settlement agreement impermissibly contravened Act No. 2010-725, specifically the part that explicitly forbid the PACT board from violating the contractual relationship existing between a PACT contract holder and the PACT board. The appeals were consolidated. The Supreme Court of Alabama reversed the circuit court, holding that the mediated settlement agreement contravened the plain language of the statute which placed certain limits on the PACT board's authority to craft solutions that would violate the contractual rights provided to the contract holders. *(My Note: I think this is the first case in Alabama where it was alleged that a mediated agreement violated the law.)*

Purdue v. Green, 127 So. 3d 343 (Ala. 2012) On application for rehearing. Soon after the release of the Supreme Court's decision, above, the legislature enacted Act No. 2012-198 repealing the section of the act that caused the problem in the settlement agreement, above. The PACT board applied for this rehearing since the statutory language that impeded the agreement had been removed. It requested that the new law be applied retroactively. The Alabama Supreme Court remanded the case to the trial court for a determination as to the constitutionality of the retroactive application of the act—an issue that the Court said should be first addressed by the trial court.

Green v. Ivy, Circuit Court of Montgomery County, Alabama. CV-2010-900013.00 "This matter is before the Court for a return to remand from the Alabama Supreme Court. The mandate to this Court requires, 'a determination as to the constitutionality of retroactive application of Act No. 2012-198 under the facts of the case.'" The Court, after oral argument, found and ordered as follows: "1. That Objectors Perdue, Motlow, and Sears have failed to present this Court with any factual or legal basis to support a finding that Act 2012-198 impaired any vested rights. 2. That the retroactive repeal of portions of Act 2010-725 (specifically the provision embodied in the Alabama Code, 1975, as Section 16-33C-19) by Act No. 2012-198 is not unconstitutional. 3. That all changes effectuated by Act 2012-198 are hereby declared valid and effective. 4. That all other motions or requests made to or of this Court are hereby denied. 5. That the Clerk of this Court shall forthwith transmit a copy of this Order to the Clerk of the Supreme Court of Alabama as a return to remand."

Perdue v. Green, 127 So. 3d 343 (Ala. 2012). Buyers and beneficiaries of the Prepaid Affordable College Tuition (PACT) program appealed the Montgomery County Circuit Court decision that the retroactivity provision in the amended PACT statute was constitutional. On return to remand, the Supreme Court affirmed the lower court and held that: The legislature's repeal of provision in the statutes creating PACT program, which repeal allowed PACT board to negotiate class action settlement, retroactively applied to class action; that the class action settlement was reasonable; that settlement notice was sufficient; and that the settlement agreement was not overly broad.

*Leverett v. Leverett, 123 So. 3d 962 (Ala. Civ. App. 2013) Parties went to mediation to negotiate terms of a divorce. The court adopted the mediated agreement. Later, former wife filed a motion to alter, amend or vacate the divorce judgment, seeking a legal separation, rather than a divorce, so that she could retain health insurance through former husband's military benefits. The wife (who is currently disabled) alleged that after the entry of judgment the husband had notified the provider of the divorce and her healthcare benefits were terminated contrary to the mediated agreement. The husband responded to the motion that he had made arrangements for wife to contact the appropriate military agency, and that he had attempted to contact her to communicate that she would have to cooperate with the agency, but the wife failed to take steps to continue her benefits. The husband was being deployed so he filed a motion for the court to proceed to rule on the wife's motion in his absence. In that motion the husband averred that wife was ineligible for benefits because the length of their marriage failed to meet Defense Department requirements. He also attached exhibits showing that the military office had tried to contact her, and that they were unsuccessful. At a hearing on the motion the lower court changed the decree to a legal separation, and said it did so to accomplish the original intent of the parties to have medical for the wife. The husband appealed. The Court of Civil Appeals found that the parties did not enter into mediation for a separation, but for divorce, and had filed for divorce. The trial court therefore lacked a legal basis on

which to justify its alteration of divorce judgment to grant a legal separation absent a complaint from either party seeking a legal separation. The Court acknowledged the trial courts broad discretion with respect to post judgment matters but said that it did not, "extend to rewriting the parties' mediated agreement to craft relief that neither party properly requested in a complaint...." The trial court, upon finding that something was unavailable, could have vacated the prior judgment to allow parties to remediate, set the matter for trial, or fashion other appropriate relief. *(My Note: We should all think about the possibility that a remedy agreed upon in mediation might become unavailable.)*

Williams v. Jackson, 122 So. 3d 205 (Ala. Civ. App. 2013) Siblings of the deceased brought an action against their nephew, who was the son of the deceased and administrator of his mother's estate. Parties had come to a settlement in mediation, and then siblings accused him of breaching the mediated agreement with respect to distribution of personal property. The nephew/son had designated on the inventory those items that had belonged to his mother during her lifetime and now belonged to him a sole heir and removed them from the house. Siblings alleged that everything in the house should have stayed with the house. The lower court entered a judgment in favor of the nephew/son. The Court of Civil Appeals held that evidence was sufficient to support finding that nephew did not breach mediation agreement. Even if some items had been purchased for his mother by family members, those items were gifts. There were no receipts to show that the items belonged to any of the siblings.

SSC Montgomery Cedar Crest v. Bolding, 130 So. 3d 1194 (Ala. 2013)
A nursing home resident by his attorney in fact daughter, Linda Boling, brought a medical malpractice action against the nursing home. The Court denied the nursing home's motion to compel arbitration. The nursing home appealed. The Supreme Court affirmed. The nursing home's dispute resolution agreement (DRA) required mediation and binding arbitration. It was signed by Michelle, one of the daughters of the admitee, who was with him when he was admitted, but did not have power of attorney. Normally, an arbitration agreement that binds the nursing home resident also binds the resident's representative. But in this case, the patient was mentally incompetent at the time he was admitted. An incompetent is unable to empower an agent. Therefore, the patient was not bound, daughter signing was not bound, and Linda Boling was not bound by the DRA. The Court said that while daughter Linda Bolding as holder of a durable power of attorney granted by her father may have been able to bind him to an arbitration agreement if she had been with him and signed, Michelle who signed as family member or next friend while her father was incompetent, could not. The fact that daughter Michelle, who may have purported to be the resident's legal representative when she signed the DRA, was insufficient basis upon which to apply the doctrine of apparent authority to render the DRA binding on the resident. *(My note: An incompetent cannot empower an agent to sign a valid med/arb agreement binding the incompetent and representative. But if the person who signs has power of attorney…)*

Waddell v. Colbert County-Northwest Alabama Healthcare Authority, 97 So. 3d 178 (Ala. Civ. App. 2012) A hospital visitor sued the hospital when he was injured in an elevator accident. He requested mediation after several years (32 months) of litigation, at the time the trial court set the hospital's summary-judgment motion for a hearing. After the hospital won its motion for summary judgment, the visitor appealed, because he said the court never ruled on his motion for mediation in violation of §6-6-20 Ala. Code 1975. The appellate court in its review said that for 7 months Waddell chose to defend against the hospital's motion for summary judgment without mentioning the issue of mediation. The court said that Waddell had abandoned his right to mediation in favor of defending against the hospital's motion, and would not be heard to argue on appeal that the trial court erred in denying his request for mandatory mediation sub silentio. It appeared to the court to be an attempt to buy more time to respond to that motion.
(My note: You can abandon your request for mediation under §6-6-20 by how you proceed during the run up to trial.)

*Ex parte Sheila Stone Schoen. Petition for writ of mandamus 2120920
(In re: Kasandra Larrivee, f/k/a Kasandra Tolbert v. Nicholas Tolbert)
(Baldwin Circuit Court: DR-11-900031.02)
September 5, 2013: The Alabama Court of Civil Appeals granted the mandamus petition of the mediator, directed the trial court to grant the mediator's motion to quash subpoenas and motion for protective order, thus prohibiting the parties from seeking to compel testimony from the mediator regarding any aspect of the mediation.
In the lower court, plaintiff wife had sought to set aside the mediated agreement. She was self-represented at time of mediation, and she later asserted that the mediator gave legal advice and coerced her to enter the agreement under duress. The Circuit Court of Baldwin County found the issue to be whether or not a mediator can be compelled to testify in a hearing, when the testimony being sought does not involve the substance of the case or negotiations of the parties, but the alleged improper conduct of the mediator. It found that this type of testimony of the mediator is not protected by Rule 11 or falls within an exception. In fact, Rule 11 exceptions include (3)(iii): to the extent necessary if a party to the mediation files a claim or complaint against a mediator or mediation program alleging professional misconduct by the mediator arising from the mediation.
(My note: The Alabama Court of Civil Appeals order prohibits parties from seeking to compel testimony from the mediator regarding any aspect of the mediation.)

Dollar Tree Stores, Inc. v. Ates, 160 So. 3d 296 (Ala. Civ. App. 2014) Plaintiff, Ates, filed in the Mobile Circuit Court for workers' compensation benefits which were denied by employer Dollar Tree. The Court ordered parties to mediation. Employer was to have insurance representative there in person, but knew before the mediation that the individual would not be able to come. The employer had someone on the phone with settlement authority, but did not seek permission from the court to do so. There was no

settlement. A trial was held. The court awarded permanent total disability, for which plaintiff was entitled to benefits outside the schedule of benefits from the Act. The court also said that they imposed these findings in part as a sanction for failure of employer to comply with the mediation order. The trial court did not order any separate monetary sanction with respect to the violation of the mediation order. The Alabama Court of Civil Appeals found that the trial court considered the contempt in determining the factual issues relating to the employee's claim, and that only injury based considerations are permissible under the Act §25-5-51. Ala. Code 1975. In reversing the trial court, the court stated, "The trial court committed reversible error in allowing its contempt findings to influence its determination of the employer's liability and the amount of benefits due the employee." The fine for sanctions, "may not take the form of workers' compensation benefits, but should be a separate award altogether." *(My note: The trial court may sanction a party for failure to abide by an order to mediate. However, sanctions must be separate from the finding/holding of the case.)*

Ex Parte Culverhouse, September 20, 2019, Alabama Court of Civil Appeals. Husband requested mediation in a divorce action. The trial court granted that motion; the trial court ordered the husband and the wife to mediate and specified that the husband and the wife equally share the costs of the mediation. The wife filed a motion asking the trial court to amend the mediation order. She argued she did not agree to mediation and that, because husband moved for mediation, the husband was required to pay the costs of the mediation citing §6-6-20(b), Ala. Code 1975, and *Mackey v. Mackey*, 799 So.2d 203 (Ala.Civ.App. 2001). The trial court denied her motion. Wife filed another motion seeking relief from the requirement to share the costs of mediation. The trial court denied her motion. Wife timely filed a writ of mandamus. The Alabama Court of Civil Appeals directed to the trial court to vacate the portion of its order requiring the wife to share in paying the costs of the mediation.