ADR Caselaw Update June 2014

I. U.S. Supreme Court ADR Cases & Pending Cert Petitions

Cert denied in "manifest disregard" case. On April 7, 2014, the U.S. Supreme Court denied certiorari in *Dewan v. Walia*, No. 13-722. In the case below, the Fourth Circuit applied manifest disregard of the law as an independent basis for vacating an arbitral award. The question presented to the Supreme Court was "Whether and when the Federal Arbitration Act permits a court to vacate an arbitral award as the product of "manifest disregard of the law." *Arun Walia v. Kiran M. Dewan, CPA, P.A., et al.,* No. 13-722, cert petition available at www.scotusblog.com/case-files/cases/walia-v-dewan/ (click on link for Dec. 13, 2013 cert petition). A copy of the Fourth Circuit's opinion and dissent in *Kiran M. Dewan v. Walia,* No. 12-2175, 544 Fed. Appx. 240 (4th Cir. October 28, 2013) is available at http://www2.bloomberglaw.com/public/desktop/document/Kiran_M_Dewan_v_Walia_No_12-2175_2013_BL_297566_36_IER_Cases_1672_/1 . A group of prominent law professors and arbitration practitioners submitted an amicus curiae brief in support of cert, arguing that upholding manifest disregard as an independent basis for setting aside arbitral awards may deter arbitration users from selecting the United States as an arbitral forum. Copy of brief at www.cpradr.org/Portals/0/Article%20Attachments/Walia_Amicus_Brief.pdf.

Arbitration required in international dispute, notwithstanding exhaustion of local litigation provision in treaty. *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (March 5, 2014) is a jurisdiction case in the context of an international investment treaty between the U.K. and Argentina that contained a dispute resolution provision for situations when an investor in one of those nations had a dispute with the other nation. The treaty authorized a party to submit a dispute to "the competent tribunal of the Contracting Party in whose territory the investment was made," i.e. a local court. The treaty allowed arbitration if, 18 months after the submission to a local tribunal, the tribunal has not made a final decision. A British firm had an interest in an Argentine entity licensed to distribute natural gas in Buenos Aires. Argentine law had provided for calculation of gas tariffs in U.S. dollars at levels to assure a reasonable return for gas distribution firms. Argentina later changed the calculation basis to pesos, and profits became losses. The British firm sought arbitration, which was conducted in Washington, D.C. It claimed that Argentina had violated the Treaty, which forbids expropriation of investments and requires each nation to give investors fair and equitable treatment. Argentina denied the claims and argued that the arbitrators lacked jurisdiction because the British firm did not comply with the local litigation requirement. The arbitration panel decided that Argentina's enactment of laws that hindered recourse to its judiciary excused compliance with the litigation requirement; Argentina had not expropriated the British firm's investment, but had denied fair treatment. The British firm was awarded $185 million. The district court confirmed the award, but the D.C. Circuit vacated, holding that the arbitrators had lacked jurisdiction. The Supreme Court reversed. The local litigation requirement was a matter for arbitrators to interpret and apply; the provision is procedural, fixing when the contractual duty to arbitrate arises, not whether there is a duty to arbitrate. The fact that the contract is a treaty does not change the result. In a dissent, Justice Roberts asserts that the provisions in the Treaty make local litigation a condition to formation of any agreement to arbitrate between Argentina and the British firm that was not a party to the Treaty. He would have vacated the Court of Appeals decision and remanded the case for a determination as to whether Argentina had made exhaustion of local litigation remedies "futile." Copy of majority opinion and dissent at http://www.supremecourt.gov/opinions/13pdf/12-138_97be.pdf.

II. Selected Sixth Circuit ADR Cases

Post-filing employment contract does not force class action into arbitration. In *Keith Russell, on behalf of himself and all others who are similarly situated v. Citigroup, Inc. and Citicorp Credit Services, Inc*., 748 F.3d 677 (6th Cir. April 4, 2014), Citicorp's former employee had signed a standard contract to arbitrate any disputes with the company. That agreement covered individual claims, but not class actions. In 2012, Russell filed an employment case class action against the company. Citicorp did not seek arbitration. In 2012, with the lawsuit still in progress, the plaintiff applied to work again at Citicorp and Citicorp rehired him. Citicorp had updated its arbitration contract to cover class claims as well as individual ones. The plaintiff signed the new contract without consulting his attorneys, and began work in the call center. About a month later, Citicorp's outside attorneys learned that he had been rehired and sought to compel the plaintiff to arbitrate the class action, which by then had begun discovery. Held: as drafted, the new arbitration agreement did not cover lawsuits commenced before the agreement was signed. Copy of opinion at http://www.ca6.uscourts.gov/opinions.pdf/14a0061p-06.pdf.

Strong presumption favoring arbitration trumps failure to list arbitration clause in contract's survival clause; no class arbitration available. In *Cynthia Huffman, et al. v. The Hilltop Companies, LLC*, 747 F.3d 391 (6th Cir. March 27, 2014), Hilltop hired Huffman and others to review mortgage loan files originated by PNC Bank to determine whether lawful procedures were followed. Until their employment ended in January 2013, the plaintiffs regularly worked more than 40 hours per week, but were not compensated at the overtime rate because Hilltop classified them as independent contractors. Each employment relationship was governed by a now-expired contract that included arbitration and survival clauses, but the survival clause did not list the broadly worded arbitration clause. The workers filed a class action. The district court denied Hilltop's motion to dismiss and compel arbitration. On appeal, the Sixth Circuit reversed, rejecting an argument that omission of the arbitration clause from the survival clause constituted a "clear implication" that the parties intended the arbitration clause to expire with the agreement. The strong presumption favoring arbitration was not rebutted. Also, the parties must proceed in arbitration on an individual basis under the facts in this case, where the arbitration clause did not mention class arbitration. Copy of opinion at http://www.ca6.uscourts.gov/opinions.pdf/14a0056p-06.pdf.

Mandatory arbitration per union pension plan. In *Knall Beverage, Inc., HDT Expeditionary Systems Inc., fka Hunter Manufacturing Co. and Beverage Distributors, Inc. v. Teamsters Local Union No. 293 Pension Plan, et al.,* 744 F.3d 419 (6th Cir. March 4, 2014), three employers were formerly contributing members of a local union pension plan. In 2007-2008 each of them agreed with the Plan to terminate its membership. They paid "withdrawal liability" reflecting each employer's share of unfunded, vested pension benefits under 29 U.S.C. 1381–1461. Under the statute, if the plan is terminated by a "mass withdrawal" of remaining members within three years, the earlier withdrawing members may be subject to additional "reallocation liability." Disputes about the amount of this liability are subject to mandatory arbitration. The employers claim that a 2009 mass withdrawal by other employees was expedited to occur within the three-year period so the three employers would be subject to reallocation liability. The Plan trustees sought more than $12 million in additional funds from the three employers. The 6th Circuit affirmed the district court's decision to dismiss the suit for failure to complete arbitration. The statute requires that the claim of "sham" mass withdrawal be arbitrated. Copy of opinion at

http://www.ca6.uscourts.gov/opinions.pdf/14a0044p-06.pdf.

Arbitrability. In *Pureworks, Inc. v. Unique Software Solutions, Inc.,* 554 Fed.Appx. 376, No. 13-5115(6th Cir. January 21, 2014) (not for publication), the Court addressed arbitrability of earn-out covenants in an asset purchase agreement. The district court properly determined that the dispute was arbitrable because the disputed issues arguably fell within the scope of the parties' arbitration agreement. The parties' agreement required PureWorks to prepare regular earn-out reports detailing the revenues of the transferred business. The earn-out report would become final unless Unique Software gave notice to PureWorks of its disagreement as to any item included in the report. In the event the parties were unable to resolve a dispute, the agreement provided for binding arbitration by an accounting firm. Although it might plausibly be argued that the arbitration agreement only covered issues of accounting, not operational agreements, the district court did not err in including operational issues in the operation. Note Judge Stranch's concurring opinion expressing her concern about poorly drafted arbitration clauses in contracts. Copy of opinion at http://www.ca6.uscourts.gov/opinions.pdf/14a0051n-06.pdf.

Dispute over enforcement of settlement agreement is subject to arbitration clause in CBA. In *Teamsters Local Union 480 v. United Parcel Service, Inc*., 748 F.3d 281 (6th Cir. April 4, 2014), the Union sought a declaratory judgment to enforce a settlement agreement it had entered into with UPS in 2010 to resolve a labor dispute. UPS maintained that any allegation of failure to abide by the agreement fell within a broad arbitration clause in the parties' collective bargaining agreement. The district court agreed and dismissed for lack of subject matter jurisdiction. The Sixth Circuit held that the district court actually had subject-matter jurisdiction, but affirmed dismissal based on the language of the CBA, which provides that "any controversy, complaint, misunderstanding or dispute" that concerns "interpretation, application or observance" of the CBA "shall be handled" in accordance with the CBA's grievance procedures. The parties agreed that the alleged breach of the Settlement Agreement constituted a violation of the CBA. The dispute here is subject to the CBA's grievance procedures. Copies of majority and dissenting opinions at http://www.ca6.uscourts.gov/opinions.pdf/14a0062p-06.pdf.

District Court erred in enjoining ongoing arbitration before final award. In *Savers Property and Casualty Insurance Co.; Star Insurance Company; Ameritrust Insurance Corporation; Williamsburg National Insurance Co. v. National Union Fire Insurance Company of Pittsburg, Pa.,* 748 F.3d 708 (6th Cir. April 9, 2014), National Union Fire Insurance Company appealed a preliminary injunction enjoining an ongoing arbitration in which the panel of arbitrators had issued an interim award. In the absence of a final arbitration award, the district court should not have interjected itself into this dispute. Interlocutory appeal was not available under 9 U.S.C. 2. The parties' arbitration agreement did not expressly provide for interlocutory appeal. Copy of opinion at http://www.ca6.uscourts.gov/opinions.pdf/14a0067p-06.pdf.

District Court erred in reversing arbitrator's award; viability of "manifest disregard" not addressed. In *Bernard J. Schafer; Henry Block v. Multiband Corp*., 551 Fed.Appx 814, No. 13-1316 (6th Cir. January 6, 2014) (not for publication), the trustees of employee stock ownership plans settled claims of breach of fiduciary duty and sought indemnification from the parent companies pursuant to contractual provisions that provide for indemnification. An arbitrator found the indemnification agreements were invalid under ERISA § 410(a) that makes exculpatory agreements unenforceable. The Sixth Circuit noted that the arbitrator's decision would be reversed, if it

were a lower court decision, because the arbitrator's reading of the relevant section of ERISA was contrary to Sixth Circuit precedent. But the arbitrator's decision reasoned from the statute and the contract, and not in clear disregard of them. Therefore, the district court erred in vacating the arbitrator's decision on manifest disregard of the law grounds. Absent extraordinary circumstances, arbitration is supposed to resolve, with finality, legal as well as factual disputes. Clear legal error by the arbitrator is not sufficient by itself to vacate. The Court did not address whether manifest disregard of the law survives the U.S. Supreme Court's decision in *Hall Street Associates., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) as a basis to vacate an arbitrator's decision. It was not necessary to decide that issue because there had been no manifest disregard of the law in arriving at the arbitral award. Copy of opinion at http://www.ca6.uscourts.gov/opinions.pdf/14a0003n-06.pdf.

III. Tennessee ADR Cases

A. Arbitration

Movant's failure to specifically seek to compel arbitration results in no jurisdiction in interlocutory appeal. In *The SJR Limited Partnership v. Christie's Inc. et al.,* No. W2013-01606-COA-R3-CV (Tenn. Ct. App. March 5, 2014), the Court held it did not have subject matter jurisdiction over this interlocutory appeal from the trial court's denial of a Tenn. R. Civ. P. 12 motion to dismiss. The Tennessee Uniform Arbitration Act, Tenn. Code Ann. § 29-5-319, does grant subject matter jurisdiction in interlocutory appeals, but only in specifically enumerated circumstances. The statute includes appeals from orders denying an application to compel arbitration and orders granting an application to stay arbitration. Here, Christie's failed to move to compel arbitration. Instead it filed a Rule 12 motion to dismiss. The Court rejected Christie's argument that its motion should be considered the functional equivalent of a motion to compel arbitration. The Court relied on *Person v. Kindred Healthcare, Inc.,* No. W2009-01918-COA-R3-CV, 2010 WL 1838014 (Tenn. Ct. App. May 7, 2010), and distinguished *Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595 (Tenn. 2013). Copy of opinion at http://www.tncourts.gov/sites/default/files/sjroopn.pdf.

Unsuccessful Evident Partiality Claim: Petitioner Failed to Introduce Evidence. In *Maury Bronstein, IRA v. Morgan Keegan & Company, Inc.*, No. W2011-01391-COA-R3-CV (Tenn. Ct. App. April 1, 2014), the trial court vacated a FINRA arbitration award in favor of Morgan Keegan on the ground of evident partiality, based on counsel's statements at the hearing. The parties had not stipulated to a trial based on counsel's statements. The trial court found Morgan Keegan's motion to confirm the award to be moot. After Morgan Keegan appealed, Mr. Bronstein's lawyer filed a transcript of the arbitration hearing with the trial court. The Court of Appeals determined it had jurisdiction to hear the appeal pursuant to Tenn. Code Ann. § 29-5-319(c)(3), as interpreted in *Morgan Keegan & Co., Inc. v. Smythe*, 401 S.W.3d 595, 608 (Tenn. 2013) (trial court's order vacating arbitration award and directing rehearing necessarily results in implicit denial of confirmation of award, notwithstanding absence of motion to confirm award). Reversing the trial court's order vacating the arbitration award, the Court of Appeals found that Bronstein failed to introduce evidence to support allegations of evident partiality. The Court declined to consider the question of whether Bronstein had waived his evident partiality claim. http://www.tncourts.gov/sites/default/files/maurybronsteiniraopn.pdf.

Uninsured motorist carrier complied with statutory requirements to preserve rights to jury trial and subrogation, preventing binding arbitration. The issue in *Linda F. Coffey et al. v. Tyler N. Hoffman et al.,* No. E2013-01109-COA-R3-CV (Tenn. Ct. App. March 28, 2014) is

whether the plaintiffs' uninsured motorist insurance carrier preserved its rights to a jury trial and subrogation interest under Tenn. Code Ann. § 56-7-1206(k) (2008). The plaintiff had accepted the defendants' offer to settle an auto accident case for $25,000, the policy limit of their insurance coverage. Notices required by statute were sent to the UM carrier. The UM carrier's attorney responded with a letter enclosing a check for $25,000 and asserting that the check was submitted in preservation of his client's right to a jury trial and right of subrogation per § 56-7-1201 et seq. The letter did not specifically use the words in the statute that the UM carrier was declining binding arbitration. The plaintiff then filed a motion to compel arbitration of the plaintiff's claim against the UM carrier. The trial court granted the plaintiff's motion, holding that the carrier failed to comply with a local rule that requires a defendant to file a response to a motion no later than 30 days after the motion is filed. The trial court further held that the carrier "did not strictly comply" with § 56-7-1206's requirement to object to arbitration. The Court of Appeals vacated the trial court's judgment, holding that the carrier complied with the statute and preserved its rights to a jury trial and subrogation. A local rule cannot operate to abrogate these rights. Copy of opinion at http://tncourts.gov/sites/default/files/coffeylfopn.pdf.

Mobile Home Sale Contract's Arbitration Agreement Held Unconscionable under *Taylor.* In *Richard A. Berent v. CMH Homes, Inc. et al.*, No. E2013-01214-COA-R3-CV (Tenn. Ct. App. February 28, 2014) a consumer sued the seller of a mobile home and a mortgagor. The defendants moved to compel arbitration. Affirming the trial court, and applying *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 1996), the Court of Appeals held that: 1) the arbitration agreement was unconscionable; and 2) the issue was not preempted by the Federal Arbitration Act. Like the arbitration clause in *Taylor,* the contract here required the plaintiff to submit virtually all of his claims to arbitration, while allowing the defendants access to a judicial forum for some of their potential claims ("arguably their most likely, and most significant causes of action"). Although the contract here was less one-sided (both sides had the right to sue in small claims court if the amount at issue was less than the court's jurisdictional limit), that does not lead to a different result. Further, it is not up to the Court of Appeals to consider the argument that the *Taylor* decision is no longer in the legal majority among the states. The Court also declined to address an issue not raised at the trial court level: whether the trial court should have severed the contract's exceptions clause that allowed more court access to the seller, pursuant to a severability clause in the contract. Copy of opinion at http://www.tncourts.gov/sites/default/files/berentraopn.pdf.

Specific Language in Health Care Power of Attorney Impacts Outcome in Nursing Home Case: Motion to Compel Arbitration Denied. In *James H. Wilkins, et al. v. GGNSC Springfield, LLC dba Golden Living Center-Springfield, et al*., the nursing home moved to compel arbitration of a negligence and wrongful death action, asserting that the health care power of attorney executed by the decedent was effective to authorize the agent to execute an optional arbitration agreement on the decedent's behalf at the time of admission to the nursing home. The trial court denied the motion, holding that the attorney-in-fact did not have authority to sign the optional arbitration agreement. Affirming on appeal, the Court distinguished a number of nursing home arbitration cases, including *Owens v. National Health Corporation*, 263 S.W.3d 876 (Tenn. 2008) and *Mitchell v. Kindred Healthcare Operating Inc*., 349 S.W.3d 492 (Tenn. Ct. App. 2008). Key to its decision was the wording in the power of attorney's preamble: "The Agent is authorized in her sole and absolute discretion to exercise the powers granted herein relating to matters involving Principal's health and medical care. The Agent is authorized by and on Principal's behalf to

consent to proposed medical treatment, and shall give, withhold or withdraw consent for Principal based upon any choices of treatment within her best discretion, and to that end, Principal grants the following powers to Agent: . . ." (emphasis in Court's opinion). The Court distinguished Owens on two grounds: 1) execution of an agreement to arbitrate in Owens was required as a condition of admission and was incorporated in the nursing home admission agreement; 2) the power of attorney was "'intended to comply in all respects with the provisions of Tennessee Code Annotated, § 34-6-04(b) et seq.'" The Court distinguished *Mitchell* where the contract at issue had specific language that permitted executing "waivers" on behalf of the principal. Copy of opinion at http://www.tncourts.gov/sites/default/files/wilkins_v._golden_living.opn_.pdf.

B. Mediation

Of interest to family law advocates and mediators: psychologist-client privilege in child custody case. *Hannah Ann Culbertson v. Randall Eric Culbertson*, No. W2012-01909-COA-R10-CV (Tenn. Ct. App. April 30, 2014), is the second extraordinary interlocutory appeal in a divorce case and custody dispute. In the first appeal, *Culbertson v. Culbertson*, 393 S.W.3d 678 (Tenn. Ct. App. 2012), the Court held that the father did not automatically waive the psychologist-client privilege as to his mental health records by seeking custody of his children or by defending against the mother's claims that he was mentally unfit. While the first appeal was pending, the trial court granted the mother's motion for a second mental health evaluation of the father, pursuant to Tenn. R. Civ. P. 35. The Rule 35 psychologist, like a previous Rule 35 psychologist, concluded the father did not pose a danger to his children. The mother then again moved to compel production all mental health records of the father's treating psychologists. After the Court of Appeals decided in the first appeal, the trial court granted the mother's request and again ordered the father to produce all of the mental health records. The trial court based its decision on the following: 1) the father waived his psychologist-client privilege under Tenn. Code Ann. 63-112-13 as to all of his mental health records by allowing the evaluating psychologists to speak to his treating psychologists, providing mental health records to the evaluating psychologists, and testifying that he had a history of depression and had undergone treatment; 2) the mother needed the records to prepare her case. The Court of Appeals in this second extraordinary appeal, thoroughly discusses subject matter jurisdiction, the law of the case, Tennessee's statutory psychologist-client privilege, waiver, and the split of authority among the states as to the degree of protection under the privilege, particularly in child custody cases. It vacated the trial court's order and held there was at most a limited waiver of the privilege, only as to the privileged mental health information that the father actually voluntarily disclosed to the two evaluating psychologists involved in this case. Regarding mental health records not subject to a limited waiver of the privilege, the Court held that the standard for the trial court to compel disclosure of the records was not met. It remanded the case for factual findings on any privileged mental health records the father had actually disclosed voluntarily, and ordered reassignment of the case to a new trial judge. It stated that the first order of business on remand must be a hearing on the father's petition for unsupervised visitation with his children, something he had sought for more than three years. Copy of opinion at http://www.tncourts.gov/sites/default/files/culbertsonhaopn.pdf.

Tip for drafting mediated settlement agreements: include specific deadlines. In *Denise L. Heilig v. Roy Heilig,* No. W2013-01232-COA-R3-CV (Tenn. Ct. App. February 28, 2014), the Court of Appeals was divided on whether to consider one issue the pro se mother raised regarding a consent order on a mediated settlement agreement. Years after their divorce, the parties returned to meditation and agreed to the consent order. It required the mother to

cooperate with the father in obtaining passports for their two minor children, but did not specify a deadline for the mother's cooperation. Months later, the father petitioned for contempt, alleging the mother had refused to cooperate in signing necessary documents. Although the mother signed the necessary passport documents just before the hearing, trial court found the mother in contempt. On appeal, the mother argued that the trial court did not have subject matter jurisdiction to enter the contempt order, citing the Uniform Child Custody Jurisdiction and Enforcement Act, because the parties no longer lived in Tennessee. She also argued that the trial court erred in holding her in contempt. The majority of the Court of Appeals affirmed, after only addressing the merits of the jurisdiction issue. In partial dissent, one judge disagreed with the majority's decision to deem waived the mother's issue of whether the trial court erred in holding her in contempt when the mediated consent order had no deadline for signing the passport paperwork. Copies of opinions at http://www.tncourts.gov/sites/default/files/heiligddis.pdf.

Failure to tell trial judge that disagreement should be mediated in post-divorce proceeding results in no mediation. In *James Allen Austin v. Marely Torres*, No. M2012-01219-COA-R3-CV (Tenn. Ct. App. March 20, 2014), the divorced father petitioned to transfer custody of his child from the mother to himself. After hearing expert proof, the court found there was a material change of circumstances and it was in the child's best interest to transfer custody to the father. Among other issues, the Court of Appeals rejected the mother's argument that the trial court should have ordered mediation. The parties' parenting plan did provide that they would try to resolve disagreements or modifications through mediation. But the wife had failed to bring this to the trial court's attention. Copy of opinion at http://tncourts.gov/sites/default/files/austinj.opn_.pdf.

Risk of allowing parties to meet privately without mediator or attorneys. In *Alissa Owen (formerly Haas) v. Darin Haas*, No. M2013-00950-COA-R3-CV (Tenn. Ct. App. April 1, 2014), the wife appealed the trial court's denial of her Tenn. R. Civ. P. 60 petition to set aside a marital dissolution agreement and permanent parenting plan in a final divorce decree. The wife contended she agreed to the MDA and parenting plan under duress. Affirming the trial court's decision, the Court of Appeals held the evidence did not preponderate against findings that the agreements were not entered into under duress and the parenting plan was in the best interests of the children. The wife claimed that her husband intimidated her during a private meeting with him at their mediation. No agreement was reached during the meditation and the wife never told her attorney or the mediator about the alleged intimidation. Her attorney later filed a motion to withdraw, stating that his client wanted to accept a settlement offer that was not in the wife's best interest. Copy of opinion at http://www.tncourts.gov/sites/default/files/haasa.opn_.pdf.

Mediated settlement did not address attorneys' fees. *In Re: Nathaniel C. T., Jason J. T. and Emerald S. T.*, No. E2013-01001-COA-R3-CV (Tenn. Ct. App. March 17, 2014), concerns attorney's fees. Two relatives had petitioned to terminate the parental rights of the parents. The trial court appointed counsel to represent the parents. The parties ultimately resolved their dispute through a mediated agreement. The children remained with the parents, whose attorneys then filed a motion for attorney's fees, arguing they should receive additional fees under Tenn. Code Ann. § 36-5-103(c). The Court of Appeals affirmed the trial court's decision denying fees. Of note is the fact that the mediated settlement did not address attorney fees. Copy of opinion at http://tncourts.gov/sites/default/files/inrenathanielctopn.pdf.

Dispute on attorney's fees included mediator's fee. In *Pepper & Brothers P.L.L.C. v. Brett Jones,* No. M2013-01668-COA-R3-CV (Tenn. Ct. App. April 4, 2014), a homeowner sued by a contractor hired an attorney to defend the suit. The homeowner paid some of the attorney's fees, but stopped paying after he became dissatisfied with the attorney's services, including dissatisfaction with the advice to participate in a mediation that was unsuccessful. He discharged the attorney and hired other counsel. The attorney sent a final bill for $8,529. The homeowner paid $4,000 and offered to settle the remainder for a lesser amount. The attorney refused and sued the homeowner for the unpaid balance. The trial court entered judgment in favor of the attorney, affirmed by the Court of Appeals. Copy of opinion at https://www.tncourts.gov/sites/default/files/pepperopn1.pdf.

C. Settlements; Releases

Local rule on parenting plans cannot trump state law. In *Christopher Vance Smalling v. Sarah Rebecca Smalling***,** No. E2013-01393-COA-R10-CV (Tenn. Ct. App. Jan. 24, 2014), a TRAP 10 extraordinary appeal, the Court of Appeals reversed a trial court's refusal to set a hearing on a divorce petition. The uncontested divorce case reached an unexpected impasse when the Sullivan County Chancery Court refused to set a hearing until the parties filed a written Temporary Parenting Plan per a local rule of the court. The trial court erred. First, its local rule requiring a filed written Temporary Parenting Plan in every divorce case conflicted with state law. Tenn. Code Ann. § 36-6-403 provides that filing a written Temporary Parenting Plan is not required if the parties have agreed on a plan, as in this case. Second, even if the local rule does not conflict with Tenn. Code Ann. § 36-6-403, the husband complied with the local rule by submitting a Temporary Parenting Plan (a copy of the parties' agreed Permanent Parenting Plan attached to a document filed with the trial court). Copy of opinion at http://www.tncourts.gov/sites/default/files/smallingcvopn.pdf.

Releases in FELA cases Held to Higher Standard to be Enforceable. In *Delores Blackmon, Individually and as surviving spouse and personal representative of Dolphus H. Blackmon v. Illinois Central Railroad Company, Individually and successor-in-interest to Gulf, Mobile & Ohio Railroad Co., & Illinois Central Gulf Railroad*, No. W2013-01605-COA-R3-CV (Tenn. Ct. App. May 16, 2014), the plaintiff filed an action under the Federal Employers' Liability Act. She alleged her husband was exposed to toxic substances, including asbestos and other chemicals, while employed with the railroad, leading to his death from mesothelioma. The railroad asserted in a summary judgment motion that a release signed by the employee and his lawyer when he settled prior litigation with the railroad (an asbestosis suit in 2002) barred the current litigation. In exchange for a lump sum payment of $28,000, the employee released the railroad from "any and all claims arising out of Dolphus Blackmon's employment." The railroad was released "from any and all claims, losses, damages, injuries, conditions or diseases, including, but not limited to . . . mesothelioma, or any other disease allegedly resulting in any manner from the employment of Dolphus Blackmon or any other medical condition allegedly related to the employment of Dolphus Blackmon." And the railroad was released from "any and all claims, losses, damages and injuries directly or indirectly caused by or resulting from any alleged exposure to asbestos, . . . and any and all other fumes, dusts, mists, gases, and vapors from any material, chemical, or agent which allegedly occurred while Dolphus Blackmon was in the employment of the parties released." The plaintiff argued that the Release did not cover future claims and was void under 45 U.S.C. § 55. The Court of Appeals held that the release did cover future claims. With regard to the second argument, the Court reversed the

summary judgment granted to the railroad and remanded the case. 45 U.S.C. § 55 provides that any "contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void . . . ." Releases are not, however, per se invalid in FELA cases. *Callen v. Pennsylvania Railroad Co.*, 332 U.S. 625, 626-27 (1948). "[A] release of FELA claims can have the same effect as any other release, in that it may constitute a settlement or compromise, rather than an attempt to escape liability." *Babbitt v. Norfolk & Western Ry. Co.,* 104 F.3d 89, 92 (6th Cir. 1997) (citing Callen, 332 U.S. 625). State and federal courts are split on Callen's scope; the U.S. Supreme Court has not had an opportunity to clarify *Callen's* scope. Rejecting the plaintiff's argument, the Court of Appeals found *Norfolk & Western Railway v. Ayers*, 538 U.S. 135 (2003) does not redefine how to analyze the Release. Like the trial court, the Court of Appeals decided to take the case-by-case approach adopted in *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690 (3rd Cir. 1998). Wicker allows parties to "settle claims for potential future injuries, not yet manifested, but of which the employee is at risk." *Blackmon* at 16 (emphasis in original). The trial court erred in not fully following Wicker and its caution about boilerplate language in releases. The plaintiff does have the burden of proving the Release is invalid as to the present mesothelioma claim. But the railroad's summary judgment motion relied only on the Release and no other evidence. Validity of the Release does not turn on the writing alone in this FELA case. On remand, the trial court must determine whether the railroad can negate an essential element of the nonmoving party's claim or demonstrate that the nonmoving party cannot prove an essential element at trial, which requires an analysis of the employee's intent when he executed the Release. The Release may be strong, but not conclusive, evidence as to the parties' intent in a FELA case. *Id*. at 19, citing *Wicker* at 701. Like the releases in *Wicker*, the Release here "appears to be a standard waiver of liability, with nothing to indicate that the parties understood, let alone addressed or discussed, the scope of the claims being waived." Id. The railroad cannot rely on the specific references to asbestos and mesothelioma in the Release because "these terms were buried in a laundry list of other substances and diseases." *Id*. at 20. It must show more that the risk of mesothelioma was known to the employee when he signed the Release. Copy of opinion at http://www.tncourts.gov/sites/default/files/blackmondeloresopn.pdf.

Unsigned MOU Ineffective. In *Conrad Ernest Frye v. Katrina Annemarie Smith Kimball*, No. W2013-00636-COA-R3-CV (Tenn. Ct. App. February 6, 2014), family members disagreed over the proper distribution of assets from two trusts. The appellant contended that the grantor of one trust revoked a modification of the trust before she died, pursuant to a settlement agreement with the appellant. The grantor's attorney did draft a memorandum of understanding that reflected a settlement reached by the grantor and the appellant. The trial court correctly declined to give effect to the alleged settlement agreement because the parties did not sign it before the grantor's death. Copy of opinion at http://www.tncourts.gov/sites/default/files/fryeconradernestopn.pdf.

Settlement Offer Lapses after Reasonable Period of Time. In *Tonita Reeves v. Pederson-Kronseder, LLC, d/b/a Pederson's Natural Farms, Inc.*, No. M2013-01651-COA-R3-CV (Tenn. Ct. App. March 28, 2014), the attorneys for the parties in an age discrimination case discussed settlement as they were preparing to arbitrate the claim. The employee's attorney was aware that the employer would be responsible for arbitration expenses and suggested they discuss settlement before the employer incurred the bulk of expenses. The employer offered to settle on June 29, 2012 and inquired about the offer on July 10. The employee attempted to

accept the offer of settlement on August 12, three days before the arbitration was scheduled, after the employer paid a required $9,000 deposit for arbitration and incurred other necessary expenses. The employer informed the employee the offer had lapsed. The employee did not receive a favorable outcome at the arbitration. Employee sued for breach of a settlement contract. Under Tennessee law, when a settlement offer does not include a deadline for acceptance, the offer is open only for a reasonable period of time. *Tullahoma Concrete P. Co. v. T.E. Gillespie Const. Co.,* 405 S.W.2d 657 (Tenn. Ct. App. 1966). The Court held that, under the circumstances of the case, the employee failed to accept the employer's offer within a reasonable period of time; there was no settlement contract to enforce. Copy of opinion at http://www.tncourts.gov/sites/default/files/reevestopn.pdf. Practice tip: include a deadline for acceptance of a settlement offer.

Court considers parol evidence to interpret ambiguous marital dissolution agreement. *Brenda J. Hutcherson v. Wallace Jackson Hutcherson*, No. M2013-01658-COA-R3-CV (Tenn. Ct. App. April 22, 2014) involves apportionment of property sales proceeds after a divorce. A 2005 marital dissolution agreement required the husband and wife to sell six properties and split the proceeds. The agreement listed each property with a dollar amount beside it and provided that the wife could be compelled to accept an offer for a particular property if her share of the proceeds netted her the dollar amount listed in the agreement. The sum of the amounts listed with the properties at issue was $565,800. But the agreement failed to define the term "nets." Real estate values declined substantially and the properties sold for $322,287.71 in 2012. The husband moved the trial court for equal division of the sale proceeds. The wife asserted she was entitled to all of the sale proceeds, less the husband's expenses related to the properties. Finding the agreement ambiguous, the trial court considered parol evidence and found that the parties intended to split the sale proceeds equally, after the husband was reimbursed for one-half of his expenses. The Court of Appeals affirmed the decision. Copy of opinion at http://www.tncourts.gov/sites/default/files/hutchersonbrenda.opn_.pdf.

Release in contract insufficient to bar fraud defense and counterclaim. *Bradford E. Holliday, et al. v. Homer C. Patton, et al.,* No. W2013-00545-COA-R3-CV (Tenn. Ct. App. March 31, 2014) is a breach of contract and specific performance action. The parties had entered into a contract for the sale of a corporation. After certain misrepresentations by the seller were discovered, the deal was renegotiated, including an amended stock purchase agreement that included a release. In this case, the defendants claimed additional fraud as a defense and counterclaim. The trial court granted the plaintiffs' motions for summary judgment, after finding that the release provision in the parties' amended agreement had broad release language adequate to release the defendants' fraud claims. Reversing the summary judgment, the Court found that the release was not sufficient to waive fraud claims and the trial court erred in finding that defendants could not have reasonably relied upon representations made by one of the plaintiffs, given that they were aware of his prior misrepresentations before they signed the amended agreement. It held there are genuine issues of material fact as to the issue of reasonable reliance. Copy of opinion at http://www.tncourts.gov/sites/default/files/hollidaybeopn.pdf.

D. Workers Comp; Employment Grievance Procedures

Failure to exhaust administrative remedies bars court action. *Jennifer Gray v. Zanini Tennessee, Inc.,* No. M2013-00762-WC-R3-WC (Tenn. Workers Comp App. April 1, 2014) involves the requirement that an employee

exhaust administrative remedies on a workers' comp claim before filing suit. See Tenn. Code Ann. § 50-6-203(a)(1) (2008). The employee had two alleged injuries. The first injury was settled after benefit review conference and an impasse report. The second injury (involving the employee's shoulders) was removed from consideration at the first benefits review conference. The employee then filed this action regarding her shoulders on April 8, 2010. The employer asserted that the employee had failed to exhaust administrative remedies and, in the alternative, the claim was barred because the action was filed more than 90 days after an impasse report. Another benefit review conference was held on April 19, 2011, resulting in impasse. Relying on *Chapman v. DaVita, Inc.*, 380 S.W.3d 710 (Tenn. 2012), the Court held that the 2011 conference did not cure the jurisdictional defect and the trial court properly dismissed the action. Copy of opinion at https://www.tncourts.gov/sites/default/files/grayjennifer.opnjo_.pdf.

Settlement language expands employer's liability. In *Joe Christopher Watson v. The Parent Company,* No. M2013-01207-WC-R3-WC (Tenn. Workers Comp. App. May 14, 2014), the employee suffered a work-related back injury. After conservative treatment failed to provide relief, the employee had lumbar fusion surgery from an unauthorized physician. He settled his workers' comp claim in 2009. The settlement provided that the employer was "not responsible for payment of future medical expense . . . for services rendered by non-designated and unauthorized physicians." But the settlement also provided, "All future medical benefits relating to the back injury" of 2007 "are to remain open. If future medical treatment is needed, Employee will be provided a panel of physicians pursuant to T.C.A. Section 50-6-204 from which to select a treating physician." In 2011, the employer denied the employee's request for authorization of a second surgery by an authorized treating surgeon. Affirming the trial court's order, the Court of appeals held that the employer was liable to pay for the second surgery. Parties "are free to negotiate future medical benefits beyond what the Workers' Compensation Law guarantees. Here, the employee sought costs for treatment pursuant to the settlement agreement, not the statute. Copy of opinion and Tennessee Supreme Court's per curiam order adopting the panel's findings of fact and conclusions of law at https://www.tncourts.gov/sites/default/files/watson_v_parent_co_opn__jo.pdf.