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CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
SHARLA KNOX, CLERK

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

TEIRANNI KIDD, as mother and next Friend of Nicko Silar and as personal representative of the Estate of Nicko, Silar, deceased and TEIRANNI KIDD, Individually,	*	CIVIL ACTION NUMBER:
Plaintiff,	*	02-CV-20-900171-BBH
vs.	*	
SPRINGHILL HOSPITALS, INC., d/b/a SPRINGHILL MEMORIAL HOSPITAL; BAY AREA PHYSICIANS FOR WOMEN, P.C.; KATELYN BRASWELL PARNELL, MD, et al,	*	
Defendants.	*	

PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT

Plaintiff, Teiranni Kidd, individually, and as mother and next friend of Nicko Silar and as personal representative of the Estate of Nicko Silar, deceased, respectfully asks this Court to enforce her April 15, 2024 settlement agreement with Springhill Hospitals, Inc. d/b/a Springhill Memorial Hospital ("SMH").

Plaintiff asks the Court to first set the required evidentiary hearing on this motion. Following presentation of the evidence and argument, Plaintiff will seek entry of an order granting her motion together with an entry of judgment in the amount owed to Plaintiff. In support of this motion, Plaintiff states as follows:

I. Narrative of Undisputed Material Facts

On April 15, 2024, Plaintiff and SMH entered into a binding settlement agreement written by veteran mediator Reggie Copeland, Jr. and confirmed in writing by both parties:

(Exhibit A). The mediator specifically asked the parties to "reply all" to "confirm that this is our agreement." *Id.*

In response to the mediator's written proposal, Plaintiff's attorney Skip Finkbohner responded: "Yes, confirmed for Plaintiff." *Id.* Ten minutes later, Bill McGowin, General Counsel for SMH's insurer Inspirien[1], responded: "Confirmed." *Id.* All three law firms representing SMH were copied on this correspondence, including attorney Ed Sledge on behalf of Bradley Arant Boult Cummings, LLP; attorney John Hall on behalf of Hall Booth Smith, P.C.; and attorney Bryan Smith on behalf of Armbrecht Jackson, LLP. None of SMH's lawyers objected to or contradicted the mediator's description of the written settlement terms or Mr. McGowin's confirmation of them on behalf of SMH.

[1] https://www.inspirien.net/our-story/our-leadership/william-mcgowin/ (identifying Mr. McGowin as General Counsel for Inspirien Insurance Company and stating that he "currently leads legal operations at Inspirien, bringing a depth of legal knowledge and understanding in healthcare to the team."). (Exhibit B).

To date, SMH refuses to fund the settlement. Instead, it is holding the payment hostage to a new demand for additional material terms for which it never bargained – i.e., [redacted]. By contrast, the written settlement agreement clearly and unambiguously states [redacted] for which SMH bargained is limited to "[redacted]." (Exhibit A).

II. Relevant Law

"[I]t is the policy of the law to encourage settlements." *Allstate Ins. Co. v. Amerisure Ins. Companies*, 603 So. 2d 961, 965 (Ala. 1992). "[A] settlement agreement is simply a particular type of contract. Thus, a settlement agreement is 'as binding...as any other contract.'" *Lem Harris Rainwater Family Trust v. Rainwater*, 373 So.3d 1089, 1096 (Ala. 2022) (other citations omitted).

"Normally, when a party to a settlement agreement alleges, before the underlying claim has been dismissed, that the settlement agreement has been violated, that party seeks relief by moving to enforce the settlement agreement instead of asserting a new claim of breach of contract." *Ingenuity International, LLC v. Smith*, __ So.3d. __, 2023 WL 4038274, *3 (Ala. 2023) (citing *Lem Harris Rainwater Family Trust v. Rainwater*, 373 So.3d 1089 (Ala. 2022)). "That motion essentially functions as an amendment to the complaint, asserting a breach-of-contract claim against the allegedly breaching party." *Id.* (other citations omitted). "In addition, a motion to enforce functions as a summary-judgment motion because the trial court may summarily dispose of it by entering a judgment in favor of the moving party." *Id.* "Ordinarily, then, when a party moves to

enforce a settlement agreement, the party simultaneously amends the complaint and moves for a summary judgment on the new claim." *Id.*

"[W]hen a party raises a fact-based defense to enforcement of a settlement agreement, that defense must be resolved in the same way other issues of fact are resolved – by conducting a hearing at which evidence is received and any witnesses are subject to cross-examination." *Lem Harris Rainwater Fam. Tr. v. Rainwater*, 373 So. 3d 1089, 1094 (Ala. 2022).

III. Argument

A. The parties entered into a valid and enforceable contract.

The April 15, 2024 settlement agreement is a valid and enforceable contract because it contains "'an offer and an acceptance, consideration, and mutual assent to terms essential to the formation of a contract.'" *Ex parte Jackson Cnty. Bd. of Educ.*, 4 So. 3d 1099, 1104 (Ala. 2008) (citing *Ex parte Grant*, 711 So.2d 464, 465 (Ala.1997) (quoting *Strength v. Alabama Dep't of Fin., Div. of Risk Mgmt.*, 622 So.2d 1283, 1289 (Ala.1993))).

i. There was an offer and acceptance.

SMH offered, and Plaintiff accepted, a sum certain in exchange for a full release and dismissal of Plaintiff's claims. (Exhibit A). The parties also agreed to two essential terms: [redacted]. (Exhibit A).

ii. There was adequate consideration.

SMH's payment and Plaintiff's release of her claims constitute adequate consideration. *Ryan's Fam. Steakhouse, Inc. v. Kilpatric*, 966 So. 2d 273, 279 (Ala. Civ. App. 2006) (quoting *Marcrum v. Embry*, 282 So.2d 49, 51 (Ala. 1973) ("So long as there is a valuable consideration moving from one side to the other, or there are binding promises on the part of each party to the other, there is adequate consideration for a valid contract."). Moreover, Plaintiff gave up her trial setting, excused all witnesses, and communicated to the co-defendants that all claims against them would be dismissed.

iii. There was mutual assent.

Mutual assent is evidenced by: (a) the written confirmation of both parties by and in the presence of their counsel; and (b) the cancellation of both the pretrial hearing and the trial on the grounds that the parties had reached a settlement. *See, e.g.*, *Ex parte Rush*, 730 So. 2d 1175, 1177-78 (Ala. 1999) ("The purpose of a signature on a contract is to show mutual assent; however, the existence of a contract may also be inferred from other external and objective manifestations of mutual assent."). Moreover, on April 19, 2024, four days after the settlement agreement had been confirmed in writing by both parties, the mediator concluded his work and issued his final invoice. (Exhibit C).

SMH may argue that a new round of negotiations between the parties between April 22, 2024 and May 15, 2024 evidences a lack of mutual assent. However, the negotiations ***after*** April 15, 2024 involved a new issue – i.e., SMH's unilateral modification of material terms of the settlement agreement in the paperwork it drafted to effectuate the release of Plaintiff's claims. While the enforceable April 15, 2024 settlement agreement stated that [redacted]

[redacted]" SMH's draft release seeks to [redacted].

Plaintiff participated in these additional negotiations to avoid filing a motion to enforce the settlement agreement. The failed negotiations following SMH's attempted unilateral modification of the material terms of the April 15, 2024 settlement agreement plainly do not render the original agreement invalid or unenforceable. Indeed, if a party could retroactively nullify its unequivocal written mutual assent simply by unilaterally changing a material term of a binding agreement and reopening negotiations, then no binding agreement could ever be made.

B. McGowin had actual and apparent authority to settle Plaintiff's claims on behalf of SMH.

"Under Alabama law, a settlement agreement negotiated by an attorney binds the client only when the attorney acts with 'express, special authority' from the client or with apparent authority." *Bowers v. BBH SBMC, LLC*, 2023 WL 8290705, at *9 (Ala. Dec. 1, 2023) (other citations omitted). "'The doctrine of apparent authority does not rest upon what one thinks an agent's authority may be, or what the agent holds out his authority to be; rather, the doctrine of apparent authority is based on the principal's holding the agent out to a third person as having the authority under which he acts.'" *Id.* (other citations omitted).

In every respect, Mr. McGowin had actual authority and SMH held him out to be an agent with the authority to negotiate, decide, and confirm this settlement. First, at the mediator's request, Mr. McGowin confirmed the settlement agreement in writing without any objection from three different lawyers each from different law firms all representing

SMH (each of whom was copied on the mediator's correspondence that both defined the settlement terms and requested that Mr. McGowin confirm the agreement on behalf of SMH). (Exhibit A). If Mr. McGowin did not have authority to bind SMH to the settlement agreement, there is no doubt that each of those lawyers had an obligation to, and most certainly would have, immediately informed the mediator and counsel for Plaintiff.

Second, on the same afternoon on which Mr. McGowin provided written confirmation of the settlement, SMH and its lawyers agreed to cancel the hearing on all pending pretrial motions. Had Mr. McGowin lacked authority to bind SMH to the settlement agreement, SMH would have insisted on proceeding with the pretrial hearing. Instead, SMH's lawyers exited the courtroom and accepted the Court's return of multiple binders of briefing materials that were rendered moot by the parties' settlement. Similarly, SMH did not insist that the trial proceed as scheduled on April 29, 2024, a date that had been set by the Court more than 16 months earlier. (Doc. 737).

Third, this Court's February 9, 2024 Order for Mediation required that "[a] representative of each party having FULL authority to settle the case MUST be present at the mediation session." (Doc. 1219, ¶ 4). Mr. McGowin attended the initial March 28, 2024 mediation in the presence of SMH's CEO Jeff St. Clair as well as counsel from the law firms of Bradley Arant and Hall Booth Smith. Mr. McGowin served as SMH's principal negotiator throughout settlement discussions.[2]

[2] Plaintiff's counsel observed the attendees at the mediation on behalf of SMH. The conclusion that Mr. McGowin was the principal negotiator was formed based on Plaintiff counsels' experience negotiating between March 28, 2024 and April 15, 2024 in this case, as well as their experience with Mr. McGowin's involvement in negotiating other matters involving SMH. At all times during the last 3-4 years, Mr. McGowin has exercised actual authority and SMH has held out Mr. McGowin as having authority to act on its behalf during settlement negotiations – including rejecting or confirming settlement agreements.

C. There are no grounds to reopen the settlement agreement.

"A validly executed settlement agreement is as binding on the parties as any other contract." *Billy Barnes Enterprises, Inc. v. Williams*, 982 So. 2d 494, 498 (Ala. 2007) (citations omitted). "However, settlement agreements may be reopened for reasons of fraud, accident, or mistake." *Id.* (other citations omitted). There are no grounds to reopen the April 15, 2024 settlement agreement.

i. There is no evidence of fraud.

"In determining whether a settlement agreement should be rescinded or set aside because of fraud, the courts of this state have applied the definition of legal fraud in Ala. Code 1975, § 6-5-101." 982 So. 2d at 499. "Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud." Ala. Code § 6–5–101.

There is no allegation of fraud. The settlement negotiations occurred at arm's length between seasoned attorneys with the assistance of a neutral mediator. At the time they entered into the April 15, 2024 settlement agreement, the parties were exactly two weeks from trial. (Doc. 737). They were fully cognizant of the factual record, the claims in the lawsuit, and the defenses asserted. The terms of the settlement were proposed in writing by the neutral mediator and confirmed by attorneys for the parties who each have decades of litigation experience. (Exhibit A). All three of the law firms representing SMH on this case were copied on this correspondence. *Id.*

ii. The terms of the settlement agreement are clear and unambiguous, precluding introduction of parol evidence regarding any accident or mistake.

Where the terms of a written settlement agreement are clear and unambiguous, the terms of that agreement may not be varied by the introduction of parol evidence regarding a mutual mistake of fact. *State Farm Mut. Auto. Ins. Co. v. Brackett*, 527 So.2d 1249 (Ala.1988).

Whether an agreement is ambiguous is a question of law to be determined by the court. *Austin v. Cox*, 523 So.2d 376 (Ala.1988). An agreement is ambiguous if it is susceptible to more than one meaning. *Bain v. Gartrell*, 666 So.2d 523 (Ala. Civ. App.1995). However, an agreement is not rendered ambiguous simply because the parties assign different meanings to it. *Wayne J. Griffin Elec., Inc. v. Dunn Constr. Co.*, 622 So.2d 314 (Ala.1993). Parol evidence regarding the terms of an agreement is admissible only where an ambiguity exists. *F.W. Woolworth Co. v. Grimmer*, 601 So.2d 1043 (Ala. Civ. App.1992).

The following term in the April 15, 2024 settlement agreement is clear and unambiguous: [redacted] (Exhibit A) (emphasis added). This sentence has only one meaning – [redacted]. There is simply no reasonable interpretation of this sentence to mean that [redacted], as SMH now insists.

Because the parties' settlement agreement is unambiguous, it is due to be enforced without regard to parol evidence regarding the parties' intentions or understandings in entering the settlement. A veteran mediator was involved in the negotiations, both parties were represented by experienced counsel, and each had the opportunity to review and confirm the written settlement agreement in a manner that fully protected their interests.

D. The [redacted] that SMH now seeks were never part of the settlement agreement; instead, they are new terms for which SMH did not bargain.

The following term in the April 15, 2024 settlement agreement is clear and unambiguous: "[redacted]" (Exhibit A). Despite this unmistakeable language, SMH inexplicably now insists on the inclusion of new terms – i.e., that [redacted]. These new terms were never part of the settlement agreement.

First, the new terms on which SMH insists are literally nowhere to be found in the written settlement agreement (Exhibit A). It is preposterous to argue that terms that are not in the settlement agreement are nevertheless somehow part of it.

Second, the underlying action's claims and defenses have already been made public. The word "confidential" is defined as "meant to be kept secret." "Confidential," Black's Law Dictionary (11th ed. 2019). Information in a public court filing is, by definition, "[o]pen or available for all to use." "Public," Black's Law Dictionary (11th ed. 2019). The underlying action, the claims and defenses, and most of the underlying facts on which

this lawsuit is predicated have been a matter of public record for years. (*See, e.g.*, Docs. 1, 138, 388, 703, 1022, 1130, 1149, 1245, 1247, 1266, and all exhibits attached to these filings).

Third, the scope of the agreed upon confidentiality provision never extended to the [redacted] because Plaintiff's counsel would never subject themselves or their client to [redacted] for the public disclosure of details about this litigation that ***SMH and its lawyers have already revealed***.

On February 29, 2024, ***SMH and its lawyers*** publicly filed Plaintiff's healthcare cybersecurity expert's 75-page report and all 4 appendices, which described in excruciating detail the systems in the Labor & Delivery Unit ("LDU") affected by the cyberattack, the relative levels of SMH's digital and security maturity, the relevant hazards associated with the cyberattack and their clinical impacts, a comprehensive risk assessment of the LDU before and after the cyberattack, and specific conclusions regarding how SMH's unacceptable response led to the death of baby Nicko. (Doc. 1283). This was not an inadvertent filing error – SMH also quoted extensively from this report in the ***unredacted*** portions of its ***publicly filed*** brief in support of its Motion To Exclude Saif Abed From Testifying At Trial. (Doc. 1267, pp. 10-20).

Courtesy of SMH's lawyers, Dr. Abed's complete, unredacted report is already available to every media organization that obtains an AlaCourt password or requests a copy from the clerk of Court. It has been that way for months and it will remain that way for the indefinite future.

This case has been the subject of intense media interest because it involves novel allegations that a hospital's inadequate response to a cyberattack led to the death of a patient. Plaintiff and her counsel have received media inquires from the following media outlets, among others:

- 60 Minutes
- *The Wall Street Journal*
- NBC Universal
- CBS News
- Bloomberg News
- CNN Investigates
- CNN National Desk
- *USA Today*
- Pulitzer Prize winner Dan Golden (for a book)
- Harvard Business School
- New York Post
- Documentarian Burt Helm
- Norwegian newspapers *VG* and *Aftenposten* as well as Swedish newspaper and *Svenska Dagbladet*
- *The Record*
- NBC-15
- *Lagniappe*
- Al.com

(Affidavit of George W. Finkbohner, III, Exhibit D, ¶ 2).

Since this case was filed in January 2020, neither Plaintiff nor her counsel has provided a comment or interview to the media. (Exhibit D, ¶ 3).[3] While their only obligation was not to disclose information designated "Confidential" pursuant to the protective order (Doc. 482), Plaintiff and her counsel have nevertheless been utterly

[3] Nevertheless, much has already been publicized about this case based on the public record. *See, e.g.*, Poulsen, K., McMillan, R. and Evans, M., "A Hospital Hit by Hackers, a Baby in Distress—The Case of the First Alleged Ransomware Death," *The Wall Street Journal* (Sept. 30, 2021) (available at https://www.wsj.com/articles/ransomware-hackers-hospital-first-alleged-death-11633008116) ("Ms. Kidd declined an interview request through her attorneys, citing the pending litigation.").

discreet and circumspect by refraining from participating in any publicity associated with this matter. (Exhibit D, ¶ 4).

Despite Plaintiff's and her counsels' manifest decision to litigate this case only in the courtroom and their decision to refrain from leveraging any publicity in this matter, SMH insists on adding new material terms to the settlement agreement requiring [redacted]. Plaintiff and her counsel are left to conclude that SMH only has two possible motivations for these new settlement terms: (a) to subject Plaintiff and her counsel to the risk of [redacted] from meritless allegations of breach of confidentiality for disclosure of details about this litigation that have already been made public; or (b) to extricate SMH from a binding settlement about which it has apparently had second thoughts. Either way, SMH's conduct is detrimental to the settlement process, disrespectful of Plaintiff's need to finalize her recovery, and antithetical to the just and timely resolution of this case.

IV. Conclusion

In accordance with *Ingenuity International, LLC v. Smith*, __ So.3d. __, 2023 WL 4038274, *3 (Ala. 2023), Plaintiff moves this Court to set an evidentiary hearing on her Motion to Enforce Settlement Agreement. Following that hearing, Plaintiff will ask the Court to grant her motion and enter judgment in the amount of the settlement so that it accrues post-judgment interest and is subject to immediate collection efforts.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 16th day of May 2024, caused a copy of the foregoing to be served on the following parties by using the Court's E-file system, which will send notification to the following upon filing:

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