No. 19-7697

IN THE

SUPREME COURT OF THE UNITED STATES

Rebecca Lovell-Petitioner

vs.

Children's Corner Daycare-Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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28 U.S. Code 651
(f) The Federal Judicial Center and the Administrative Office of the United States Courts are authorized to assist the district courts in the establishment and improvement of alternative dispute resolution programs by identifying particular practices employed in successful programs and providing additional assistance as needed and appropriate.

TCA 47-50-112

All contracts, including but not limited to, notes, security agreements, deeds of trust, and installment sales contracts, in writing and signed by the party to be bound, including endorcements thereon, shall br prima facie evidence that the contract contains the tru intentions of the parties and shall be enforeced as written.

Local Rules Appendix D.1 Section 10(b)(1)
The Neutral shall not require a participant's further presence at an ADR proceeding when it is clear the participant desires to withdraw.

28 U.S. 455(a)
Any justice, judge, or magistrate judge of the United States shall disqualify himself fin any proceeding in which in impartiality might reasonably be questioned.

SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15(8), I, Rebecca Lovell, Petitioner, files this Supplemental Brief, in order to call attention to additional legislation and rulings that establish a public policy regarding the procedural effectiveness of the ADR Plan and how if not conducted properly, results in depriving a party due process of law. 28 U.S. Code 651 provides that the Federal Judicial Center and the Administrative Office of the United States Courts are authorized to assist district courts in establishing and improvement of alternative dispute resolution programs by identifying particular practices employed and providing additional assistance as needed and appropriate. The FJC has reported that 58 district courts authorize required use of mediation, including 12 that mandate use for some or all civil cases. Because ADR programs are overseen by Congress, this Court should grant the writ in order to address any legitimate concerns with the practices and procedures of a required ADR proceeding to determine the effectiveness of the program and address issues that may impact the integrity of the ADR program, judicial system, and the Court as a whole.

ARGUMENT I. KUKLA CITING CONTRADICTS COURT RULINGS

Prior to judgement in the district court, a motion to set aside the settlement agreement was filed, focusing on discovery abuse allegations. The magistrate judge issued his Report and Recommendations, quoting *Kukla* (6th Cir. 1973) as a basis for denial stating an "evidentiary hearing is required where facts material to an agreement are disputed," *Id* at 646, however, "no evidentiary hearing is required where an agreement is clear and unambiguous and no issue of fact is present" Id. (citing *Aro Corp. v. Allied Witan Co.*, 531 F. 2d 1368, 1372(6th Cir. 1976)) The magistrate found that an evidentiary hearing was not required as I had not, at the time, made any allegations of duress or inability to read the settlement agreement prior to signing it. Objections to the R&R, although untimely, were considered by the court, at which time I disclosed to the court that the mediator stopped me from

leaving once mediation was concluded and demanded I write a check for mediation fees before I could leave because I did not agree to the settlement, which resulted in the agreements being signed under duress as I was aware I was not capable of paying the fees on that day, which were not yet due.

Additionally, I disclosed that I had made requests prior to the signing of any agreements about wanting time to address discovery issues from the responses I was given after I declined the settlement. I informed the mediator that I hadn't read the settlement agreement when they had reentered the room because I was reading discovery responses that I wanted to discuss first, however I was denied additional time to finish reading discovery and told to "take the settlement or write a check" because opposing counsel "had places to be". Making these allegations prior to any judgement should've give cause for an evidentiary hearing as cited by the magistrate in R&R. The trial judge did not specifically address either allegation before adopting the R&R in its entirely, and only said the actions of the mediator "did not rise to the level to set aside the agreement" and I "took the risk of feeling pressured by representing myself." It should be considered that the district court initially recommended denying the motion without an evidentiary hearing pursuant *Kukla* and *Aro Corp.* because duress had not been alleged at that point, however once it was prior to judgement, the required evidentiary hearing was not provided. Ensuring that a party has the right to a hearing is a matter of public importance regarding due process of law. The argument made in *Kukla* that was initially stated by the magistrate judge should have been applied following the allegations of duress and coercion made prior to judgement, and an evidentiary hearing should have been provided by the court.

ARGUMENT II. SMITH V. ABN AMRO CONTRADICTS COURT RULING

The R&R also addressed the validity of contracts through state contract law quoting *Smith v. ABN AMRO Mortg. Grp. Inc.,* 434 F. App'x 454. 460 (6th Cir. 2011)(citing Bamerilease Capital Corp. v. Nearburg, 958 F.2d 150, 152 (6th Cir. 1992)) in addition to quoting two additional 6th Circuit rulings

summarily stating that any agreements made on all terms can only be reopened in the presence of fraud or mutual mistake.

> **TCA 47-50-112 All contracts, including but not limited to, notes, security agreements, deeds of trust, and installment sales contracts, in writing and signed by the party to be bound, including endorsements thereon, shall be prima facie evidence that the contract contains the true intention of the parties and shall be enforce as written.**

Providing the principles given by the magistrate as well as TCA 47-50-112, the printed and signed payment agreement provided by the mediator prior to the first mediation in pursuant to Tn Supreme Court Rule 31 that explained the terms of mediation fees, including the time in which payment was due (30 days preceding mediation) is also an enforceable contract governed by state contract law. As such, if an enforceable agreement is reached under duress during mediation as a result of another equally enforceable agreement being breached, fraud exists that warrants the setting aside of the resulting settlement. "A breach exists if it can be proven that an enforceable contract exists, nonperformance amounting to the breach exists, and damages resulted from the breach." *BancorpSouth Bank, Inc. v. Hatchel*, 223 S.W. 3d 223, 227 (Tenn.Ct.App. 2006 The court was provided with all elements needed to establish a breach, including the mediator's signed agreement, which resulted in coerced settlement. "The purpose of assessing damages in breach contracts is to place the plaintiff as nearly as possible in the same position she would have been in had the contract been performed, but the nonbreaching party is not to be put in any better position by recovery of damages for the breach of the contract than he would have been if the contract had been fully performed." *Lamons v. Chamberlain,* 909 S.W. 2d. 795, 801 (Tenn.Ct.App.1993)

On Motion for Relief, it was only requested that the district court return this case to the exact state in which it was in prior to the mediator's conduct that violated the payment arrangement we had all agreed upon prior to the first mediation, which would have invalidated any settlements reached on August 30, 2017 after the mediator's actions and allowed this case to continue. The arguments made by

the magistrate citing *Smith* and *Bamerilease* that were adopted by the trial court should have applied in the final judgement once the allegations of fraud and breach in payment agreement were made. It is prejudicial to enforce one contract that was only reached by breaching another, in order to enforce a settlement.

If the source is tainted, anything gained from it is tainted as well. See *Nardone v. United States,* 308 U.S. 338, 60 S. Ct 266, 84 L. Ed. 307 (1939); *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920). In *Nardone* and *Silverthorne,* the U.S. Supreme Court reversed judgements and remanded to the district courts for further proceedings on the opinion that the unlawful and unethical gain of evidence results in the evidence itself being unusable. Although these cases pertain to criminal proceedings and search and seizures, this same principle should apply to all matters of the court, including the court-mandated ADR program in civil proceedings. Because the agreements reached at mediation were the products of the mediator violating his own contract that is required by the Tn Supreme Court, as well as the local rules of the ADR Plan, the court should've found that any agreement reached as a result of this conduct to be fruits of a poisonous tree and invalid. Because the judgement of the district court does not uphold the opinion of the Supreme Court in *Nardone* and *Silverthorne*, this Court should grant the writ to address the validity of agreements reached by a breach of contract and procedural violations during a court-mandated ADR proceeding.

ARGUMENT III. ESTABLISHMENT OF DURESS UNDER TENNESSEE CONTRACT LAW AND SUPREME COURT AND HOW IT IS CONTRADICTED BY COURT RULING

Settlement agreements are governed by state contract law. See *Smith.* In Tennessee, duress is defined as "an unlawful restraint, intimidation, or compulsion of another to such an extent and degree as to induce such other person to do or perform some act which he is not legally bound to do, contrary to his will and inclination and the coercive event must be of such severity, either threatened, impending, or actually inflicted, so as to overcome the mind and will of a person of ordinary firmness." *McMahan v.*

McMahan, 2005 WL 3287475 (Tenn.Ct.App.2005) as cited in *McClellan v. McClellan*, 873 S.W.2d 350 (Tenn.Ct.App.1993), citing *Johnson v. Ford*, 147 Tenn. 63, 245 S.W. 531 (1922); *Fogg v. Union Bank*, 63 Tenn. [4 Baxter] 530 (1830). Additionally, the U.S. Supreme Court holds "unlawful duress is a good defense to a contract if it includes such degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness." *U.S. v. Huckabee*, 16 Wall. 414, 432 (U.S. 1873).

The court was informed that upon declining the settlement to conclude mediation, I was physically blocked by the mediator as I was trying to leave. Pursuant to ADR Plan Appendix 10(b)(1), this action alone should have provided the necessary element to establish misconduct, coercion, and duress. 10(b)(1) prohibits a Neutral from requiring a party to remain in an ADR proceeding once it has been clearly established the party no longer wishes to do so. The imposition of fees, which was the purpose of detaining me after mediation was concluded, did not follow the prearranged payment agreement provided by the mediator, and were being imposed, according to the mediator because I "didn't take the settlement that included my portion of mediation fees.

The court did not directly address any of these allegations or provide any information on how they did not rise to the level for relief. Instead the trial court found that it "appeared" I didn't bother asking the mediator for other payment options. As the key element of duress is "overcoming the mind and will of a person of ordinary firmness", it would be prejudicial for the court to question my actions or inactions while I am being told by a court officer to "take a settlement or write a check" while being unlawfully detained after mediation had concluded. The court's finding that I took the risk of feeling pressured by not being represented by counsel, and the fault was mine and mine alone as I "did not understand the mediation process," is equally prejudicial as the allegations I provided to the court specifically cited procedural standards in the Court's ADR Program, which cannot be altered at the mediator's discretion simply because a party was unable to afford representation.

ARGUMENT IV. LILIEBERG RULING ON VACATUR AS REMEDY

Pursuant 28 U.S. 455(a), the mediator should have disqualified himself once his actions gave reason to question his ability to conduct mediation impartially. In *Lilieberg v. Health Svcs. Acq. Corp., 486 U.S. 847 (1988),* the Court held that the disqualification of a judge is appropriate when he should have reasonably known that a situation has created an appearance if impropriety, even if the judge isn't fully aware of the details of a situation. The Supreme Court held that vacatur is proper remedy for a violation of 455(a) under Rule 60(b)(6) by considering the risk of injustice to particular parties, the risk that denying relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. In *Lilieberg*, despite the face the judge had no actual knowledge of the situation in dispute, his participation in the case created a strong appearance of impropriety that provided vacatur as an appropriate remedy. The court found the vacatur would not produce injustice in other cases and could aid in judges being more careful on disclosing grounds for recusal.

The Court's findings in Lilieberg should apply in this case following the same determination factors. By vacating the judgement and placing this case back to its exact state prior to the actions of the mediator will not result in injustice towards opposing counsel, while not vacating it will put countless others who depend on a fair ADR proceeding at risk of being coerced into settlements they do not want, which will result in a negative outlook on the effectiveness and equal protection of the judicial system for anyone who cannot afford representation. Because the Office of the United States Courts and FJC oversee all aspects of the practices and procedures in the ADR Program used by courts, the writ should be granted to address the damage done during this ADR proceeding. If the actions alleged are common practices in this or any other court-mandated mediation proceeding, it directly affects public interest in the judicial system and needs to be eliminated to prevent the courts from depriving any party the right to trial by imposing settlements during mandatory ADR programs.

ARGUMENT V. HAZEL-ATLAS RULING

The U.S. Supreme Court has found that the "integrity of the judicial process" relies on policing fraud on the court and eliminating any appearance of judicial partiality. *Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238, 246 (1944) Relief should be granted under Rule 60(d) when a party has alleged fraud on the court where sufficient evidence of such fraud is present before judgement. Despite any unartfully stated claims, I provided both courts with sufficient evidence in support of the allegations made regarding the mediator. *Hazel* establishes that after discovering fraud, relief will be granted against judgements regardless of the term of their entry. "Even if Hazel failed to exercise due diligence to uncover the fraud, relief may nit be denied on that ground alone, since public interests are involved." P. 322 U.S. 246. The Court holds that "it cannot be that preservation of the integrity of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." The Circuit Court erred in affirming the district court's opinion that despite all the allegations made and undisputed regarding the conduct of the mediator, the Circuit court agreed that I could have walked away, despite their opinion in *Smith* explaining that coercion exists "when a judge threatens to penalize a party that refuses to settle." The Court held in *Hazel* that the appellate court had "both the duty and the power to vacate its own judgement and to give the trial court appropriate directions because every element of the fraud demanded the exercise of the power to set aside fraudulently begotten judgements." The principle in *Hazel* should apply to this case.

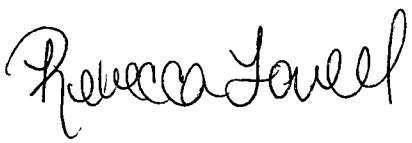
The 6th Circuit affirmed the district courts denial for relief, stating I was free to walk away if I felt pressured, despite having made a similar contrasting disposition in *Smith,* quoting *Gevas v. Ghosh.* In fact, in the Circuit Court's order (Petition: Appendix A) Circuit Judge Karen Nelson Moore cited *Smith* as grounds to vacate the district court's order and remand for further instructions regarding the mediator's conduct. This argument was given in a petition for rehearing (Petition: Appendix C.) that although was

untimely due to documented mailing delays during the holidays, was tendered and considered by the court, however, was not accepted for filing.

CONCLUSION

It is for all reasons mentioned above and the petition that beg The Court to grant the writ, and address the effectiveness of the ADR proceeding and if the misconduct alleged warrants relief rom judgement to reinstate this case in its exact state prior to the misconduct of the mediator.

Respectfully submitted,



Rebecca Lovell

3/16/20

APPENDIX

Appendix a(2)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

REBECCA LOVELL,	)	
	)	
	)	
Plaintiff,	)	**No.: 1:17-cv-01039-JDT-egb**
	)	
v.	)	
	)	
	)	
CHILDREN'S CORNER DAYCARE,	)	
	)	
Defendant.	)	
	)	

REPORT AND RECOMMENDATION

Before the Court is Plaintiff's Rule 60 Motion for Relief of any Agreement and Release made between Plaintiff and Defendant Children's Corner Daycare (D.E. 31). Defendant Children's Corner Daycare ("Defendant") has responded in opposition (D.E. 32). Pursuant to Administrative Order 2013-05, this case was referred to the United States Magistrate Judge for management of all pretrial matters. For the following reasons, the Magistrate Judge recommends that this Court DENY Plaintiff's Motion.

BACKGROUND

Plaintiff filed a *pro se* Complaint on March 10, 2017, against the Union City Police Department, Tennessee Department of Children's Services, Union City District Attorney, and Children's Corner Daycare alleging violations of 42 U.S.C. § 1983 (D.E. 1). Plaintiff's claims revolve around an incident where her child was found in the street near the Defendant daycare when he was left unattended by the daycare. The parties engaged in mediation on July 20, 2017. During mediation, Plaintiff settled with Tennessee Department of Children's Services and Union City District Attorney General's Office and agreed to a partial dismissal of the action (D.E. 27).

Plaintiff and the remaining two Defendants agreed to a stay of discovery until the second scheduled mediation. The parties engaged in a second mediation on August 30, 2017. During that mediation, the Plaintiff reached a settlement agreement with the remaining two Defendants. Plaintiff and the parties signed a "Mediated Settlement Agreement" and a "Confidential Settlement Agreement and Release." Additionally, Plaintiff was given discovery responses by the Union City Police Department at the mediation. Plaintiff and the Union City Police Department agreed to a partial dismissal and the action against the Union City Police Department was dismissed (D.E. 30).

Pursuant to the agreement, Defendant Children's Corner Daycare mailed a settlement check to Plaintiff via overnight mail on September 6, 2017. On September 14, 2017, Plaintiff emailed counsel for Defendant and informed counsel that she read the discovery given to her by Union City Police Department and believed the settlement was negotiated in bad faith. Plaintiff believes she was not given time to review the discovery prior to signing the settlement agreement. Moreover, Plaintiff informed counsel that she wanted to renegotiate the agreement, and she no longer agreed with the non-disclosure agreement clause of the settlement agreement. Lastly, Plaintiff asserts that she would like to file a new claim of defamation against Defendant based on the discovery received and have time to obtain an attorney, believes Defendant's counsel violated some of the ABA Model Rules of Professional Conduct because allegedly counsel incorrectly named some of the items as work-product in discovery, and that there was an error on one of the agreements she signed that incorrectly listed the incident as involving playground equipment. Thus, instead of agreeing to an order of dismissal with Defendant, Plaintiff filed Rule 60 Motion for Relief of any Agreement and Release made between Plaintiff and Defendant Children's Corner Daycare.

ANALYSIS

Rule 60(b) of the Federal Rules of Civil Procedure, which provides as follows:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud ... misrepresentation, or misconduct of an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Since no final judgment, order, or proceeding is present in this case, and given Plaintiff's *pro se* status, the Magistrate Judge will analysis this as a motion to set aside settlement.

A district court has the authority to enforce an agreement to settle litigation pending before it. *See Bostick Foundry Co. v. Lindberg,* 797 F.2d 280, 282- 83 (6th Cir. 1986). However, "[b]efore enforcing a settlement, a district court must conclude that agreement has been reached on all material terms." *Re/Max Intl, Inc.* v. *Realty One, Inc.* 271 F.3d 633, 645-46 (6th Cir. 2001). "Ordinarily, an evidentiary hearing is required where facts material to an agreement are disputed." *Id.* at 646 *citing Kukla v. Nat'l Distillers Prods. Co.,* 483 F.2d 619, 622 (6th Cir. 1973); *Aro Corp. v. Allied Witan Co.,* 531 F.2d 1368, 1372 (6th Cir. 1976)). Conversely, "no evidentiary hearing is required where an agreement is clear and unambiguous and no issue of fact is present." *Id.* (citing *Aro Corp.,* 531 F.2d at 1372). Summary enforcement of a settlement agreement has been deemed appropriate where no substantial dispute exists regarding the entry into and terms of an agreement. *Kukla v. Nat'l Distillers Prods. Co.,* 483 F.2d 619, 621 (6th Cir. 1973). "Because settlement agreements are a type of contract, the formation and [validity] of a purported settlement agreement are governed by state contract law." *Smith v. ABN AMRO Mortg. Grp. Inc.,* 434 F. App'x 454, 460 (6th Cir. 2011)(citing *Bamerilease Capital Corp. v. Nearburg,* 958 F.2d 150, 152 (6th Cir. 1992)).

"If the parties reached agreement on all material terms, then existing precedent dictates that only the existence of fraud or mutual mistake can justify reopening an otherwise valid settlement agreement." *Henley v. Cuyahoga County Bd. of Mental Retardation & Dev. Disabilities,* 141 F. App'x 437, 443 (6th Cir. 2005), *reh'g en banc denied* (Oct. 12, 2005) (citing *Brown v. County of Genesee,* 872 F.2d 169, 174 (6th Cir.1989)) (internal quotation marks omitted). "More importantly, once a settlement is reached, it is the party challenging the settlement who bears the burden to show that the settlement contract was invalid based on fraud or mutual mistake." *Id.* (citing *Brown,* 872 F.2d at 174).

Here, there is no dispute that a settlement agreement was reached in this case on August 30, 2017. The parties agreed in writing via two documents labeled "Mediated Settlement Agreement" and "Confidential Settlement Agreement and Release" to dismiss the case in exchange for $2,500.00. Plaintiff does not allege she did not understand what she was signing or that the documents were unclear or ambiguous. Both parties agree that they reached an agreement to settle the case. Although Plaintiff asserts that one of the agreements mention an incorrect term about the incident involving playground equipment, the Magistrate Judge finds this error is not material to the agreements. Both agreements correctly name the case number in this action and all other material information is correct. Plaintiff knowingly signed the agreement under no allegation of duress or inability to read the settlement agreements prior to her signature and agreement. Thus, the Magistrate Judge finds that an agreement was reached between Plaintiff and Defendant on all material terms that were fully understood and agreed upon by both parties. Next, the Magistrate Judge must determine if fraud or mutual mistake was present in order to justify invalidating the settlement agreement. Plaintiff does allege that the agreement was fraudulent. Plaintiff asserts that Defendant employees lied about certain statements made to

Union City Police Department and the discovery given to Plaintiff shows fraudulent information given to Plaintiff. Although fraud is a finding upon which a court may modify an otherwise valid contract, Plaintiff has not presented any evidence of fraudulent behavior by the Defendant that would justify reopening the settlement agreements, and, therefore, Plaintiff's claim of fraud fails.

Most of Plaintiff's claims center around after-the-fact sentiments. After-the-fact sentiments do not invalidate an otherwise binding settlement agreement. *See Stewart v. Carter Mach. Co. Inc.*, 82 Fed. Appx. 433, 436 (6th Cir. 2003) ("settlor's remorse" is not a sufficient reason to invalidate an enforceable oral agreement to settle a case); *Ashley v. Blue Cross & Blue Shield of Michigan*, 225 F.3d 658 (Table), 2000 WL 799305 at *2 (6th Cir. 2000) (the fact that plaintiff may have had a change of heart following the settlement ... is insufficient to invalidate an otherwise valid settlement agreement entered into by the parties); *Montano v. Knox Cty.*, No. 3:14-CV-404-PLR-CCS, 2016 WL 1192673, at *2 (E.D. Tenn. Mar. 28, 2016) (the fact that Plaintiff changed his mind five days after acceptance of the offer did not invalidate the agreement already reached by the parties). Plaintiff failed to notify Defendant that she was not in agreement any longer until two weeks after the agreement was signed and a week after the settlement check was mailed. Plaintiff asserts she did not have enough time to review the discovery given to her by the Union City Police Department the day of the settlement agreement and the discovery now contains newly discovered evidence of comments made by Defendants' employees. However, Plaintiff does not allege that she was forced to sign the settlement agreement that day under duress, that she couldn't request a stipulation dependent on her review of discovery be placed in the agreement, or that she couldn't agree to any terms after reading the discovery at some time in the future. Plaintiff's inability to review discovery or any new claims she may believe she has after reviewing the discovery does not invalidate an otherwise valid settlement agreement that both

parties understood and signed. Likewise, Plaintiff's assertions that she no longer wants to be bound by a non-disclosure agreement do not merit invalidating the settlement agreement. Plaintiff does not allege she did not have time to read and fully understand the agreement she signed, including the terms of non-disclosure. Plaintiff's thoughts about being bound by the non-disclosure are clearly after-the-fact sentiments, which do not invalidate the settlement agreement. Lastly, Plaintiff's claims concerning whether some items she was informed by Defendant's counsel in discovery were protected by the work-product doctrine and the allegations that Defendant's counsel violated the ABA Model Rules due to the alleged incorrectness of the assertion of protection does not invalidate the valid settlement agreement. It is clear from the record that Plaintiff fully understood the terms of the settlement and agreed to them. Accordingly, the Magistrate Judge recommends that Plaintiff's Rule 60 Motion for Relief of any Agreement and Release made between Plaintiff and Defendant Children's Corner Daycare be DENIED, the settlement be enforced, and the case be DISMISSED pursuant to the settlement agreement.

CONCLUSION

For all these reasons, the Magistrate Judge recommends that this Court DENY Plaintiff's Motion for Relief. Additionally the Magistrate Judge recommends that this case be DISMISSED pursuant to the "Mediated Settlement Agreement" and "Confidential Settlement Agreement and Release" signed by both parties.

Respectfully Submitted this 23rd day of January, 2018.

s/Edward G. Bryant
UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT AND RECOMMENDATION MUST BE FILED WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT AND RECOMMENDATION. 28 U.S.C. § 636(b)(1). FAILURE TO FILE THEM WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.

Appendix b(2)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE EASTERN DIVISION

REBECCA LEIGH LOVELL,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. 17-1039-JDT-egb
	)	
UNION CITY POLICE DEPARTMENT, ET AL.,	)	
	)	
Defendants.	)	
	)	

AMENDED[1]
ORDER ADOPTING REPORT AND RECOMMENDATION, DENYING PENDING MOTIONS AND DISMISSING CASE PURSUANT TO THE PARTIES' SETTLEMENT AGREEMENT AND RELEASE

Plaintiff Rebecca Leigh Lovell, acting *pro se*, filed this action pursuant to 42 U.S.C. § 1983 on March 10, 2017, against Children's Corner Daycare in Union City, Tennessee; the Union City Police Department (UCPD); the Tennessee Department of Children's Services (DCS); and the Union City District Attorney's General's Office. (ECF No. 1.) The case concerns an incident involving Plaintiff's son that occurred on June 15, 2016, while he was attending Children's Corner.

After all of the Defendants had responded to the complaint and the discovery process had begun, a mediation session was conducted with Mediator James S. Wilder, III on July 20, 2017.

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[1] The Court's original order adopting the Report and Recommendation identified the Union City District Attorney General's Office as the District Attorney General's Office for the 8th Judicial District of Tennessee. (ECF No. 37 at 1 n.1.) The office in question is actually the District Attorney General's Office for the 27th Judicial District of Tennessee. The mistake was, in turn, based on errors in documents filed by Defendants. (*See* Answer, ECF No. 8; Mot. to Dismiss, ECF No. 10; Mot. to Stay Discovery, ECF No. 15.)

That first mediation session resulted in a settlement with DCS and the District Attorney General's Office, and an agreed order of dismissal was entered by the Court as to those Defendants on August 8, 2017. (ECF No. 27.) While Children's Corner asserts that Plaintiff and the remaining Defendants also agreed to a stay of discovery pending a second mediation session, Plaintiff now disputes that assertion.

The second mediation session was held on August 30, 2017, and resulted in Plaintiff reaching a settlement with both the UCPD and Children's Corner. A Mediated Settlement Agreement (Settlement Agreement) setting out the terms of the settlement was signed by Plaintiff, counsel for the UCPD Michael R. Hill, counsel for Children's Corner Pamela Webb, and Mediator Wilder. (ECF No. 32-2.) Plaintiff also executed a Confidential Settlement Agreement and Release (Release) in which she released Children's Corner from liability. (ECF No. 32-3.) At the close of the mediation, Plaintiff was given discovery responses from the UCPD. In accordance with the Settlement Agreement, an agreed order of dismissal with regard to the UCPD was entered by the Court on September 25, 2017. (ECF No. 30.)

Ms. Webb sent Plaintiff a settlement check on behalf of Children's Corner on September 6, 2017, via overnight delivery. (ECF No. 32-4.) However, on September 14, 2017, fifteen days after signing both the Settlement Agreement and the Release, Plaintiff sent an email to Ms. Webb and Mr. Hill in which she stated that after reading the discovery given to her she believed the mediation was not negotiated in good faith. (ECF No. 32-5.) She expressed a desire to renegotiate the settlement and did not wish to be bound by the non-disclosure portion of the Release because she wanted to seek legal counsel to review the documents. (*Id.*)

On November 6, 2017, Plaintiff filed a motion pursuant to Federal Rule of Civil Procedure 60(b)[2] seeking relief from the Settlement Agreement and Release made between Plaintiff and Children's Corner. (ECF No. 31.) Children's Corner filed a response (ECF No. 32), and Plaintiff filed a reply (ECF No. 33). A Report and Recommendation (R&R) was issued by U.S. Magistrate Judge Edward G. Bryant on January 23, 2018, in which he recommended denying Plaintiff's motion for relief from the settlement and dismissing her claims against Children's Corner pursuant to the Settlement Agreement and Release. (ECF No. 34.)

Plaintiff filed untimely objections to the R&R on February 8, 2018. (ECF No. 35.)[3] Children's Corner's response to Plaintiff's objections, filed on March 15, 2018, is also untimely. Because Plaintiff's objections to the R&R were not timely filed they need not be addressed by the Court. However, the Court will consider some of the objections briefly.

As the Magistrate Judge explained, settlement agreements are governed by state contract law, *see Smith v. ABN AMRO Mortg. Grp. Inc.*, 434 F. App'x 454, 460 (6th Cir. 2011), and once a settlement agreement has been reached it should be set aside only if it is shown to be invalid based on fraud or mutual mistake. *See Henley v. Cuyahoga Cnty. Bd. of Mental Retardation & Dev. Disabilities*, 141 F. App'x 437, 443 (6th Cir. 2005). In this case, Magistrate Judge Bryant noted that Plaintiff did not dispute that a settlement agreement was reached. However, she asserted in her

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[2] No final judgment has been entered in this case, neither has there been an order of dismissal as to Children's Corner. Therefore, Rule 60(b) is not applicable, and Magistrate Judge Bryant correctly treated Plaintiff's motion simply as a motion to set aside the settlement.

[3] Plaintiff agreed, in writing, to receive notice of the entry of Court documents via the Electronic Case Filing system. (ECF No. 3.) Thus she was served with the R&R on January 23, 2018, the date it was entered. Her objections were due fourteen days thereafter, on February 6, 2018. *See* Fed. R. Civ. P. 72(b)(2).

motion that the Settlement Agreement and Release should be set aside on several grounds, including newly discovered evidence, misrepresentation and fraud, misconduct by counsel and Children's Corner, and errors in the Release document. The Magistrate Judge concluded that none of Plaintiff's assertions justify setting aside the Settlement Agreement and Release.

Not all of Plaintiff's objections to the R&R are specifically directed to the findings of the Magistrate Judge. For example, Plaintiff first focuses heavily on the untimeliness and perceived deficiencies of various discovery responses that were provided to her by the UCPD and Children's Corner. However, with regard to any discovery responses received prior to mediation, Plaintiff had sufficient opportunity to review those responses and to raise any concerns about discovery "abuse" by filing an appropriate discovery motion with the Court. Her failure to do so is not a sufficient reason to set aside the Settlement Agreement and the Release.[4]

Plaintiff next focuses on the August 30th mediation itself, contending she was intimidated and coerced into settlement by counsel and Mediator Wilder. First, she complains about a telephone call she received the day before the mediation from Mr. Hill, counsel for the UCPD. Plaintiff states that Mr. Hill thought she had agreed to dismiss her claims against the UCPD before the mediation and forego any claim for damages, but she told him that was not the case. Mr. Hill "became irritated" and "aggressively" stated that if she did not agree to dismiss her claims and his motion to dismiss was later granted by the Court he would "come after her" by seeking to have discretionary

[4] Plaintiff now asserts she did not agree that discovery should be stayed between the first and second mediation sessions. She admits that counsel suggested they "take a break from discovery," but contends she did not understand that meant outstanding and/or overdue discovery responses would not be provided until the second mediation. However, despite acknowledging that the discovery responses in question were already past due before the August 30th mediation, Plaintiff never filed a motion to compel with the Court.

costs assessed against her. Plaintiff characterizes this as a threat by Mr. Hill and claims it was inappropriate for him to call her at home. However, merely asserting that he would seek the imposition of costs if his motion to dismiss was granted by the Court is not an impermissible threat. If Plaintiff was represented, Mr. Hill could have said the same thing to her attorney. Since Plaintiff represents herself in this proceeding, it was and is not improper for opposing counsel to contact her at home by telephone.

Plaintiff also complains that she was not provided with the overdue discovery on August 30th in time for her to sufficiently read both it and the Settlement Agreement and Release. She contends counsel rushed her and pushed her to agree to a settlement that day, refusing to discuss what she could see were deficiencies and contradictions in the discovery responses. Plaintiff also contends that Mediator Wilder engaged in misconduct by making several inaccurate statements and leading her to believe she was required to settle with both the UCPD and Children's Corner or with neither.

The statements and actions of counsel and of the mediator that are described in Plaintiff's objections do not rise to the level of fraud justifying setting aside the settlement. The Court does not doubt that Plaintiff felt pressured by the situation during the August 30th mediation. However, she chose to represent herself in this case and must accept the risks that come with that decision. If she did not understand what was occurring or what was said or needed more time to read the discovery before agreeing to the settlement proposal, Plaintiff could have walked away without signing anything and let this case go forward. There is simply no suggestion that Plaintiff was forced to sign either the Settlement Agreement or the Release against her will. The fact that she now regrets her actions does not require granting relief.

Plaintiff's objections to the R&R are overruled. The Court adopts the R&R in its entirety. All pending motions are DENIED, and all claims against Children's Corner are DISMISSED pursuant to the Settlement Agreement (ECF No. 32-2) and Release (ECF No. 32-3).

The Clerk is directed to prepare a judgment based on this order and the prior orders of partial dismissal entered on August 8, 2017 and September 25, 2017.

IT IS SO ORDERED.

s/ James D. Todd
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

No. 19-7697

IN THE

SUPREME COURT OF THE UNITED STATES

Rebecca Lovell-Petitioner

vs.

Children's Corner Daycare-Respondent

PROOF OF SERVICE

I, Rebecca Lovell, do swear or declare that on this day, March 16, 2020, as required by Supreme Court Rule 29 I have served the enclosed SUPPLEMENTAL BRIEF on each party to the above proceeding or that party's counse, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail, properly address to each of them and with first-class postage prepaid, or by delivery to a third party commercial carrier for delivery within 3 calendar days.

The names and address of those served are as followed:

Christopher L. Ehresman
P.O. Box 14503
Des Moines, IA 50306-3507

I declare under penalty of perjury that the foregoing is true and correct.
Executed on March 16, 2020

Rebecca Lovell

Rebecca Lovell