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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2009-2010

2090027

R.B.S.

v.

K.M.S.

Appeal from Baldwin Circuit Court
(DR-02-60)

THOMAS, Judge.

R.B.S. ("the former wife") appeals from the judgment of the Baldwin Circuit Court enforcing a settlement agreement between the former wife and K.M.S. ("the former husband"). We affirm.

Facts and Procedural History

In 2002, the former husband petitioned the trial court for a divorce. The former husband also filed a motion for temporary custody of the parties' two minor children ("the children") and for a restraining order preventing the former wife from having any contact with the former husband or the children. The trial court granted the former husband's motion for temporary custody and entered a temporary restraining order against the former wife. The former wife then moved the trial court for temporary custody of the children, child support, and pendente lite alimony; the former wife also moved the trial court to grant her exclusive possession of the parties' Ono Island home. The former wife then answered the former husband's complaint and counterclaimed, requesting custody of the children, child support, an equitable division of the parties' assets and debts, alimony, and an attorney fee. The trial court entered an order that, among other things, granted the parties joint legal custody of the children, with the former husband having temporary physical custody of the younger child and the parties having joint physical custody of the older child, modified the temporary

restraining order insofar as it conflicted with the trial court's order, and ordered the former husband to pay to wife $1,000 per month in pendente lite alimony.

In October 2004, the parties entered into a settlement agreement. The settlement agreement was read into the record in open court. The settlement agreement contained several provisions relating to the parties' Ono Island home and an Internal Revenue Service ("IRS") tax lien ("the tax lien") on the Ono Island home. The settlement agreement provided that the former wife would receive all right, title, and interest in the Ono Island home and that the former husband would waive all claims to the home. The settlement agreement also provided that the tax lien on the Ono Island home had been incurred solely by the former husband, that the former husband would cooperate with the former wife's efforts to discharge the tax lien, and that the former husband would agree to be solely responsible for the tax lien and to indemnify and hold the former wife harmless from the tax lien. The settlement agreement further provided that the "parties stipulate and agree that this settlement agreement is primarily based upon the discharge of the [tax] lien against the Ono [Island home.]

If said discharge is not accomplished the parties are not bound by the terms of this agreement." In return for the Ono Island home, the former wife gave up any rights to alimony, the former husband's retirement accounts, and any other property. The parties agreed that the agreement, as read into the record, accurately reflected the settlement reached between the parties.

In 2004, the former husband arranged to refinance the Ono Island home so that he could use the proceeds to pay off the tax lien. When the wife arrived for the closing, she noticed that she was also listed as an obligor on the mortgage; the former husband should have been solely obligated to repay the mortgage. The former wife refused to sign the mortgage note and left the closing. Richard Shields, the attorney who was then representing the former husband, testified that the mortgage had been intended to be only in the former husband's name and that the former wife's name was removed from the mortgage documents. As a result of the former's wife's refusal to sign the documents at the closing, the refinancing of the Ono Island home was never completed. The IRS then began collection efforts on the tax lien.

The former husband alleged that in August 2008 the parties agreed to settle the tax lien in a federal-court action. The tax-lien settlement provided that the Ono Island home would be sold and the proceeds from the sale would be used to satisfy the tax lien. The federal court, in December 2008, granted the former husband's motion to enforce the tax-lien settlement and, in January 2009, ordered that the Ono Island home be sold.

The former wife moved the trial court for an increase in pendente lite alimony on October 27, 2008; the former wife also moved the trial court to compel discovery. On March 11, 2009, the former husband moved the trial court to enforce the settlement agreement and to enter a judgment divorcing the parties. The former husband alleged in his motion that the settlement agreement had been contingent on the discharge of the tax lien on the Ono Island home, that an agreement with the IRS relating to the tax lien had been reached, and that the tax lien had now been resolved.

On August 12, 2009, the trial court held a hearing on the former husband's motion to enforce the settlement agreement and the wife's motions to compel discovery and for increased

pendente lite alimony. The parties agreed that if the trial court granted the former husband's motion to enforce the settlement agreement, then the former wife's motions would both become moot, as the case would be resolved. Following the hearing, the trial court entered a judgment on August 12, 2009, enforcing the settlement agreement and divorcing the parties. The trial court determined in its judgment that the former wife had failed to cooperate with the former husband's efforts to discharge the tax lien; therefore, the former wife had been at fault for the former husband's failure to discharge the tax lien. As a result, the trial court determined that, even though the former wife had lost the benefit she was to receive under the settlement agreement, the former wife could not use the former husband's failure to discharge the tax lien to prevent the enforcement of the settlement agreement. The former wife subsequently filed a postjudgment motion, pursuant to Rule 59(e), Ala. R. Civ. P. The trial court denied the former wife's postjudgment motion, and the former wife appealed to this court.

Analysis

The former wife first argues that the trial court erred

when it enforced the settlement agreement because, she argues, the enforcement of the settlement agreement was contingent upon the former husband's discharge of the tax lien on the parties' Ono Island home. The settlement agreement provided that "[t]he parties stipulate and agree that this settlement agreement is primarily based upon the discharge of the IRS lien against the Ono [Island] property. If said discharge is not accomplished the parties are not bound by the terms of this agreement." However, the trial court did not determine that the discharge of the tax lien was not a condition precedent to the enforcement of the settlement agreement. Instead, in the trial court's August 19, 2009, judgment, the trial court determined that the former husband had met his obligation to discharge the tax lien by arranging to refinance the Ono Island home and to then satisfy the tax lien with the proceeds. The trial court further determined that the former wife refused to cooperate with the former husband's attempt to discharge the tax lien. The trial court then stated:

> "The Court is of the opinion that a party to a settlement agreement cannot evade the terms of the settlement agreement by refusing to cooperate in accomplishing the terms of the settlement. While [the former wife] may have lost the benefit of the bargain, she did so by her own actions and not

through any fault of [the former husband]."

Thus, even assuming that the former wife is correct that the discharge of the tax lien is a condition precedent to the enforcement of the settlement agreement, to prevail on appeal the former wife would still need to challenge either the trial court's conclusion that the wife was responsible for the non-occurrence of the condition precedent or the trial court's conclusion that the former wife's responsibility for the non-occurrence of the condition precedent precluded her from preventing the enforcement of the settlement agreement.

The former wife does not make any argument concerning the correctness of the trial court's legal conclusion that the former wife's fault for the nonoccurrence of the condition precedent precluded her from preventing the enforcement of the settlement agreement. "'An argument not made on appeal is abandoned or waived.'" Muhammad v. Ford, 986 So. 2d 1158, 1165 (Ala. 2007)(quoting Avis Rent A Car Sys., Inc. v. Heilman, 876 So. 2d 1111, 1124 n.8 (Ala. 2003)). Because the former wife has waived any legal argument on this issue, we need not further consider this issue.

The only challenge the former wife makes to the trial

court's factual finding that the former wife was at fault for the former husband's failure to discharge the tax lien is a statement, without the support of any authority, that the settlement agreement did not require her to refinance the Ono Island home or to sign a mortgage. Because the wife's argument is not supported by relevant authority, it does not meet the requirements of Rule 28(a)(10), Ala. R. App. P.

> "Inapplicable general propositions are not supporting authority, and an appellate court has no duty to perform a litigant's legal research. Legal Systems, Inc. v. Hoover, 619 So. 2d 930 (Ala. Civ. App. 1993); Lockett v. A.L. Sandlin Lumber Co., 588 So. 2d 889 (Ala. Civ. App. 1991); and Moats v. Moats, 585 So. 2d 1386 (Ala. Civ. App. 1991). Similarly, appellate courts do not, 'based on undelineated propositions, create legal arguments for the appellant.' McLemore v. Fleming, 604 So. 2d 353, 353 (Ala. 1992). This court will address only those issues properly presented and for which supporting authority has been cited. Simonton v. Carroll, 512 So. 2d 1384 (Ala. Civ. App. 1987)."

Asam v. Devereaux, 686 So. 2d 1222, 1224 (Ala. Civ. App. 1996). Moreover, "[w]hen an appellant fails to properly argue an issue, that issue is waived and will not be considered." Asam, 686 So. 2d at 1224.

However, even if an appellant fails to comply with Rule 28(a)(10), this court may consider an argument if we can adequately discern the issue presented on appeal. Thoman

Eng'rs, Inc. v. McDonald, 57 Ala. App. 287, 290, 328 So. 2d 293, 295 (Civ. App. 1976) (explaining that, even when an appellant fails to comply with Rule 28(a)(10), an appellate court may consider an argument when the argument "has been raised in a manner which is fair to all concerned"). Because we can adequately discern the bases for the former wife's arguments challenging the factual findings in the trial court's judgment, we will consider the merits of those arguments on appeal.

The first of the former wife's arguments challenging the trial court's factual findings is her argument that the trial court incorrectly determined that she had failed to cooperate with a 2003 attempt to refinance the Ono Island home. Although there was an unsuccessful attempt to refinance the Ono Island home in 2003, it is clear from the testimony at the August 2009 hearing that the failed attempt at refinancing the Ono Island home at issue at the hearing, and referenced in the trial court's judgment, occurred in 2004, not December 2003. Therefore, this argument does not properly challenge any of the factual findings in the trial court's judgment and it cannot form the basis for this court to reverse the trial

court.

The wife's next argument challenging the trial court's factual findings is that "[the former husband] was not required to refinance the Ono [Island] home in the settlement agreement. [The former wife] was not required to sign any mortgage in the settlement agreement, and for this reason there is no mention of this requirement in the settlement agreement at all." It appears that the former wife is arguing that because the 2004 settlement agreement did not explicitly require the refinancing of the Ono Island home and because the terms of the 2004 settlement agreement were unambiguous, the parties could not present testimony regarding any oral agreement to alter its terms, because consideration of any such testimony by the trial court would violate the parol evidence rule. See Prattville Mem'l Chapel v. Parker, 10 So. 3d 546, 561 (Ala. 2008) (stating that "once contracts have been reduced to a writing and the parties have acknowledged that the writing represents the complete agreement between them, parol evidence of the negotiations will not be admitted to alter or contradict the writing").

> "However, in Alabama, parties 'may try their case on evidence that would otherwise be inadmissible upon

> proper objection and ... where evidence violative of the parol evidence rule is admitted without objection, it may be considered and allowed such force and effect as its weight entitles it in construing the agreement of the parties.'"

Parker, 10 So. 3d at 561 (quoting Alfa Mut. Ins. Co. v. Northington, 561 So. 2d 1041, 1044 (Ala. 1990)).

At the hearing, Shields testified that the parties had agreed to refinance the debt associated with the Ono Island home in order to resolve the tax lien, that the former husband had arranged for the refinancing of the debt associated with the Ono Island home, and that the former husband would have been solely responsible for the payment of the resulting mortgage. Shields and the former wife testified that the former wife had refused to complete the closing for the refinancing of the debt associated with the Ono Island home.

Because the former wife did not object to Shields's testimony based on the parol evidence rule, she has waived that argument on appeal, and the trial court properly could have considered Shield's testimony concerning the parties' agreement to discharge the tax lien. Id. This testimony supports the trial court's determination that the former wife thwarted the former husband's attempt to refinance the debt

associated with the Ono Island home and, thus, prevented the discharge of the tax lien. Because the former wife did not raise an objection to Shield's testimony based on the parol evidence rule and because that testimony supports the trial court's determination that the former wife had been responsible for the failure of the former husband's attempt to discharge the tax lien, we cannot agree that the trial court's determination on that issue was plainly and palpably wrong.

The former wife next argues that the settlement agreement was procured through fraud. In support of her argument, the former wife alleges that her own attorney misled her regarding whether she could remain the beneficiary of a life-insurance policy or whether the beneficiary of the life-insurance policy had to be changed to the children. An action for fraud is cognizable when there are "[m]isrepresentations 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 ...." Ala. Code 1975, § 6-5-101. There is nothing in the record to suggest that the former wife raised this issue before the trial court, either in her pleadings, at trial, or

in a postjudgment motion. It is well settled that "'[t]his Court cannot consider arguments advanced for the purpose of reversing the judgment of a trial court when those arguments were never presented to the trial court for consideration or were raised for the first time on appeal.'" Halford v. Alamo Rent-A-Car, LLC, 921 So. 2d 409, 416 (Ala. 2005) (quoting State Farm Mut. Auto. Ins. Co. v. Motley, 909 So. 2d 806, 821 (Ala. 2005), quoting in turn Crutcher v. Wendy's of N. Alabama, Inc., 857 So. 2d 82, 97 (Ala. 2003)). Because the former wife failed to raise the issue of fraud before the trial court, she has not preserved this issue for our review.

The former wife further argues that the trial court erred when it failed to award her periodic alimony and when it failed to reserve the right to award periodic alimony in the future. However, as with her fraud argument, the former wife failed to raise this argument before the trial court or in her postjudgment motion.[1] Thus, the former wife's argument is not preserved for appellate review, and we need not further consider this issue. See Halford, supra.

[1]In her motion for increased support, the former wife asked only for an increase in pendente lite support.

The former wife next makes a general argument that the trial court should have granted the divorce on fault grounds instead of on the ground of incompatibility of the parties. The former wife argues that because of the former husband's alleged actions, she should have received some form of spousal support or she should have received a more favorable settlement. The former wife's argument on this issue is not supported by any authority; therefore, it does not meet the requirements of Rule 28(a)(10), and we need not further consider it. See Asam, supra.

The former wife further argues that the trial court erred because neither the settlement agreement nor the judgment contains a provision addressing the former husband's unpaid child support. The settlement agreement provides that the parties shall have joint legal and physical custody of the children and that neither party is to pay child support. The settlement agreement further states that the children may choose with which party they wish to live and that the children may determine how long they wish to live with either party. In addition, the record does not reflect the existence of any order requiring the former husband to pay child

support. Because there is no evidence indicating that the former husband had ever been subject to a requirement to pay child support, we find no error on the part of the trial court for its failure to address past-due child support.

Finally, the former wife argues that the trial court erred in denying her various motions for an attorney fee.

> "Whether to award an attorney fee in a domestic relations case is within the sound discretion of the trial court and, absent an abuse of that discretion, its ruling on that question will not be reversed. Thompson v. Thompson, 650 So. 2d 928 (Ala. Civ. App. 1994). 'Factors to be considered by the trial court when awarding such fees include the financial circumstances of the parties, the parties' conduct, the results of the litigation, and, where appropriate, the trial court's knowledge and experience as to the value of the services performed by the attorney.' Figures v. Figures, 624 So. 2d 188, 191 (Ala. Civ. App. 1993)."

Glover v. Glover, 678 So. 2d 174, 176 (Ala. Civ. App. 1996). The former wife's argument concerning the award of an attorney fee consists only of a statement of the above general proposition of law and a statement that "the factors to be considered by the trial court have been covered extensively in this brief." Such an argument is not sufficient to invoke this court's review.

> "Rule 28(a)(10) requires that arguments in briefs contain discussions of facts and relevant

> legal authorities that support the party's position. If they do not, the arguments are waived. Moore v. Prudential Residential Servs. Ltd. P'ship, 849 So. 2d 914, 923 (Ala. 2002); Arrington v. Mathis, 929 So. 2d 468, 470 n. 2 (Ala. Civ. App. 2005); Hamm v. State, 913 So. 2d 460, 486 (Ala. Crim. App. 2002). 'This is so, because "'it is not the function of this Court to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument.'"' Jimmy Day Plumbing & Heating, Inc. v. Smith, 964 So. 2d 1, 9 (Ala. 2007) (quoting Butler v. Town of Argo, 871 So. 2d 1, 20 (Ala. 2003), quoting in turn Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994))."

White Sands Group, L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1058 (Ala. 2008). Therefore, we need not further consider the former wife's argument on this issue.

Conclusion

Because the former wife's arguments are either waived, not preserved for our review, or are not supported by relevant authority, we affirm the judgment of the trial court.

AFFIRMED.

Pittman, J., concurs.

Thompson, P.J., and Bryan, J., concur in the result, without writings.

Moore, J., concurs in the result, with writing.

MOORE, Judge, concurring in the result.

I reluctantly concur in the result.

The trial court entered a judgment enforcing a settlement agreement that had been reached between the parties on October 26, 2004 ("the 2004 agreement"). That agreement provided, in pertinent part:

> "For property settlement: The wife shall have all right, title, and interest in the [Ono Island property] and husband waives all claims to the same.
>
> "Wife shall refinance [the Ono Island property] in her separate name within 90 days of discharge of the IRS lien that is currently on the property and shall indemnify and hold harmless husband from the mortgage debt thereon.
>
> "Husband shall have all right, title, and interest in the property located at 260 North Joachim, J-o-a-c-h-i-m. Street in Mobile, Alabama and shall indemnify and hold harmless the wife from any indebtedness on the same.
>
> "The parties recognize that the IRS currently maintains a lien on the Ono [Island property] for unpaid withholding taxes incurred solely by the husband and/or husband's business activities. The wife will seek a discharge of the lien with the IRS at the wife's cost of processing this discharge. Husband shall cooperate in all respects with wife's efforts in accomplishing this discharge.
>
> "The husband agrees to be solely responsible for any and all indebtedness to the IRS and agrees to indemnify and hold wife harmless from the same. ...
>
> "....

> "Alimony: Husband and wife waive all claims of periodic alimony in gross [sic] that they have, that they may have against the other.
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> "....
>
> "Retirement: Parties waive all claims to the other parties retirement and pension accounts and they shall be their respective party's property.
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> "....
>
> "The parties stipulate and agree that this settlement agreement is primarily based upon the discharge of the IRS lien against the Ono [Island] property. If said discharge is not accomplished the parties are not bound by the terms of this agreement."

As the terms of the 2004 agreement make plain, the provisions relating to property division and alimony, among other things, depended on the satisfaction of a condition precedent -- the discharge of the IRS tax lien against the Ono Island property. It is undisputed that the IRS tax lien was never discharged and, in fact, that the IRS had foreclosed on the tax lien against the Ono Island property. However, the trial court concluded, as a matter of fact, that the failure to discharge the tax lien resulted from the wife's misconduct in refusing to cooperate with the husband's efforts to mortgage the Ono Island property in order to pay the IRS tax lien and that, as a matter of law, that misconduct by the wife

preventing the satisfaction of the condition precedent essentially estopped the wife from complaining of that failure.

The main opinion correctly concludes that the wife has not challenged the legal conclusion reached by the trial court, thereby waiving any right to reversal on that ground. ___ So. 3d at ___. The wife instead only attacks the sufficiency of the evidence supporting the trial court's factual conclusion, pointing out that the unambiguous terms of the 2004 agreement did not require her to cooperate with the husband's efforts to mortgage the Ono Island property and that her husband's former attorney's testimony to the contrary violates the parol evidence rule. The main opinion affirms the judgment on the ground that the testimony of the husband's former attorney supports the trial court's interpretation of the 2004 agreement and that the wife waived any argument based on a violation of the parol evidence rule by failing to object to that testimony. ___ So. 3d at ___. I must agree that the main opinion has properly applied current Alabama law, but I believe that current Alabama law regarding the effect of the failure to object to parol evidence should be reconsidered.

The wife correctly argues that the terms of the 2004 agreement do not require her to permit the husband to mortgage the Ono Island property for any reason, including obtaining funds necessary to satisfy the IRS tax lien. In fact, the terms of the 2004 agreement contradict any implication that the husband could mortgage the Ono Island property to gain a discharge of the IRS tax lien. The 2004 agreement calls for the husband to indemnify and hold the wife harmless from the IRS tax lien, and, upon the lien's discharge, the agreement calls for the wife to indemnify and hold the husband harmless from any mortgage on the Ono Island property. If the husband had achieved his goal of mortgaging the Ono Island property, the wife ultimately would have had to pay the mortgage in order to perform her contractual obligations, but such responsibility would have violated the husband's contractual obligation to hold the wife harmless for the IRS tax lien. The wife thus argues that her refusal to participate in the closing of the attempted mortgage cannot be considered misconduct that prevented the satisfaction of the condition precedent.

Nevertheless, the wife allowed the husband's former

attorney, Richard Shields, to testify, without objection, that the parties did agree to refinance the Ono Island property in order to satisfy the IRS tax lien and that the husband would have been solely responsible for that mortgage. The trial court evidently agreed with that testimony when it concluded that the husband had performed his part of the bargain under the 2004 agreement. The trial court therefore inferred that the wife had acted unreasonably in failing to cooperate with the husband's efforts to mortgage the Ono Island property.

On appeal, the wife correctly points out that Shields's testimony violates the parol evidence rule. Under that rule, in the absence of some ambiguity, oral testimony generally will not be received to explain, contradict, vary, add to, or subtract from the express terms of a written contract. See Lake Martin/Alabama Power Licensee Ass'n v. Alabama Power Co., 601 So. 2d 942 (Ala. 1992). In this case, the 2004 agreement was read into the record by the wife's attorney and both parties then confirmed their agreement to the trial court. At that point, the 2004 agreement became as enforceable as any written agreement. See Ezell v. Childs, 497 So. 2d 496, 498 (Ala. Civ. App. 1985) ("In Alabama oral agreements entered in

open court are as binding as written ones."). As such, parol evidence could not be used to vary its terms.

However, current Alabama law also holds that, when a party allows the introduction of parol evidence contradicting the terms of a written agreement, the evidence may be considered and allowed such force and effect as its weight entitles in construing the agreement of the parties. Alfa Mut. Ins. Co. v. Northington, 561 So. 2d 1041 (Ala. 1990). On appeal, the court will consider that a party, by failing to object to the introduction of parol evidence, has waived any argument as to its use in determining the meaning of the agreement. Id. In other words, present Alabama law holds that by failing to object to parol evidence, a party may not thereafter complain that the fact-finder found a contract in accord with the parol evidence even if that parol evidence is totally contrary to the terms of the written agreement.

I believe the foregoing rules are premised on a misunderstanding of the parol evidence rule.

> "The parol evidence rule does not exclude certain evidence because, for one reason or another, it is untrustworthy or undesirable as a means of evidencing a fact sought to be proved. The rule simply states that certain evidence is legally ineffective. See Hibbett Sporting Goods, Inc. v.

Biernbaum, 375 So. 2d 431 (Ala. 1979)."

Dixon v. SouthTrust Bank of Dothan, 574 So. 2d 706, 713 n.5 (Ala. 1990) (Houston, J., dissenting). In Southern Guaranty Insurance Co. v. Rhodes, 46 Ala. App. 454, 459, 243 So. 2d 717, 721 (Civ. App. 1971), the court stated:

> "In Section 2400(1)[, Wigmore on Evidence, 3d ed., Vol. 9,] Dean Wigmore says as follows:
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> > "'... The rule is in no sense a rule of evidence, but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process, -- the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of fact are legally ineffective as substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. But this prohibition of proving it is merely the dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all, the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to "prove" it or "give evidence" of it; otherwise, any rule of law whatever might be reduced to a rule of evidence; ...'"

As a rule of substantive law, the parol evidence rule declares all oral testimony contradicting the terms of a written

agreement to be ineffective regardless of any attempt by a party to introduce such testimony and regardless of any failure by the opposing party to object to that attempt.

In Moody v. McCown, 39 Ala. 586 (1865), our supreme court, in discussing the effect of parol evidence admitted without objection, said:

> "That this parol testimony was not objected to in the court below, or that no motion was made by the defendant to draw from the court an instruction against its being taken into consideration by the jury, will not, as we conceive, vary the case. The rule of law is, that the best evidence the case admits of must be produced. If either party offers to produce secondary evidence of the contents of a deed or other writing, and the opposing party does not object, the latter party waives his right, and the court may receive the secondary evidence. But this rule does not apply, where the parol evidence is not merely a secondary or inferior kind of evidence of the same facts, but is an inferior species of evidence, which conflicts with, and seeks to overthrow, that which is of a higher degree. This is against law; the silence of the opposing party does not cure its illegality, and the court is bound, mero motu, to treat it as having no validity, and to instruct the jury accordingly, if the nature of the case and the rights of the other party so require. There are cases, in which the rule requiring the best evidence may be relaxed; but evidence which is positively illegal, can never be received; and such is the character of parol evidence going to contradict or vary a written instrument. The court has no power to permit a deed or other writing, the foundation of a right or suit, to be annulled or weakened in that way. Even if the parties consented that the parol evidence should be

> heard, the rule of interpretation would be the same, because the principle is, that parol evidence shall not be received to alter or contradict a written instrument. ..."

39 Ala. at 594-95 (emphasis added). The supreme court recognized in Moody that parties cannot change a rule of substantive law by their conduct at trial.

Over the years since was Moody decided, our appellate courts have consistently issued opinions contradicting the holding in Moody so that the decision now must be considered to have been implicitly overruled. See, e.g., State ex rel. Elmore v. Leveson, 207 Ala. 638, 93 So. 608 (1922); Vinyard v. Duck, 278 Ala. 687, 180 So. 2d 522 (1965); Mersereau v. Whitesburg Ctr., Inc., 47 Ala. App. 146, 251 So. 2d 765 (Civ. App. 1971). However, the logic employed in Moody has never been challenged in any reported case. It appears that the appellate courts of this state simply adopted a contrary rule without any real analysis or explanation of why parol evidence should be treated as simply another form of proof that may be considered in the absence of a proper objection.

The rule now persisting in Alabama was once followed in the majority of jurisdictions, see Gary D. Spivey, Annotation, Modern Status of Rules Governing Legal Effect of Failure to

Object to Admission of Extrinsic Evidence Violative of Parol Evidence Rule, 81 A.L.R. 3d 249 (1977); however, the "new rule" now prevailing in this country holds, consistent with Moody, that parol evidence cannot vary the terms of a written instrument even if the evidence is admitted without objection, and that a party may raise for the first time on appeal an error by the trial court in relying on such oral testimony when considering the meaning of a written instrument. See Gajewski v. Bratcher, 221 N.W.2d 614 (N.D. 1974). In Bratcher, the North Dakota Supreme Court stated:

> "Our research reveals that there is a sharp conflict and substantial difference in the judicial decisions upon the question of the legal effect of the admission, without proper and timely objection, of oral or intrinsic evidence, incompetent and inadmissible under the parol evidence rule.
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> "One line of authority, characterized as the 'old rule,' holds that, unless proper and timely objection is made to the incompetency or inadmissibility of intrinsic evidence in violation of the parol evidence rule, such error cannot be assigned or raised for the first time upon appeal.
>
> "....
>
> "The other line of authority, referred to as the 'new rule' established by the 'modern trend' of judicial decisions, holds, in effect, that since parol evidence is not a rule of evidence but of substantive law, the failure to make proper and timely objection to the admissibility of oral or

intrinsic evidence does not render such evidence competent or admissible or entitle it to any probative force or value, and imposes a duty upon the appellate courts to disregard and to exclude such evidence from its consideration in the rendition of its decision in the absence of a claim or proof of fraud, mistake or accident. 32A C.J.S. Evidence § 851, p. 219; 30 Am. Jur. 2d, Evidence, §§ 1017 and 1022; 88 C.J.S. Trial § 154, p. 301; Williston on Contracts (3d ed.) § 631; and 5 Am. Jur. 2d, Appeal and Error, § 737.

"We believe it to be appropriate and advisable to quote from some of the decisions to establish the rule recognized and approved by the 'modern trend' of judicial authority.

"(1) 'Parol evidence, though admitted without objection, must be ignored as of no legal import, and its incompetency to vary a written contract is a matter of law.' Pinsky v. Sloat, 130 Cal. App. 2d 579, 279 P.2d 584, 590 (1955). Smith v. Bear, 237 F.2d 79 (2d Cir. 1956).

"(2) 'The parol-evidence rule is not so much the rule of evidence as the rule of substantive law and requires the court to disregard such evidence even if it gets into the record without objection.' Conrad Milwaukee Corporation v. Wasilewski, 30 Wis. 2d 481, 141 N.W.2d 240, 244 (1966).

"(3) 'Since the parol evidence rule is a rule of substantive law as well as a rule of evidence (citations omitted) we conclude that the parol evidence in this case must be ignored as having no probative value even though it was admitted without objection.' Thornton Construction Co. v. Mackinac Aggregates Corp., 9 Mich. App. 467, 157 N.W.2d 456, 458 (1968).

"(4) 'The parol evidence rule is not a rule of evidence, but is a rule of positive or substantive

law founded upon the substantive rights of the parties. (Citations omitted.) Admission of testimony in violation of the parol evidence rule does not make the testimony competent, whether it is admitted without, or over, objection. Such evidence will be disregarded even though no objection is made thereto. (Citations omitted.) ... and an appellate court cannot consider such evidence or give it any weight.' Farmers State Bank v. Keiser, 83 S.D. 354, 159 N.W.2d 388, 390 (1968).

"We find that, in addition to the decisions of the Supreme Courts of the states of California, Michigan, Wisconsin, and South Dakota, from which we quoted herein, there are another fourteen states that have recognized and approved the so-called modern rule. They are: Carey v. Shellburne, burne, Inc., Del., 43 Del. Ch. 292, 224 A.2d 400 (1966); Waters v. Lanier, 116 Ga. App. 471, 157 S.E.2d 796 (1967); Williams v. Williams, 251 Iowa 260, 100 N.W.2d 185 (1959); O'Bryan v. Massey-Ferguson, Inc., 413 S.W.2d 891 (Ky. 1966); Burrowes Corporation v. Read, 151 Me. 92, 116 A.2d 127 (1955); Sherman v. Koufman, 349 Mass. 606, 211 N.E.2d 220 (1965); Melton v. Ensley, 421 S.W.2d 44 (Mo. App. 1967); Fry v. Ashley, 228 Or. 61, 363 P.2d 555 (1961); Philip Carey Mfg. Co. v. General Products Co., 89 R.I. 136, 151 A.2d 487 (1959); Adams v. Marchbanks, 253 S.C. 280, 170 S.E.2d 214 (1969); Aetna Casualty & Surety Company v. Watson, 476 S.W.2d 868 (Tex. Civ. App. 1972); Zehler v. E.L. Bruce Co., 208 Va. 796, 160 S.E.2d 786 (1968); Fleetham v. Schneekloth, 52 Wash. 2d 176, 324 P.2d 429 (1958); North American Uranium, Inc. v. Johnston, 77 Wyo. 332, 316 P.2d 325 (1957).

"We are convinced that the rule established by the modern trend of judicial authority is sound, reasonable and just....

"....

"Considering these principles of law and rules

of evidence, we conclude that the mere failure by the plaintiffs to object to the admission of intrinsic evidence that is incompetent under the parol evidence rule does not constitute the relinquishment of a known right or privilege by them. We think that the crucial question presented for decision is whether a substantial breach of the material terms and conditions of a written contract by a party thereto is prohibited by and against the public policy expressed in our statute.

"We are convinced that the trial court erred in considering the evidence that was received in violation of the parol evidence rule and in the entry of an order directing the dismissal of plaintiffs' action with prejudice for two sound and practical reasons:

"First, because the mere failure of the plaintiffs to object to the admission of intrinsic evidence cannot render competent or admissible, or impart any probative value, to evidence which was incompetent and inadmissible in the first instance under the parol evidence rule embodied in and expressly prohibited by our statute, in the absence of any claim of fraud, mistake or accident; and

"Second, because it is our plain duty to interpret the quitclaim deed involved herein in the light of the law in existence at the time of its execution and delivery, which must be read into and become an enforceable part thereof, and when so interpreted we find and determine that the parties thereto agreed:

"(1) That their written contract expressed their true intention;

"(2) That they would not adduce or rely upon extrinsic evidence to vary, contradict or impeach it, and having so agreed, they are bound thereby and cannot be permitted to repudiate or violate the

material terms and conditions thereof.

> "Manifestly, to permit either of the parties to breach or to dishonor their written agreement would not only destroy the value of written contracts, but seriously undermine and impair the stability and security of titles to real property, evidenced by written instruments, and thereby defeat the very purpose of the parol evidence rule, nullify the legislative enactment thereof, and induce the commission of perjury. 92 A.L.R., p. 812.
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> "For these reasons, we approve the rule established by the modern trend of judicial authority as an exception to the general rule that error in the admission of incompetent evidence must first be raised in and decided by the trial court before it can be assigned as prejudicial error upon appeal.
>
> "Consequently, we find and determine that we not only have the legal right, but the explicit duty, to disregard and to exclude from our consideration in the rendition of our decision all of the oral or intrinsic evidence, admitted without objection, in violation of the parol evidence rule."

221 N.W.2d at 629-32. Accord Barber v McCord Auto Supply, Inc. (In re Pearson Indus., Inc.), 147 B.R. 914 (Bankr. C.D. Ill. 1992); Tri-Cities Forklift Co. v Conasauga River Lumber Co., 700 S.W.2d 548 (Tenn. Ct. App. 1985); and Baroid Equip., Inc. v. Odeco Drilling, Inc., 184 S.W.3d 1 (Tex. App.-Houston [1st Dist.] 2005).

This case illustrates the inherent injustice in allowing a technical rule of procedural law to overcome the substantive

rights of the parties. By determining that the wife has waived any argument as to the sufficiency of the parol evidence upon which the trial court relied in construing the 2004 agreement, this court is allowing the 2004 agreement to be interpreted in a manner totally contrary to its plain and unambiguous terms. Despite Alabama law that parol evidence is ineffective to vary the terms of a written agreement, this court is affirming a judgment based exclusively on the testimony of an advocate for the husband, which testimony absolutely contradicts the terms of the 2004 agreement. Basically, this court is allowing a trial court to disregard the terms of a written agreement because a former attorney for one of the parties testified that it means something different than what it actually says. The trial court did not enforce the 2004 agreement; it enforced a totally different agreement proven solely by the words of former counsel for the husband. As a result, the wife lost, among other things, her right to contest the grounds for divorce, her right to an equitable division of property, and her right to alimony. The better-reasoned rule would have required this court to disregard the parol evidence, which would have mandated a reversal of the

trial court's judgment and would have allowed the divorce of the parties to be decided based on actual evidence.

Because I am constrained by the decisions of our supreme court, I must agree that the main opinion correctly disposes of the wife's argument regarding the sufficiency of the evidence by holding that the factual findings of the trial court are supported by the testimony of the husband's former attorney. However, I urge the supreme court to reconsider its position and to adopt the "new rule," which requires appellate courts to apply the substantive law that parol evidence cannot be considered to the extent it contradicts the terms of a written instrument even if the appealing party fails to object to the introduction of such evidence.