REL: March 26, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190687

Cobbs, Allen & Hall, Inc., and CAH Holdings, Inc.

v.

EPIC Holdings, Inc., and Crawford E. McInnis

Appeal from Jefferson Circuit Court
(CV-14-904935)

MENDHEIM, Justice.

Cobbs, Allen & Hall, Inc. ("Cobbs Allen"), and CAH Holdings, Inc. ("CAH Holdings") (Cobbs Allen and CAH Holdings are referred to

collectively as "CAH"), appeal from a summary judgment entered against them and in favor of EPIC Holdings, Inc. ("EPIC"), and EPIC employee Crawford E. McInnis, with respect to CAH's claims of breach of contract and tortious interference with a prospective employment relationship. We affirm in part, reverse in part, and remand.

I. Facts

This is the second time these parties have been before us. In Cobbs, Allen & Hall, Inc. v. Epic Holdings, Inc., 224 So. 3d 157 (Ala. 2015), this Court affirmed, without an opinion, the Jefferson Circuit Court's denial of a preliminary injunction sought by CAH against EPIC, McInnis, and other defendants not relevant to the present action. Because the present action stems from a settlement agreement reached by the parties in that original action, it is necessary to briefly relate some of the facts underlying the original action.

Cobbs Allen is an Alabama corporation with its principal place of business in Jefferson County. CAH Holdings, a Delaware corporation, is the parent corporation of Cobbs Allen. Cobbs Allen is a regional insurance and risk-management firm specializing in traditional commercial

insurance, surety services, employee-benefits services, personal-insurance services, and alternative-risk financing services. It is undisputed that CAH Holdings is a family-run business: Bruce Denson, Sr., is the chairman of the board, Grantland Rice III is the chief executive officer, Grantland Rice IV is the chief operating officer, and Bruce Denson, Jr., is the president. The Rices and the Densons control the majority, but, importantly for this case, less than 75 percent, of the stock in CAH Holdings. Employees who are "producers" for CAH have the opportunity to own stock in CAH Holdings, provided they meet certain sales thresholds, known as a "validation" number." In the insurance-brokerage business, a producer sells insurance products and acquires new business. For CAH Holdings, the equity arrangement in the company is dictated by the "Restated Restrictive Stock Transfer Agreement" ("the RSTA").

For several years, McInnis and other individuals who ended up being defendants in the first action were producers for CAH, and McInnis was also a shareholder in CAH Holdings. In the fall of 2014, a dispute arose between CAH and McInnis and those other producers concerning the management of CAH. That disagreement led McInnis and other CAH

producers to have contact with EPIC, a competitor of CAH.[1] CAH alleged that McInnis and the other producers had violated restrictive covenants in their employment agreements with the aim of helping EPIC. Because of the dispute, CAH fired McInnis, allegedly "for cause," and in November 2014 McInnis went to work for EPIC, becoming the local branch manager at EPIC's Birmingham office.

In December 2014, CAH commenced an action against EPIC, McInnis, and other defendants, alleging that McInnis and other former employees had breached restrictive covenants in their employment agreements and that EPIC had aided and abetted those breaches. CAH sought preliminary and permanent injunctive relief prohibiting McInnis and the other former employees from further breaching those covenants. McInnis and the other former employees filed a counterclaim against CAH alleging, among other things, breach of contract and wrongful termination. The circuit court denied CAH's request for a preliminary

[1]EPIC is a Delaware corporation with its principal place of business in California.

injunction, and in the first appeal this Court affirmed the circuit court's judgment.

In January 2018, on the eve of trial, the parties reached a "Settlement Agreement and Mutual Release" concerning all claims they had asserted against one another ("the settlement agreement"). The settlement agreement provided that the circuit court would retain jurisdiction "for the resolution of any disputes that arise related to the [settlement agreement]." Additionally, paragraph 11 of the settlement agreement provided:

> "11. The Parties will take reasonable efforts to instruct their officers, directors, shareholders, accountants, financial advisors, and attorneys not to disparage any other party. The statement: 'The Parties were able to reach a mutually agreeable business resolution' is not disparagement under this provision. The terms of this non-disparagement provision apply, without limitation, to any generalized comments about fee resolution of this case to any trial reporting services."

(Emphasis added.) As a party to the settlement agreement, McInnis read the settlement agreement before signing it. According to McInnis, before executing the settlement agreement, Dan Crawford, EPIC's executive vice

president and general counsel, discussed the settlement agreement with him:

> "A. Okay. [Dan Crawford] told us that we had to follow what the agreement said, and there were a couple of different provisions in there, one being the do not disparage provision that were highlighted to us. That provision along with the particular clients that we were not supposed to solicit business from for a period of time. Those were the two main ones.
>
> "[Counsel for CAH:] Did Mr. Crawford tell you that you were not to disparage anyone at Cobbs, Allen & Hall?
>
> "A. He did.
>
> "Q. Okay."

Crawford testified that, a month after the settlement agreement was executed, EPIC held an executive-committee meeting in California at which Crawford told EPIC's senior corporate management about the settlement agreement:

> "[Counsel for CAH:] And what did you tell them?
>
> "A. I told them -- I went further than what Paragraph 11 said, and I said to everybody in the room that, 'The Cobbs Allen settlement -- the Cobbs Allen case in Birmingham has been resolved. It's the subject of a confidential Settlement Agreement, and that no one at the company should talk about the terms of the Settlement Agreement.' I went further, even though there's no requirement to do so, and said, 'I don't want

> anybody talking about the facts and circumstances and the evidence of the litigation.' And I said, 'If you are contacted by anybody to talk about this, you should either direct those people to me or respond with the agreed statement in the Settlement Agreement.' "

In June 2018, CAH began negotiating with Michael Mercer, an account executive in the Houston, Texas, office of Lockton Insurance Brokers ("Lockton"), in an attempt to have Mercer come work as a producer at Cobbs Allen's Houston office. As an account executive, Mercer's responsibilities for Lockton focused on handling existing client needs and maintaining client relationships. CAH's offer to become a producer was appealing to Mercer because of the potential for an increased salary and benefits, including the opportunity to become a stockholder in CAH Holdings, something that was not possible for Mercer at Lockton. Mercer orally accepted a job offer from CAH extended to him on July 22, 2018, and he tendered his resignation from employment to Lockton. Lockton then made a series of counteroffers to Mercer in an effort to keep him from leaving Lockton for CAH. CAH, in turn, increased its offers to Mercer each time Lockton offered more compensation to Mercer for staying with Lockton. On July 29, 2018, Mercer orally

reaffirmed his commitment to take CAH's job offer. Despite doing so, Mercer admitted in his deposition that, at the time he reaffirmed his commitment, he was still struggling with whether moving to CAH was the right decision. Mercer testified that one factor that made him have second thoughts was that CAH would require him to reach a validation number of $795,000 in annual sales -- three times his base salary -- in order to purchase equity in CAH Holdings, and he was not sure he could reach that number. On a related note, Mercer also admitted to having difficulty understanding the RSTA.

Mercer told John Stillwell, a producer at Lockton, about his difficulty in deciding what to do concerning CAH's job offer. Stillwell suggested that Mercer talk to a friend of his, McInnis, who had formerly worked for CAH. Mercer was open to talking to McInnis because, as Mercer put it: "At that point, you know, I'm willing to talk to anybody who has an -- has an opinion so I can kind of make my decision, and Stillwell recommended that I speak to Crawford [McInnis]." Mercer called McInnis twice: the first time on July 30, 2018, a conversation that lasted about 15 minutes, and the second time on July 31, 2018, a conversation

that lasted about 5 minutes. Neither Mercer nor McInnis could remember the substance of the second conversation, but in his deposition Mercer summarized what he remembered about the July 30, 2018, conversation.

> "[Counsel for EPIC:] And what did Mr. McInnis tell you that you recall?
>
> A. Uhm -- well, I'm not a finance person so I had a lot of questions about how [CAH's equity plan] worked and he articulated it well, but I still found -- you know, it was still confusing to me because it wasn't a -- you know, 'We're going to give you 5 percent of the company and that's you know, that's yours in the event that we sell the company.'
>
> "So it was -- it was kind of a confusing arrangement. I, you know, gathered from the conversation that [McInnis] had had some grievance with Cobbs [Allen] ....
>
> "....
>
> "A. Okay. Well, I'll just -- okay. So I cannot recall if [McInnis] had left the company; and when he left, there was, you know, an issue with -- with -- between the two organizations or if he was asked to leave the company and, then, there was the issue. So I can't remember what the order of that was, but I knew there was some -- you know, some frustration on his part about the way that had -- that had sort of unraveled.
>
> "Q. Okay. That is, his relationship with the Cobbs Allen?
>
> "A. Correct.

"Q. And, so, you gained that understanding during the communication you had with Crawford McInnis?

"A. That's correct.

"Q. That he'd had some, as you put it, grievance with the company?

"A. Yes.

"....

Q. All right. And as I understand it -- well, what beyond that did you gain from this conversation with Mr. McInnis, other than what you've already told us?

"A. I mean that was the extent of it. He explained objectively in his opinion how the equity structure worked.

"....

"Q. Okay. Well, just to be clear, the first conversation that you had with Mr. McInnis, the one that lasted 10 to 15 minutes, that was a conversation that had been initiated or suggested by your colleague at Lockton, Mr. John Stillwell, correct?

"A. That's correct.

"Q. And the second communication, the one that was a couple of days later that was a very short one, that's a communication that you [had] initiated with a follow-up question?

"A. Yes.

"Q. Okay. And you don't remember the details of the follow-up question at this time?

"A. No, I do not.

"Q. Did Mr. -- can you state with certainty that at any of these conversations that Mr. McInnis told you that if you griped about the management team at Cobbs Allen that you would lose your stock? Can you state that with certainty?

"A. That -- that's too much of a specific comment.

"Q. Okay. So, you cannot state that with certainty?

"A. No, I cannot.

"....

"Q. All right. So, what did you tell [Robert Plumb, a CAH employee at Cobb Allen's Houston office,] about your communication with Mr. McInnis?

"A. I explained what we talked about and, obviously, the -- the tone of the conversation was that, again, that [McInnis] had felt aggrieved about what happened with Cobbs [Allen] and made a comment that, you know, the family ultimately control, you know, everything; and there's, you know, potential question marks about how you would, you know, receive your equity in the event that that was due.

"Q. Okay. And -- but the 'family controlling everything' is something you, yourself, have noticed from -- just from the offer letters, right?

"A. Yes -- yeah.

"....

"Q. And what did you tell Mr. McInnis in this communication -- oh, correction -- what did you tell Mr. [Bruce] Denson, Jr. about your communications with Mr. McInnis?

"A. I can't remember the specifics of the conversation. You know, we -- I talked about the fact that he and I -- because I wanted to be transparent through this whole process. You know, I mentioned that we had spoken, that [McInnis] and I had talked; and he had some reservations about, you know, the equity arrangements within the company.

"Q. Okay. And what was Mr. Denson's response to that?

"A. Uhm -- he was -- he was, I suppose, frustrated that that was -- that conversation had happened and reassured me that, you know, that what they're purporting to deliver in terms of equity is what it is. ...

"....

"[Counsel for CAH:] And I'm going to quote from the complaint since you've seen it. It's Paragraph 6, the supplemental complaint. 'McInnis while acting in the scope of his employment with Epic told Mercer that CAH is a terrible place to work and that CAH is controlled by and is operated for the benefit of Grantland Rice, III, Bruce Denson, and Bruce Denson, Jr. to the detriment of CAH's other shareholders and employees. McInnis, also, told Mercer that if Mercer disagreed with the Rices or the Densons on any material matter that they would not -- that they would take his stock and not pay him for it.'

"Do you recall saying any of that to Mr. Plumb or Mr. Denson?

"A. I certainly didn't use language that was that explicit.

"....

"Q. ... I don't want you to speculate, but do you deny making those statements?

"A. I didn't -- I don't believe I made that statement.

"Q. Which one?

"A. About it being a terrible place to work.

"Q. What about the one about taking stock and not paying you for it, do you recall anything like that?

"A. Not in such an extreme fashion.

"Q. What about -- and that about Cobbs Allen being controlled by Grantland Rice, III and Bruce Denson and Bruce Denson, Jr. to the detriment of other employees and shareholders at Cobbs Allen & Hall, do you recall anything like that?

"A. I think that language is extreme. I think the tone from [McInnis] was that they -- the family does very much hold the cards and arguably could, you know, affect the arrangements if they -- when it comes to equity, if they so felt it, you know, if they wanted to."

(Emphasis added.)

For his part, McInnis testified that Stillwell had called him to ask him to speak to Mercer because

> "Mr. Mercer was looking to go to work and had some -- at Cobbs, Allen & Hall, and had some questions about Cobbs, Allen & Hall.
>
> "[Counsel for CAH:] Well, did Mr. Stillwell tell you that Lockton wanted to keep Mr. Mercer?
>
> "A. He did not.
>
> "Q. Did you get that -- did you infer that Lockton wanted to keep Mercer from the conversation [with Stillwell]?
>
> "A. I did not."

McInnis testified that he had agreed to talk to Mercer as a favor to Stillwell. McInnis testified that he did not tell anyone at EPIC he was going to talk to Mercer and that, after the conversations with Mercer, he did not tell anyone at EPIC he had talked to Mercer. It is undisputed that EPIC was unaware of McInnis's contact with Mercer until CAH commenced this action. McInnis also testified that, in their first conversation, he simply told Mercer his understanding of how CAH's employee stock plan worked. Specifically, McInnis told Mercer that, in his opinion, the only way Mercer would realize his investment of stock in

CAH Holdings was if CAH Holdings was sold or Mercer retired. After their first conversation, McInnis sent Mercer a text message telling Mercer that, under the RSTA, the repurchase of stock in retirement is done over 10 years, "and that's a long time if you are retiring and trying to get your money out." Mercer also sent McInnis an e-mail inquiry on July 31, 2018, after their second conversation, concerning the same issue of realizing his equity investment, and McInnis stated that CAH Holdings' being purchased was the most likely way for Mercer to receive a return on his stock investment but that McInnis was "not sure that will ever happen." McInnis denied that, in any of his communications with Mercer, he had disparaged CAH or had told Mercer "that the Rices and Densons always got their way."

McInnis testified that, after his communications with Mercer, he still was not sure whether Mercer understood how the RSTA worked. Mercer confirmed that this was the case, which is why, he said, he talked to some CAH employees about their understanding of the RSTA. He also asked CAH for more information about the RSTA. CAH sent Mercer a document prepared by a third-party securities attorney that summarized

the terms of the RSTA. Mercer testified that that document answered his questions about the RSTA. Mercer also testified that, in light of all the information he had gathered about CAH, he did not consider anything McInnis had told him to be false.

Bruce Denson, Jr. ("Denson"), the CAH executive who had been communicating with Mercer about coming to work for CAH, submitted an affidavit in which he related his version of what happened after Mercer talked to McInnis.

> "6. The evidence in this case shows during July 2018 that Lockton solicited defendant Crawford McInnis to speak to Mr. Mercer about Mr. McInnis's experience with CAH. The evidence shows that Mr. Mercer spoke with Mr. McInnis twice, once on July 30, 2018 and once on July 31,2018.
>
> "7. On July 31, 2018, Mr. Mercer informed me that he was not coming to work for CAH and was instead remaining at Lockton. In response to my inquiry as to his reasons for such decision, Mr. Mercer told me that he had spoken to Mr. McInnis and that Mr. McInnis had told him that CAH was a terrible place to work, that it was controlled by the Densons and the Rices, and that if anyone disagreed with the Densons or Rices, ... they would take their stock and not pay them for it. I sent an email to CAH management informing them that Mr. Mercer had talked to Mr. McInnis and that Mr. Mercer was no longer taking the job at CAH. (See Exhibit B, hereto.) Exhibit B hereto is an email that I sent describing my conversation with Mr. Mercer wherein he told me of his

> conversation with McInnis and that he was not coming to work for CAH and was instead remaining at Lockton. I prepared this email in the course of my regularly conducted business activity at the time that my conversation with Mr. Mercer concluded. It is my regular practice to send such messages regarding potential employees. It also is a statement that I made in the immediate aftermath of my conversation with Mr. Mercer.
>
> "8. I asked Mr. Mercer for an appointment to meet with him to explain the situation between Mr. McInnis and CAH. I flew to Houston a few days later and met with Mr. Mercer, [and] he reiterated the statements made to him by Mr. McInnis and reaffirmed his intention to remain at Lockton."

(Emphasis added.) Denson's affidavit also included a couple of assertions pertaining to statements Mercer had allegedly attributed to McInnis in conversations between Mercer and Denson:

> "9. The statements that Mr. Mercer told me that Mr. McInnis had made about CAH are false. CAH has never taken anyone's stock because of a disagreement with the Densons and Rices.
>
> "10. My understanding of the non-disparagement provision of the settlement agreement was that the parties were prohibited from disparaging each other."

Following all of his deliberations and inquiries, Mercer decided to stay at Lockton and not to take the job offered by CAH. In his deposition, Mercer testified about some of his reasons for staying at Lockton.

"[Counsel for EPIC:] Okay. Did that increased compensation schedule play a role in your decision to stay at Lockton?

"A. Yes.

"....

"Q. ... All righty. Mr. Mercer, other than this increase in your compensation or remuneration at Lockton, what other factors played into your remaining at Lockton?

"A. The -- I think it was, you know, the vote of confidence from the company and, then, also the fact that my -- you know, my role would change slightly, but it wouldn't be materially changed. And I think, you know, the decision to not join Cobbs [Allen] was linked to, you know, a number of things and one of which was, you know, those production targets that were required.

"Q. The production targets that were required as set forth in the offer letters, right?

"A. That's correct.

"Q. And those production targets included things like your validation level of $795,000?

"A. That's correct.

"Q. Do you consider that to be something you were concerned about?

"A. Yes.

> "Q. And what about the -- your ability to reach the floor in a renewable book of $500,000 before you would be eligible to be recommended for stock purchase?
>
> "A. Yeah, I mean less concerned by that.
>
> "Q. But the validation number was something you were concerned about?
>
> "A. Yes.
>
> "Q. What other factors played into -- if any, played into your decision to remain at Lockton?
>
> "A. I think it was more linked to the -- the fact that I wasn't really looking to leave ... Lockton in the first place and, you know, hence making it a very difficult decision.
>
> "Q. Okay. Now, Mr. --
>
> "A.. I want to rephrase that. I was -- I was never unhappy at Lockton. It wasn't that -- I want to sort of change my phrase about saying I wasn't looking to leave Lockton. I was happy at Lockton, but clearly the Cobbs Allen offer was very, very appealing.
>
> "Q. Okay. And you gave it consideration?
>
> "A. Absolutely."

(Emphasis added.)

On November 28, 2018, CAH filed a supplemental complaint against EPIC and McInnis in the Jefferson Circuit Court pursuant to that court's

retention of jurisdiction over disputes related to the settlement agreement. CAH alleged: (1) that McInnis and EPIC had breached paragraph 11 of the settlement agreement because, it said, McInnis had made disparaging comments about CAH to Mercer; (2) that McInnis had tortiously interfered with CAH's prospective employment relationship with Mercer by making disparaging comments about CAH to Mercer; (3) that EPIC was directly liable for McInnis's tortious interference; and (4) that EPIC was vicariously liable for McInnis's breach of contract and tortious interference.

Following discovery, EPIC and McInnis filed summary-judgment motions as to all the claims asserted against them. They argued (1) that paragraph 11 was not actually a nondisparagement provision but, rather, imposed only a "duty to instruct" parties to the settlement agreement and their employees not to disparage other parties; (2) that McInnis's comments about CAH to Mercer were justified because none of his comments were false; and (3) that CAH had failed to present substantial evidence demonstrating that EPIC was directly or vicariously liable for McInnis's conduct.

In its response to the summary-judgment motions, CAH contended (1) that the only reasonable construction of paragraph 11 was that it was a nondisparagement provision; (2) that CAH had submitted substantial evidence demonstrating that McInnis was not justified in making his comments about CAH to Mercer; and (3) that CAH had submitted substantial evidence demonstrating that EPIC was directly and vicariously liable for McInnis's conduct. In support of those arguments, CAH submitted the previously quoted affidavit from Denson. Subsequently, EPIC and McInnis filed a joint motion to strike paragraphs 6 through 10 of Denson's affidavit.

On January 16, 2020, the circuit court held a hearing concerning the summary-judgment motions and the motion to strike. On January 30, 2020, the circuit court entered a summary judgment in favor of EPIC and McInnis as to all claims. Specifically, the circuit court concluded (1) that paragraph 11 of the settlement agreement was a "duty-to-instruct" provision, not a nondisparagement provision, and that EPIC and McInnis had fulfilled that duty; (2) that McInnis was justified in making his comments about CAH to Mercer because his statements were true; and

(3) that CAH had failed to submit substantial evidence demonstrating EPIC's direct and vicarious liability for McInnis's conduct. In the same order, the circuit court granted the motion to strike portions of Denson's affidavit. The circuit court struck paragraphs 7, 8, and 9 of the affidavit for containing hearsay, and it struck paragraphs 6 and 10 for containing legal conclusions.

On February 28, 2020, CAH filed a postjudgment motion seeking to vacate the summary judgment, which the circuit court denied on May 28, 2020. CAH filed a timely appeal.

II. Standard of Review

> "This Court reviews a summary judgment de novo, 'apply[ing] the same standard of review as the trial court.' Slay v. Keller Indus., Inc., 823 So. 2d 623, 624 (Ala. 2001). 'In order to enter a summary judgment, the trial court must determine: 1) that there is no genuine issue of material fact, and 2) that the moving party is entitled to a judgment as a matter of law.' Williams v. Ditto, 601 So. 2d 482, 484 (Ala. 1992). This Court must view the evidence in the light most favorable to, and draw all reasonable inferences in favor of, the nonmoving party. Nationwide Prop. & Cas. Ins. Co. v. DPF Architects, P.C., 792 So. 2d 369, 372 (Ala. 2001)."

Gustin v. Vulcan Termite & Pest Control, Inc., [Ms. 1190255, Oct. 30, 2020] ___ So. 3d ___, ___ (Ala. 2020). "In reviewing a ruling on the

admissibility of evidence, ... the standard is whether the trial court exceeded its discretion in excluding the evidence." Woven Treasures, Inc. v. Hudson Capital, L.L.C., 46 So. 3d 905, 911 (Ala. 2009).

III. Analysis

The central issues in this appeal concern whether the circuit court erred in entering a summary judgment in favor of McInnis and EPIC on CAH's tortious-interference and breach-of-contract claims. In order to correctly analyze those issues, it is first necessary to evaluate the circuit court's exclusion of several paragraphs from Denson's affidavit because information in the affidavit directly bears on the evidence presented in opposition to EPIC's and McInnis's summary-judgment motions. After we address the rulings on the Denson affidavit, we will analyze the circuit court's disposition of CAH's tortious-interference claim and its breach-of-contract claim.

A. The Denson Affidavit

As we noted in the rendition of the facts, the circuit court struck paragraphs 6 and 10 of Denson's affidavit for containing legal conclusions and struck paragraphs 7, 8, and 9 for containing hearsay. CAH correctly

notes in its appellate brief that the facts conveyed in paragraph 6 -- that Mercer spoke to McInnis on July 30 and July 31, 2018 -- are not disputed by the parties and were, in fact, corroborated by Mercer and McInnis in their depositions. However, the information contained in paragraph 6 is not based on Denson's personal knowledge, so there was no error by the circuit court in striking that paragraph. See, e.g., Crawford v. Hall, 531 So. 2d 874, 875 (Ala. 1988) ("The contents of an affidavit filed in support of, or in opposition to, a motion for summary judgment must be asserted upon personal knowledge of the affiant, must set forth facts that would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters asserted. These requirements are mandatory.").

CAH concedes that paragraph 10 of Denson's affidavit "is barred by the parol evidence rule" if this Court determines that paragraph 11 of the settlement agreement is not ambiguous. In subsection C of our analysis, we conclude that paragraph 11 of the settlement agreement is not ambiguous. Therefore, the circuit court did not err in striking paragraph 10 of Denson's affidavit.

The circuit court deemed paragraphs 7, 8, and 9 of Denson's affidavit inadmissible because they were based on hearsay. The core of this ruling -- and the primary dispute between the parties regarding Denson's affidavit -- concerns the statements Denson asserted that McInnis had made to Mercer about CAH in Mercer and McInnis's telephone conversations on July 30 and July 31, 2018. Specifically, in paragraph 7 of his affidavit, Denson asserted:

> "7. On July 31, 2018, Mr. Mercer informed me that he was not coming to work for CAH and was instead remaining at Lockton. In response to my inquiry as to his reasons for such decision, Mr. Mercer told me that he had spoken to Mr. McInnis and that Mr. McInnis had told him that CAH was a terrible place to work, that it was controlled by the Densons and the Rices, and that if anyone disagreed with the Densons or Rices, ... they would take their stock and not pay them for it."

CAH contends that this portion of Denson's affidavit is not hearsay because "[CAH], of course, contends that [McInnis's] statements are false. Hence, the statements are not being offered to prove the truth of the matter asserted, only that the statements were made." CAH's brief, pp. 37-38. CAH cites for support Bryant v. Moss, 295 Ala. 339, 342, 329 So. 2d 538, 541 (1976), in which this Court stated that "[a] statement

made out of court is not hearsay if it is given in evidence for the purpose merely of proving that the statement was made, provided that purpose be otherwise relevant in the case at trial."

Rule 801(c), Ala. R. Evid., defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." It is true that CAH plainly does not agree with the statements Denson asserts that McInnis had made to Mercer about CAH. It is also true that CAH offered Denson's affidavit as evidence of what McInnis had said about CAH. Indeed, in the hearing on the summary-judgment motions, CAH's counsel confirmed to the circuit court that "we are offering [Denson's affidavit] to prove that McInnis made the statement." The problem for CAH, as EPIC and McInnis observe, is that Denson's affidavit presents double hearsay, that is, hearsay within hearsay, because it involves Mercer's relating to Denson what McInnis allegedly related to Mercer. Rule 805, Ala. R. Evid., provides that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." In other words,

"[e]ach declarant's statement, considered individually, must satisfy the hearsay concern by either qualifying under a hearsay exception or being, by definition, nonhearsay." Advisory Committee's Notes to Rule 805, Ala. R. Evid. Thus, even though McInnis's alleged statements to Mercer might qualify as nonhearsay because they are not offered for the truth of the matter asserted but, rather, to prove that McInnis made those statements to Mercer, CAH still must satisfy hearsay concerns with respect to Mercer's relating those statements to Denson. In that regard, it matters whether Mercer was truthfully conveying to Denson what McInnis said, and therefore that part of the statement is being offered for the truth of the matter asserted. The Court of Civil Appeals in Jones v. Hamilton, 53 So. 3d 134, 141 (Ala. Civ. App. 2010), explained this exact point:

> "Regarding the specific allegation that Hamilton told Channon that Jones and the companies did not properly pay taxes, we agree with Hamilton that the evidence Jones and the companies offered is hearsay. Jones testified that Edwards told him that Channon had told Edwards that Hamilton had told Channon that Jones and the companies had not paid taxes. Although a statement made by Hamilton to a witness and repeated by that same witness would not be hearsay because of the exclusion of statements made by a party-opponent from the definition of hearsay, Rule 801(d)(2), Ala. R. Evid., Jones's testimony was based on a statement

> made to him by Edwards that Channon had reported that Hamilton had made the alleged statement regarding taxes to Channon. Edwards's statement is an out-of-court statement offered to prove the truth of matter asserted -- that Hamilton made a statement regarding taxes to Channon -- and, thus, it is hearsay. Rule 801(c), Ala. R. Evid. In fact, Edwards's statement is based on an out-of-court statement by Channon, and, thus, Edwards's statement is double hearsay. Thus, we cannot conclude that Jones and the companies presented substantial evidence indicating that Hamilton breached the confidentiality agreement by making disparaging statements about Jones or the companies."

(Emphasis added.) CAH attempts to distinguish Jones on the basis that it involved "quadruple hearsay," CAH's brief, p. 38, but, regardless of the number of times a statement is purportedly repeated before it reaches the last declarant, the fact remains that in multiple-hearsay situations the party attempting to submit the statement in evidence is offering the statement for the truth of the matter asserted because whether the statement was made hinges on the truthfulness of the one relaying the statement to the last declarant. Cf. Warren v. Federal Nat'l Mortg. Ass'n, 932 F.3d 378, 387 (5th Cir. 2019) ("Contrary to Warren's assertion, Jefferson's statement about what Bynum-Wilson allegedly said other people allegedly said is, in fact, being offered for the truth of the matter

asserted. This is hearsay within hearsay, so both levels must satisfy an exception. ... To advance Warren's claim against Fannie Mae, it matters whether Bynum-Wilson was truthful as to what she heard the unnamed employees say."); Miles v. Ramsey, 31 F. Supp. 2d 869, 876 n.5 (D. Colo. 1998) ("Courts recognize that in a suit for defamation, defamatory words are normally 'words of independent legal significance' because they are being introduced not for their truth, but only to prove that they were uttered. ... If the close source had come forward in this instance, our analysis would be done, the words would be admissible. However, in our instance we again have the second level of analysis. It was the Enquirer that printed what the close source, not Ramsey, had told South and Wright. So here the article is being introduced to prove that the words were uttered by Ramsey."). In short, Mercer's statements to Denson allegedly relaying what McInnis had told Mercer about CAH qualify as hearsay, and thus, in order to be admissible, those statements must come within a hearsay exception.

CAH contends that Mercer's statements to Denson allegedly relaying what McInnis had told Mercer about CAH are admissible under

Rule 803(3), Ala. R. Evid., because they "explain [Mercer's] reasons, i.e., his state of mind, for not taking the [CAH] job." CAH's brief, p. 39. In support of this idea that Mercer's alleged repetition of McInnis's statements about CAH reflected Mercer's "state of mind," CAH points to the assertion in Denson's affidavit that Mercer allegedly repeated McInnis's statements "[i]n response to [Denson's] inquiry as to [Mercer's] reasons" for not coming to work for CAH.

Rule 803(3) provides:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> "....
>
> "(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

CAH argues that Davis v. Sterne, Agee & Leach, Inc., 965 So. 2d 1076 (Ala. 2007), illustrates that Mercer's statements are admissible

under the "state-of-mind" exception of Rule 803(3). In Davis, a widow, Mary Davis ("Davis"), asserted, among other claims, claims of fraud by forgery and conversion against her two stepsons and Sterne, Agee & Leach, Inc. ("Sterne Agee"), the servicer of an individual retirement account ("IRA") belonging to Davis's late husband, Robert Davis, Sr. ("Mr. Davis"). Davis alleged that the defendants had conspired to wrongly deprive her of the disbursement of the proceeds from the IRA. One issue in Davis concerned whether an affidavit from Sterne Agee financial adviser Linda Daniel was admissible under Rule 803(3). In the affidavit, Daniel stated that she had received a change-of-beneficiary form for the IRA from Mr. Davis in December 2001. She further related that she then had called Mr. Davis and had " 'asked him about the December 2001 beneficiary change, to verify that he wanted his sons to be his beneficiaries. [Mr. Davis] confirmed that he did in fact want his sons to be the beneficiaries and had sent the form to me to effectuate the change.' " Davis, 965 So. 2d at 1081. Davis argued that Daniel's affidavit testimony about what Mr. Davis had allegedly told her was inadmissible hearsay. This Court concluded that the affidavit was admissible under Rule 803(3)

"because even though Mr. Davis made the statement to Daniel after the [change-of-beneficiary] form had been delivered to Sterne Agee, the statement is not about what Mr. Davis remembered, but a statement of his then existing intent for his sons to be the beneficiaries of his IRA." Id. at 1089. CAH argues that, similar to the challenged statements at issue in Davis, Mercer's statements to Denson are not about what Mercer remembered McInnis saying but about "explaining [Mercer's] actual reasons for not taking the job."[2] CAH's reply brief, p. 19.

The trouble with this contention is that, even if we assume that Mercer's statement is being offered solely to explain Mercer's reasons for declining CAH's job offer -- a claim contradicted by CAH's position in the

[2]CAH also cites and discusses United States Fidelity & Guaranty Co. v. Millonas, 206 Ala. 147, 153, 89 So. 732, 737 (1921), in support of its argument that Mercer's recitation of McInnis's alleged statements in paragraph 7 of Denson's affidavit are admissible. EPIC and McInnis, as well as an amicus curiae supporting them, expend several pages seeking to undermine Millonas as a vestige of a res gestae exception to hearsay that, they say, was not included in the Alabama Rules of Evidence. However, we see no need to settle the dispute about the continued viability of the pertinent holding in Millonas given that CAH ultimately relies on Rule 803(3), Ala. R. Evid., for its insistence that paragraph 7 is admissible.

summary-judgment hearing that it was being offered as evidence of what McInnis actually said to Mercer -- the statement still does not reflect Mercer's intent to do something. Instead, the statement allegedly reflects the reasons behind Mercer's decision to do something -- specifically, to decline CAH's job offer. The hearsay exception in Rule 803(3) does not apply to such statements. Rather, it concerns statements indicating a present feeling or physical condition or "statements of mind expressed before the commission of the act as to which the state of mind is relevant." Advisory Committee's Notes to Rule 803, Paragraph (3) (emphasis added). This exception "does not apply to the declarant's after-the-fact statements made about his past state of mind. ... It similarly does not apply to the 'declarant's statements as to why he held the particular state of mind.' " United States v. Cummings, 431 F. App'x 878, 882 (11th Cir. 2011) (quoting United States v. Duran, 596 F.3d 1283, 1297 (11th Cir. 2010)).[3]

[3]Rule 803(3), Ala. R. Evid., "is identical to the corresponding federal provision." Advisory Committee's Notes to Rule 803, Paragraph 3. "Federal cases construing the Federal Rules of Evidence are considered persuasive authority for Alabama state courts construing the Alabama Rules of Evidence." Municipal Workers Comp. Fund, Inc. v. Morgan Keegan & Co., 190 So. 3d 895, 909 n.3 (Ala. 2015).

> "The statement must be limited to a declaration showing the declarant's state of mind and not the factual occurrence engendering that state of mind. See United States v. Joe, 8 F.3d 1488, 1492 (10th Cir. 1993) (holding that a victim's statement that she feared the defendant is admissible under the state of mind exception, however, the reasons why the victim feared the defendant was an inadmissible factual occurrence). The declarant must not have had an opportunity to reflect and possibly fabricate or misrepresent her thoughts. See United States v. LeMaster, 54 F.3d 1224 (6th Cir. 1995). A statement may be excluded when a declarant has time to reflect because the statement may reflect the declarant's then existing state of mind as to a past fact as opposed to a present existing fact."

United States v. Lentz, 282 F. Supp. 2d 399, 411 (E.D. Va. 2002) (emphasis added). See also United States v. Samaniego, 345 F.3d 1280, 1282 (11th Cir. 2003) (noting that " 'the state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind' " (quoting United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir. 1980))); Fomby v. Popwell, 695 So. 2d 628, 632 (Ala. Civ. App. 1996) (affirming a trial court's refusal to admit certain witness statements under Rule 803(3), observing: "Baker could have testified as to Fomby's statements that reflected Fomby's mental anguish.

However, it appears that Baker was instead attempting to testify as to the cause of Fomby's mental anguish.").

Mercer's statements purport to explain what caused Mercer to make a decision that Mercer had already made before talking to Denson. The statements did not reflect Mercer's "then existing state of mind." Rule 803(3). Rather, they constituted "a statement of [Mercer's] memory" that CAH is using "to prove the fact remembered," which is expressly not permitted by Rule 803(3). Id. Therefore, we conclude that the circuit court did not err in striking from Denson's affidavit the statements that McInnis allegedly had told Mercer about CAH.[4]

[4]The parties argue about the admissibility of an e-mail mentioned by Denson in paragraph 7 of his affidavit that Denson wrote on July 31, 2018. However, we see no need to discuss the e-mail for two reasons. First, the e-mail does not shed any further light on what McInnis actually said to Mercer. Denson only stated generally that "apparently Tim Kelly, president of Lockton['s] Houston [location], had [McInnis] talk to our prospective employee [Mercer] and tell him lots of terrible things about [CAH]." Second, it does not appear that the circuit court excluded the e-mail given that it quoted a portion of the e-mail in its January 30, 2020, order as evidence that EPIC was unaware that McInnis had talked to Mercer.

Our conclusion with respect to paragraph 7 of Denson's affidavit directly affects our assessment of the circuit court's also striking paragraphs 8 and 9 of the affidavit based on hearsay. The substantive portion of paragraph 8 concerns the same inadmissible statements: "[Mercer] reiterated the statements made to him by Mr. McInnis and reaffirmed his intention to remain at Lockton." Likewise, paragraph 9 consists of Denson's reaction to the inadmissible statements: "The statements that Mr. Mercer told me that Mr. McInnis had made about CAH are false. CAH has never taken anyone's stock because of a disagreement with the Densons and Rices." Because paragraphs 8 and 9 also concern the inadmissible statements contained in paragraph 7, we conclude that the circuit court did not err in striking those paragraphs from evidence.

B. CAH's Claim of Tortious Interference

CAH contends that McInnis tortiously interfered with CAH's prospective employment relationship with Mercer and that EPIC is liable for McInnis's conduct. First, we will examine CAH's tortious-interference

claim with respect to McInnis, and then we will evaluate that claim with respect to EPIC.

1. McInnis's Affirmative Defense of Justification

The circuit court concluded that McInnis's conduct was justified as a matter of law and, therefore, that McInnis was not liable for tortious interference. Portions of the Restatement (Second) of Torts (Am. Law Inst. 1979) ("Restatement") addressing the justification defense are integral to understanding the parties' arguments, and the circuit court's ruling, concerning whether McInnis tortiously interfered with CAH's prospective employment relationship with Mercer. Specifically, in Gross v. Lowder Realty Better Homes & Gardens, 494 So. 2d 590 (Ala. 1986), this Court adopted a balancing test of factors provided in Restatement § 767, as well as the comments to that section, for evaluating a justification defense.

> "We retain the principle that justification is an affirmative defense to be pleaded and proved by the defendant. Whether the defendant is justified in his interference is generally a question to be resolved by the trier of fact. Polytec, Inc. v. Utah Foam Products, Inc., 439 So. 2d 683 (Ala. 1983). Whether a defendant's interference is justified depends upon a balancing of the importance of the objective of the

interference against the importance of the interest interfered with, taking into account the surrounding circumstances. Restatement (Second) of Torts § 767 (1979), and Comments. The restatement utilizes the term 'improper' to describe actionable conduct by a defendant. Non-justification is synon[y]mous with 'improper'. If a defendant's interference is unjustified under the circumstances of the case, it is improper. The converse is also true. Section 767 of the Restatement lists, and the Comments explain, several items that we consider to be among the important factors to consider in determining whether a defendant's interference is justified:

> "(a) the nature of the actor's conduct,
>
> "(b) the actor's motive,
>
> "(c) the interests of the other with which the actor's conduct interferes,
>
> "(d) the interests sought to be advanced by the actor,
>
> "(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
>
> "(f) the proximity or remoteness of the actor's conduct to the interference, and
>
> "(g) the relations between the parties.

"Restatement (Second) of Torts § 767 (1979)."

Gross, 494 So. 2d at 597 n.3, overruled on other grounds by White Sands Grp., L.L.C. v. PRS II, LLC, 32 So. 3d 5 (Ala. 2009) (emphasis added).

The circuit court did not evaluate McInnis's justification defense under the factors stated in § 767. Instead, the circuit court applied the test for justification provided in Restatement § 772, titled "Advice as Proper or Improper Interference," and the circuit court concluded that McInnis's conduct was justified as a matter of law based on that standard.

Restatement § 772 provides:

> "One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person
>
> "(a) truthful information, or
>
> "(b) honest advice within the scope of a request for the advice."

CAH contends that the circuit court's use of § 772 instead of the factors stated in § 767 constitutes reversible error because this Court has expressly adopted § 767 but has never adopted § 772. CAH further argues

that the factors for testing justification set out in § 767 "all tended to show the lack of justification for [McInnis's] conduct." CAH's brief, p. 47.

McInnis and EPIC defend the circuit court's reliance on § 772 by observing that § 767 cmt. a states, in part:

> "Section 768, following this Section, deals specifically with the question of whether competition is a proper or improper interference with contractual relations, either existing or prospective. Sections 769-773 deal with other special situations in which application of the factors enumerated in this Section have produced more clearly identifiable decisional patterns. The specific applications in these Sections therefore supplant the generalization expressed in this Section."

(Emphasis added); see also § 772 cmt. a ("This Section is a special application of the general test for determining whether an interference with an existing or prospective contractual relation is improper or not, as stated in §§ 766- 766B and 767."). McInnis and EPIC further observe that this Court in Gross adopted § 767 and its comments and that the Court reaffirmed that adoption in White Sands Group, L.L.C. v. PRS II, LLC, 32

So. 3d 5 (Ala. 2009). McInnis and EPIC therefore contend that, based on Gross and White Sands, this Court already has implicitly adopted § 772.[5]

In White Sands, the Court reiterated that Restatement § 767 and its comments govern a court's evaluation of the defense of justification. See White Sands, 32 So. 3d at 12-14. The White Sands Court then discussed the application of the factors set out in § 767 to the counterclaim defendant's conduct in that case. In doing so, the Court observed that the counterclaim defendant

> "neither discusses nor cites any of the justification factors set forth in Restatement § 767 and adopted in Gross. Instead, it relies entirely on the so-called 'competitor's privilege defense,' Restatement (Second) of Torts § 768 (1979), which this Court adopted in Soap Co. v. Ecolab, Inc., 646 So. 2d [1366,] 1370 [(Ala. 1994)]."

White Sands, 32 So. 3d at 18. The Court then explained the relationship between Restatement §§ 767 and 768 with respect to justification:

> "[T]he justification factors are not so easily dismissed.
>
> "....

[5]An amicus curiae brief filed by the Alabama Free and Fair Enterprise Institute urges this Court to expressly adopt § 772.

> " ' "The rule stated in [Restatement § 768] is a special application of the factors determining whether an interference is improper or not, as stated in § 767." ' [Soap Co. v. Ecolab, Inc.,] 646 So. 2d [1366,] 1369 [(Ala. 1994)] (quoting Restatement § 768 cmt. b) .... In other words, the competitor's privilege defense is merely a 'special application' of the justification factors considered in determining whether the defendant's conduct is not justified or improper. It directly involves at least six of those seven factors, namely, (1) the nature of the defendant's conduct, (2) the defendant's motive, (3) the interests with which the defendant's conduct interferes, (4) the interests sought to be advanced by the defendant, (5) the respective social interests affected, and (6) the relations between the parties."

Id. (emphasis altered).

The foregoing discussion in White Sands concerning the Restatement and justification is relevant in this case because of the fact that the White Sands Court declared that Restatement § 768 "is a special application of the factors determining whether an interference is improper or not, as stated in § 767." White Sands, 32 So. 3d at 18 (emphasis omitted). According to the comments to § 767, § 772 represents another special application of the general factors stated in § 767 for evaluating

justification in a particular kind of factual scenario.[6] Indeed, § 767 cmt. a states that the sections that follow § 767 "supplant" it when a scenario involving those specific applications is presented. The facts presented in this case fit within the scenario posited in § 772 because CAH alleges that McInnis "intentionally cause[d] a third party[, Mercer,] ... not to enter into a prospective contractual relation with another[, CAH,]" by giving Mercer advice about going to work for CAH. Restatement § 772. Moreover, there is nothing novel or illogical about the proposition in § 772 that giving truthful information or honest advice does not constitute improper interference. Therefore, it was proper for the circuit court to apply Restatement § 772 in this case, and we expressly hold that § 772 should be applied in appropriate factual scenarios that implicate the defense of justification.

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[6]The Pennsylvania Supreme Court, in discussing the fact that § 772 is a special application of § 767, observed: "This is not an extraordinary proposition; this is the manner in which the law often progresses. As general principles are tested in practice, more specific and accurate paradigms arise." Walnut St. Assocs., Inc. v. Brokerage Concepts, Inc., 610 Pa. 371, 386, 20 A.3d 468, 477 (2011).

Having determined that Restatement § 772 provides the appropriate standard for evaluating McInnis's justification defense in this case, we must now analyze whether the circuit court correctly concluded that McInnis's conduct was justified as a matter of law, bearing in mind that "[j]ustification is generally a jury question." White Sands, 32 So. 3d at 18. The circuit court applied subsection (b) of § 772 to McInnis's conduct; that is, the circuit court analyzed whether McInnis provided Mercer with "honest advice within the scope of a request for the advice." The circuit court noted that the comments to § 772 explain that under subsection (b) three requirements must be met for honest advice to justify the interference: "(1) that advice be requested, (2) that the advice given be within the scope of the request and (3) that the advice be honest." Id., cmt. c.

CAH does not dispute that Mercer requested advice from McInnis and that McInnis's advice fell within the scope of Mercer's request. CAH's failure to contest those points is unsurprising. The undisputed evidence shows that it was Mercer who contacted McInnis on each occasion: he initiated both phone calls, and he wrote McInnis a follow-up question by

e-mail after their second conversation. The evidence also confirms that the primary topic Mercer asked McInnis about was CAH's stock or equity plan, and McInnis's feedback addressed that topic.

CAH's objection concerns the circuit court's conclusion that McInnis's statements to Mercer were true.[7] It is at this point that the relevance of our conclusion in subsection A of our analysis -- finding that the circuit court did not err in striking the portion of paragraph 7 of

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[7]The circuit court in its order and the parties in their briefs equate "honest advice" in Restatement § 772 with telling the truth. The fact that § 772 contains categories of "truthful information" or "honest advice" would seem to suggest that some distinction exists between the two -- perhaps it is only whether the information was solicited or unsolicited -- but we take the arguments as we find them for purposes of this case and assume that "honest advice" concerns whether McInnis was truthful in what he told Mercer. We note that the only comment to § 772 on honesty states, in part:

> "It is sufficient for the application of this rule that the actor gave honest advice within the scope of the request made. Whether the advice was based on reasonable grounds and whether the actor exercised reasonable diligence in ascertaining the facts are questions important only in determining his good or bad faith. But no more than good faith is required."

Restatement § 772 cmt. e.

Denson's affidavit attributing certain statements to McInnis -- becomes clear. The exclusion of the affidavit evidence means that the only specific evidence concerning what McInnis told Mercer comes from Mercer's deposition testimony. As we recounted in the rendition of the facts, Mercer denied that McInnis had told him that CAH was a terrible place to work. Mercer also disagreed with the allegation that McInnis had told him that if he disagreed with the Rices and the Densons on any company matter they would take his stock away and not pay him for it:

> "[Counsel for CAH:] What about the one about taking stock and not paying you for it, do you recall anything like that?
>
> "A. Not in such an extreme fashion.
>
> "Q. What about -- and that about Cobbs Allen being controlled by Grantland Rice, III and Bruce Denson and Bruce Denson, Jr. to the detriment of other employees and shareholders at Cobbs Allen & Hall, do you recall anything like that?
>
> "A. I think that language is extreme. <u>I think the tone from [McInnis] was that they -- the family does very much hold the cards and arguably could, you know, affect the arrangements if they -- when it comes to equity, if they so felt it, you know, if they wanted to</u>."

(Emphasis added.) Mercer also expressed the same idea in different words, stating that McInnis had told him that "the family ultimately

control, you know, everything; and there's, you know, potential question marks about how you would, you know, receive your equity in the event that that was due." In short, the foregoing quoted statements from Mercer compose the admissible evidence for evaluating whether McInnis gave Mercer honest advice.[8]

CAH focuses on McInnis's comment that the Densons and the Rices "hold the cards" at CAH and that they could "affect the [equity] arrangements ... if they wanted to." The circuit court concluded that "th[e] statement is true. It is undisputed that the Rices and the Densons occupy senior leadership positions at CAH and are major stockholders." Notably, this conclusion does not directly address whether the Densons and the

[8]CAH repeatedly points out in its briefs that, in his deposition testimony, Mercer described McInnis as being " 'frustrated' and 'aggrieved' about how his [CAH] stock was lost in connection with the settlement of the underlying dispute." CAH's brief, p. 29. CAH argues that such motivations should weigh against finding that McInnis gave honest advice to Mercer. However, the comments to Restatement § 772 state that if the three requirements are met, "it is immaterial that the actor also profits by the advice or that he dislikes the third person and takes pleasure in the harm caused to him by the advice." Restatement § 772 cmt. c. Thus, McInnis's motives are irrelevant to whether his advice to Mercer was "honest."

Rices can, in fact, affect the equity arrangements of minority stockholders at their own discretion. CAH contends that "[t]he only reasonable inference" from that comment "is that the Densons and the Rices could do something underhanded, illegal, or otherwise improper with a minority shareholders' shares" or that they "could do whatever they want to an employee's stock for any reason 'they wanted to.' " CAH's brief, pp. 29, 31. CAH contends that this is untrue because the stock arrangement is in the form of a written contract, i.e., the RSTA; thus, CAH contends, the RSTA and "not the whims of the Densons and the Rices," governs CAH's equity arrangement. CAH notes that the RSTA states that it may be amended only by a vote of holders of at least 75 percent of the shares in CAH Holdings.

> "(h) Amendment. This Agreement may not be changed orally, and may be amended only by a written amendment which is signed by the Company and the Shareholders then owning at least seventy-five (75%) of the Shares then owned by all of the Shareholders."

CAH also observes that it is undisputed that "the Densons and the Rices together own far less than 75 [percent] of [CAH Holdings] stock."[9] CAH's brief, p. 32. CAH therefore posits that McInnis's statement that the Densons and the Rices can "affect the equity arrangement" at CAH "if they wanted to" is "absolutely false." Id.

McInnis and EPIC counter that "the RSTA provides the Rices and the Densons -- as the majority shareholders and executive management of CAH -- with plenty of options to 'affect' the value of a shareholder's equity even within the bounds of the RSTA without requiring any shareholder action." McInnis and EPIC's brief, p. 47. McInnis and EPIC offer two examples. First, they observe that the RSTA provides that when an employee leaves CAH, the former employee's equity interest will be paid out in 10 annual payments at fair market value. However, if an employee-shareholder is terminated "for cause," the RSTA dictates that "the purchase price of such Shares shall be the least of: (I) the [fair

[9]We note that, according to information in the record, aside from the Densons and the Rices, there were over 40 other shareholders of CAH Holdings stock at the time this action was commenced.

market value]; (ii) the amount which the Shareholder paid for such Shares [i.e., cost]; or (iii) the tangible book value[10] of such Shares." McInnis and EPIC argue that the difference between the value of a former CAH employee's stock can vary "dramatically" depending on whether the employee was fired for cause or left for some other reason, and they assert that "[w]hether an employee is fired for cause is in the sole discretion of CAH management." McInnis and EPIC's brief, p. 48. They cite as evidence McInnis's own experience when he was fired for cause from CAH, because he received considerably less than the fair market value of his CAH Holdings stock. See id., pp. 48-50.

McInnis and EPIC's second example of a way that the Rices and the Densons could affect an employee's stock implicates paragraph 5(c) of the RSTA, which states:

> "(c) Purchase Prices Adjustment for Producers. Notwithstanding anything herein to the contrary, if the Shareholder is a Producer and the Shareholder engages in any

[10]Black's Law Dictionary indicates that "book value" is synonymous with "owners' equity," which "is calculated as the difference in value between a business entity's assets and its liabilities." Black's Law Dictionary 225, 1332 (11th ed. 2019).

activity that is prohibited by Paragraph 12 or Paragraph 13 hereof prior to the purchase of all of the Shares of the Shareholder, the purchase price for the [former producer's] Shares shall be adjusted in accordance with the following:

> "(I) The purchase price shall be reduced by the decrease (if any) in the value of such Shareholder's Book of Business between the last day of the calendar month immediately preceding the month which includes the Termination Date and the second anniversary of such date.
>
> "(ii) At any time after the Shareholder engages in any activity prohibited by Paragraph 12 or Paragraph 13 hereof, [CAH Holdings] may deliver written notice to such Shareholder and his or her Permitted Transferees that describes the prohibited activity engaged by such Shareholder and reflects:
>
> > "(A) the number of Shares to be purchased on the remaining Scheduled Redemption Dates after the date of the notice (the 'Remaining Shares'); and
> >
> > "(B) the amount that the purchase price of the Shares is to be reduced pursuant to subparagraph 5(c)(I) above; and
> >
> > "(C) the per share adjustment to be applied to the purchase price for each of the Remaining Shares which shall be determined by dividing the amount of the purchase price reduction

> described in subparagraph 5(c)(ii)(B) above by the number of Remaining Shares described in subparagraph 5(c)(ii)(A) above (the 'Per Share Price Reduction').
>
> "(iii) The purchase price for each of the Remaining Shares purchased on a Scheduled Redemption Date after delivery of the notice described in subparagraph 5(c)(ii) above shall be reduced by the Per Share Price Reduction described in subparagraph 5(c)(ii)(C) above. If the application of the Per Share Reduction Price of the Remaining Shares to be purchased on a Scheduled Redemption Date results in a negative amount, the Shareholder shall pay [CAH Holdings] cash in an amount equal to the negative amount at the closing."

Paragraphs 12 and 13 of the RSTA concern restrictive covenants for shareholders. Thus, McInnis and EPIC state that paragraph 5(c) means that if a shareholder violates a restrictive covenant, CAH is empowered

> "to offset any losses in a producer's book of business from the value of any stock the producer owns. It measures the difference by comparing the value of the book of business the month before the producer leaves CAH to the value of that same book <u>two years</u> after the producer leaves."

McInnis and EPIC's brief, p. 51 n.14. McInnis and EPIC assert, citing paragraph 5(c)(ii), that the Densons and the Rices "decide[] whether a

shareholder violated the restrictive covenants for purposes of the reduction in [paragraph] 5(c)." Id.

CAH responds that it is "absolutely false" that the Densons and the Rices have sole discretion to determine whether a CAH employee is terminated "for cause." It cites paragraph 4(c) of the RSTA, which defines "Good Cause":

> "(c) 'Good Cause' shall include, without limitation, (1) the material nonperformance of duties assigned to the Employee by [CAH Holdings] or a Subsidiary; (2) Employee's dishonesty, theft, fraud or embezzlement; (3) Employee's violation of the restrictive covenants in the employment agreement, if any, between [CAH Holdings] and Employee that are comparable to those included in Paragraph 12 and Paragraph 13 hereof; (4) temporary or permanent suspension of Employee's license to sell insurance; (5) Employee's being convicted of, the commission of a felony or a crime involving moral turpitude; (6) Employee's habitual use of, or addition to, drugs or alcohol which interferes or may reasonably be expected to interfere with the performance of his duties hereunder; (7) Employee's gross neglect of duty, insubordination, failure to be available for work when scheduled, willful inattention to the economic or ethical welfare of [CAH Holdings] and its Subsidiaries, or disloyalty to [CAH Holdings] and its Subsidiaries. Notwithstanding anything herein to the contrary, if termination of employment is predicated upon material nonperformance of the Employee's duties, Employee shall have ten (10) days following written notice from [CAH Holdings] specifying the cause of termination to cure such performance

> before termination is effective; there is no cure period for any other Good Cause termination."

CAH argues that the foregoing definition provides an objective standard for when an employee is being terminated "for cause." CAH also disputes McInnis and EPIC's contention that whether an employee has violated a restrictive covenant is solely determined by the Densons and the Rices. CAH notes that paragraph 5(c)(ii) simply provides that CAH may provide written notice to an employee when it believes such an employee has violated a restrictive covenant, but it asserts that "[t]here is absolutely no connection between the right to notify the employee of a violation and the determination of whether a violation occurred." CAH's reply brief, p. 12. CAH further observes that the RSTA contains an arbitration clause that applies to "[a]ll controversies, claims, issues and other disputes arising out of or relating to this Agreement or the breach thereof."

The foregoing arguments demonstrate that the parties have sharply divergent interpretations of McInnis's statements to Mercer and of whether those statements accurately reflect the equity plan in the RSTA. However, when the evidence is viewed in the light most favorable to CAH,

it becomes apparent that McInnis's statements to Mercer potentially were misleading. The RSTA provides detailed guidelines as to how a CAH's employee's ownership of stock in CAH Holdings is handled both during and after the tenure of employment. Although, as Mercer's own experience illustrates, ascertaining the meaning and application of the RSTA is not a straightforward task, it is clear from the RSTA that the Densons and the Rices do not "control ... everything" and that they cannot simply "affect the [equity] arrangements" of CAH Holdings shareholders "if they wanted to." Therefore, we conclude that questions of fact exist as to whether McInnis gave honest advice to Mercer. Because whether McInnis gave "honest advice" is a pivotal element of McInnis's justification defense under Restatement § 772 to CAH's tortious-interference claim, the circuit court erred in concluding that McInnis's conduct was justified as a matter of law.

2. EPIC's Liability for McInnis's Potential Tortious Interference

> " 'For [an employer] to become liable for [the] intentional torts of its agent, the plaintiff[] must offer evidence that [1] the agent's wrongful acts were in the line and scope of his employment; or [2] that the acts were in furtherance of the business of [the employer]; or [3] that [the employer]

> participated in, authorized, or ratified the wrongful acts.' Joyner v. AAA Cooper Transportation, 477 So. 2d 364, 365 (Ala. 1985). The employer is vicariously liable for acts of its employee that were done for the employer's benefit, i.e., acts done in the line and scope of employment or ... done for the furtherance of the employer's interest. The employer is directly liable for its own conduct if it authorizes or participates in the employee's acts or ratifies the employee's conduct after it learns of the action."

Potts v. BE & K Constr. Co., 604 So. 2d 398, 400 (Ala. 1992).

CAH argues that EPIC is vicariously liable for McInnis's alleged tortious interference because McInnis's communications with Mercer were "incidental" to his usual duties as an EPIC employee. The circuit court concluded that EPIC was not vicariously liable for McInnis's conduct because McInnis's conduct did not fall within the scope of his employment. CAH argues that EPIC is directly liable for McInnis's alleged tortious interference because, CAH asserts, EPIC ratified McInnis's conduct by failing to repudiate it. The circuit court concluded that EPIC did not ratify McInnis's conduct because it was unaware of his communications with Mercer until well after they occurred and it never approved of his actions. We will address those two liability issues with respect to EPIC in turn.

a. Line and Scope of Employment

CAH argues that McInnis's communications with Mercer were within the line and scope of his employment with EPIC because, CAH asserts, those communications were "incidental" to McInnis's duties as a branch manager of EPIC's Birmingham office. CAH notes that McInnis admitted in his deposition that EPIC routinely fielded phone calls and other inquiries from prospective EPIC employees and that such recruiting is common in the commercial insurance industry. Based on that admission, CAH asserts that "talking to a potential industry recruit about a competitor is incidental to talking to EPIC recruits, especially if done by a managing principal and branch manager." CAH's brief, p. 53. CAH further observes that McInnis responded to an e-mail inquiry from Mercer using his office e-mail address during regular business hours. CAH argues that those facts further lend credence to the notion that McInnis was acting in the line and scope of his employment when he communicated with Mercer.

> "An act is within an employee's scope of employment if the act is done as part of the duties the employee was hired to perform or if the act confers a benefit on his employer. See Jessup[v.

> Shaddix], 275 Ala. [281,] 284, 154 So. 2d [39,] 41 [(1963)]. In Solmica of the Gulf Coast, Inc. v. Braggs, 285 Ala. 396, 401, 232 So. 2d 638, 642 (1970), this Court stated: ' "The rule ... for determining whether certain conduct of an employee is within the line and scope of his employment is substantially that if an employee is engaged to perform a certain service, whatever he does to that end, or in furtherance of the employment, is deemed by law to be an act done within the scope of the employment." ' (Quoting Nelson v. Johnson, 264 Ala. 422, 427, 88 So. 2d 358, 361 (1956)). This Court further stated in Braggs, 285 Ala. at 401, 232 So. 2d at 643, that '[t]he conduct of the employee, to come within the rule, must not be impelled by motives that are wholly personal, or to gratify his own feelings or resentment, but should be in promotion of the business of his employment.' "

Hulbert v. State Farm Mut. Auto. Ins. Co., 723 So. 2d 22, 23 (Ala. 1998) (emphasis added).

> "An employee's tortious acts occur within the scope of his employment if the acts are 'so closely connected with what the servant is employed to do and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.' Prosser & Keeton, The Law of Torts 503 (5th ed. 1984). In Big B, Inc. v. Cottingham, 634 So. 2d 999, 1002 (Ala. 1993), this Court held that there was sufficient evidence that a store manager who falsely imprisoned a customer suspected of shoplifting was acting within the scope of his employment because preventing shoplifting was closely related to his employment as a store manager. In contrast, where the store manager forced the customer to perform a sexual act with him, this Court has held that the manager was acting outside the scope of his employment. Id. at 1002; see

> also Hendley v. Springhill Mem'l Hosp., 575 So. 2d 547 (Ala. 1990) (holding that a hospital is not liable for the unauthorized sexual touching by an agent)."

Ex parte Atmore Cmty. Hosp., 719 So. 2d 1190, 1194 (Ala. 1998) (emphasis added).

The problem for CAH is that McInnis's talking to Mercer, a Lockton employee, about Mercer's potentially going to work for CAH was in no way part of the duties that McInnis was hired to perform for EPIC. The fact that McInnis may frequently talk to prospective EPIC employees does not make McInnis's talking to a prospective CAH employee "reasonably incidental" to the work he performed for EPIC. Nothing in McInnis's communications with Mercer furthered EPIC's business interests. In fact, the undisputed evidence demonstrates that McInnis talked to Mercer as a personal favor to Lockton producer John Stillwell, and that Mercer contacted McInnis for the purpose of obtaining help in understanding CAH's equity plan. In short, the communication on both sides was impelled by personal motives that had nothing to do with McInnis's duties at EPIC. Accordingly, the circuit court did not err in concluding that CAH

had failed to present substantial evidence demonstrating that EPIC was vicariously liable for McInnis's conduct.

b. Ratification

CAH contends that EPIC is directly liable for McInnis's conduct because, CAH asserts, EPIC ratified that conduct after the fact by failing to disclaim McInnis's conduct after EPIC learned about it. For support, CAH points to testimony from Dan Crawford, EPIC's executive vice president and general counsel, who testified during his deposition that EPIC had not "made any determination that the conversation, the communication between Mr. McInnis and Mr. Mercer violated any policy of EPIC." CAH contends that, "[b]ecause EPIC has yet to disclaim McInnis's acts, there is substantial evidence of ratification." CAH's brief, p. 57.

> "An employer is ... liable for the intentional torts of the employee if the employer ratifies the employee's conduct. Potts [v. BE & K Constr. Co.], 604 So. 2d [398] at 400 [(Ala. 1992)]. An employer ratifies conduct if: (1) the employer has actual knowledge of the tortious conduct; (2) based on this knowledge, the employer knew the conduct constituted a tort; and (3) the employer failed to take adequate steps to remedy the situation. Id. 'Adequate' means that the employer took

> reasonable and necessary steps to stop the tortious conduct. Id. at 401."

Ex parte Atmore Cmty. Hosp., 719 So. 2d at 1195.

CAH's ratification theory relies on the notion that "[a]n employer's failure to stop the tortious conduct after it learns of the conduct will support an inference that the employer tolerated the conduct." Potts, 604 So. 2d at 400. But such an inference necessarily can arise only when there is evidence that an employer possesses knowledge of an employee's ongoing conduct and the employer fails to do anything about that conduct. An employer obviously cannot stop, curtail, or disclaim employee conduct about which it has no knowledge. See, e.g., East Alabama Behavioral Med., P.C. v. Chancey, 883 So. 2d 162, 170 (Ala. 2003) (noting that "[a]cquiescence or ratification requires full knowledge or means of knowledge of all material facts"); Shoney's, Inc. v. Barnett, 773 So. 2d 1015, 1028 (Ala. Civ. App. 1999) ("Nothing in the evidence presented at trial indicates that any of Hunter's superiors knew she was concealing material facts about Barnett's alleged resignation from them. Without actual knowledge of Hunter's deception, Shoney's could not have ratified

her conduct."). It is undisputed that no one at EPIC besides McInnis knew anything about McInnis's brief communications with Mercer until CAH filed its supplemental complaint -- four months after those communications occurred. Thus, EPIC could not have stopped McInnis's conduct because it had no knowledge of the communications at the time they were taking place. Accordingly, there is no evidence that EPIC ratified McInnis's conduct, and, thus, the circuit court did not err in entering a summary judgment for EPIC on CAH's claim that EPIC was directly liable for McInnis's alleged tortious interference.

C. CAH's Claim of Breach of Contract

CAH's breach-of-contract claim is based on paragraph 11 of the settlement agreement, specifically the first sentence of paragraph 11, which provides: "The Parties will take reasonable efforts to instruct their officers, directors, shareholders, accountants, financial advisors, and attorneys not to disparage any other party." CAH contends that "the only reasonable, logical construction" of paragraph 11 "is that the parties were prohibited from disparaging one another." CAH's brief, p. 59. CAH posits: "Seriously, what good would instructing your privities not to disparage the

other parties do if you could disparage the other party yourself?" Id. CAH argues that McInnis breached that provision of the settlement agreement in his conversations with Mercer and that EPIC breached it through McInnis's actions.

In contrast, McInnis and EPIC argue -- and the circuit court agreed -- that by its plain language paragraph 11 is a "duty-to-instruct" provision that required the parties to instruct their privities not to disparage the other parties to the settlement agreement and that the evidence unequivocally demonstrates that McInnis and EPIC fulfilled that duty. The circuit court noted that there is no need to look beyond the plain language of a contract if its meaning is not ambiguous. See, e.g., The Dunes of GP, L.L.C. v. Bradford, 966 So. 2d 924, 928 (Ala. 2007) (noting that " '[t]he intention of the parties controls in construing a written contract and the intention of the parties is to be derived from the contract itself, where the language is plain and unambiguous' " (quoting Loerch v. National Bank of Commerce of Birmingham, 624 So. 2d 552, 553 (Ala. 1993))). Because paragraph 11 plainly states that "[t]he Parties will take reasonable efforts to instruct" their privities "not to disparage any other

party," the circuit court concluded that paragraph 11 contained only a duty to instruct privities not to disparage parties to the settlement agreement.

We agree with the circuit court. By its plain language, paragraph 11 does not include a duty not to disparage other parties; it simply requires parties to instruct their privities not to disparage other parties. CAH was a party to the settlement agreement, and it participated in drafting the agreement. Nothing prevented the parties from expressly stating in the settlement agreement that the parties had a duty not to disparage other parties in addition to having a duty to instruct their privities not to disparage parties, yet they did not include such a provision.

CAH argues that even if a duty not to disparage is not evident in the plain language of paragraph 11, it should be implied through the covenant of good faith and fair dealing. But as McInnis and EPIC observe, the implied covenant of good faith and fair dealing cannot be used to alter the plain meaning of a contract. See, e.g., Shoney's LLC v. MAC E., LLC, 27 So. 3d 1216, 1223 (Ala. 2009) ("Where the parties to a contract use language that is inconsistent with a commercial-reasonableness standard,

the terms of such contract will not be altered by an implied covenant of good faith. ... ' "[W]here the language is unambiguous, and but one reasonable construction of the contract is possible, it must be expounded as made, as the courts are not at liberty to make new contracts for the parties." ' Heinrich v. Globe Indem. Co., 276 Ala. 518, 523, 164 So. 2d 709, 713-14 (1964) (quoting New York Life Ins. Co. v. Torrance, 224 Ala. 614, 617, 141 So. 547, 550 (1932)." (emphasis omitted)). We will not imply a duty not to disparage when none is apparent from plain language of the agreement drafted by both parties.

Because a duty not to disparage parties is not included in the settlement agreement, McInnis and EPIC may be held liable only for a failure to comply with their duty to instruct their privities not to disparage other parties. Tellingly, CAH does not even present an argument contending that either McInnis or EPIC failed to fulfill the "duty to instruct" mandated in paragraph 11. This is, no doubt, because all the submitted evidence indicated that EPIC instructed McInnis and all of its senior management not to disparage CAH, and McInnis likewise instructed the employees he managed not to disparage CAH. Because

both McInnis and EPIC fulfilled the only duty stated in paragraph 11, CAH's breach-of-contract claim against them necessarily failed. Accordingly, the circuit court did not err in granting summary judgment as to CAH's breach-of-contract claim.

IV. Conclusion

We affirm the circuit court's rulings concerning the admissibility of Denson's affidavit. We also agree with the circuit court that CAH's breach-of-contract claim against McInnis and EPIC fails because no duty not to disparage parties exists in paragraph 11 of the settlement agreement. EPIC is not vicariously liable for McInnis's alleged tortious interference because McInnis's conduct was not within the line and scope of his employment with EPIC. EPIC also is not directly liable for McInnis's alleged tortious interference because it did not ratify McInnis's conduct as it did not know about the conduct until well after it occurred. However, we disagree with the circuit court's conclusion that McInnis demonstrated that he was justified as a matter of law in interfering with CAH's prospective employment relationship with Mercer. Based upon the admissible evidence, an issue of fact exists as to whether McInnis gave

Mercer honest advice. Therefore, the judgment of the circuit court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Parker, C.J., and Bolin, Wise, Sellers, Stewart, and Mitchell, JJ., concur.

Bryan, J., concurs in part and dissents in part.

BRYAN, Justice (concurring in part and dissenting in part).

I would affirm the judgment in its entirety. I dissent as to only Section III.B.1 of the main opinion -- the portion of the analysis regarding the plaintiffs' tortious-interference claim against Crawford McInnis. I agree with the Jefferson Circuit Court that there is no genuine issue of material fact regarding the truth of McInnis's statements that "the family ... arguably could ... affect" equity arrangements or that there were "potential question marks about how [one] would ... receive [one's] equity ...." (Emphasis added.) Therefore, I respectfully dissent from the portion of the main opinion reversing the summary judgment in favor of McInnis regarding the tortious-interference claim.