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In the Supreme Court of the State of Oregon

Phillip Alfieri, Plaintiff-Appellant, Petitioner on Review v. Glenn Solomon, Defendant-Respondent, Respondent on Review	Multnomah County case number 12-03-02980 A152391 S062520

Amicus Curiae Oregon Trial Lawyers Association's Brief in Support of Petition for Review

Reviewing the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Multnomah County, Honorable Jerry B. Hodson, Judge.

Court of Appeals opinion filed June 11, 2014.

Opinion by Egan, Judge
Armstrong, Judge
Nakamoto, Judge

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If review is allowed, Oregon Trial Lawyers Association will file a brief on the merits.

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Brief in Support of Review of Amicus Curiae Oregon Trial Lawyers Association

Amicus curiae Oregon Trial Lawyers Association urges this court to accept review of *Alfieri v. Solomon*, 263 Or App 492 (2014). In *Alfieri*, the Court of Appeals upheld a trial court ruling that communications between attorney and client during mediation cannot be disclosed by the client in a related attorney malpractice case.

I. The mediation statutes do not prevent the disclosure of mediation communications during the course of related malpractice litigation.

The question presented by this case is the correct interpretation of ORS 36.220 and ORS 36.222,[1] which provide for confidentiality of certain communications made in connection with mediation. The Court of Appeals, relaying in part on *Bidwell and Bidwell*, 173 Or App 288 (2001), held that statutory mediation confidentiality applies to communications between one party and the party's attorney, effectively preventing a malpractice action against an attorney for conduct during a mediation proceeding. But, because a lawyer acts only as the client's agent, communications between them are not confidential mediation communications. And, further, a party's right to protect the confidences of the party's own statement makes no difference here; the lawyer-defendant has no standing to exclude confidential communications made by someone else. Finally, the legislative history of

[1] Excerpts of the statutes appear on the next two pages, and they appear in full in the appendix.

ORS 36.220 and ORS 36.222 reveals a legislative desire for confidentiality to protect the parties, not the lawyers.

Because the Court of Appeals decision is inconsistent with the statute, and because it will lead to absurd results, this court should accept review to consider how to construe the statute.

Oregon's three-step statutory interpretation comes from the familiar decisions in *PGE v. Bureau of Labor and Industries* (*PGE*), 317 Or 606 (1993) and *State v. Gaines* (*Gaines*), 346 Or 160, 171, (2009). That analysis begins with the statutory text and context. Provisions relating to mediation appear at ORS 36.100 through ORS 36.238, and the applicable statutes are reproduced in the appendix.

ORS 36.220(1)(a) provides: "Mediation communications are confidential and may not be disclosed to any other person."

Under ORS 36.222(1) mediation communications are inadmissible in later proceedings:

> "Except as provided in ORS 36.220 to 36.238, mediation communications and mediation agreements that are confidential under ORS 36.220 to 36.238 are not admissible as evidence in any subsequent adjudicatory proceeding, and may not be disclosed by the parties or the mediator in any subsequent adjudicatory proceeding."

Finally, "mediation communications" is defined in ORS 36.110(7) as:

> "(a) All communications that are made, in the course of or in connection with a mediation, to a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings; and

> "(b) All memoranda, work products, documents and other materials, including any draft mediation agreement, that are prepared for or submitted in the course of or in connection with a mediation or by a mediator, a mediation program or a party to, or any other person present at, mediation proceedings."

Considered in isolation, those provisions might be interpreted to include communications between a party and the party's lawyer. But the "text should not be read in isolation but must be considered in context." *Stevens v. Czerniak*, 336 Or 392, 401, (2004). *See also State v. Werdell*, 340 Or 590, 596-597 (2006) (statutory terms should be read *in pari materia* with surrounding terms.)

And, in context, confidentiality is to protect the parties, not the lawyers. Petitioner on review argues that communications between a party and the party's lawyer are not mediation communications. The Court of Appeals rejected that argument and held that communications between a party and the party's lawyer are confidential mediation communications, but that interpretation is inconsistent with the statute's text and purpose.

II. Communications between a party and a party's lawyer are not mediation communications.

For purposes of the mediation proceeding (or other adjudicative matters), a communication between a party and the party's lawyer is not a communication between two people. Rather, a party and a lawyer are a single entity: an attorney "is engaged by the client to use his or her expertise for the benefit and protection of the client's interests." *Onita Pacific Corp v. Trustees of Bronson*, 315 Or 149, 160 (1992). *See also State ex rel. Montgomery v.*

Goldstein, 109 Or 497, 501 (1923) (citation omitted) (an attorney is special agent for the client); *Link v. Wabash R. Co.*, 370 US 626, 634 (1962) *cited with approval in State v. Lafferty*, 240 Or App 564 (2010) (in "our system of representative litigation…each party is deemed bound by the acts of his lawyer-agent.") The party is considered to have "notice of all facts, notice of which can be charged upon the attorney." *Id.* (citation omitted).

Because the lawyer is not at the mediation in the lawyer's personal capacity, as a lawyer, a mediator, or a witness, communications between the lawyer and the party are intra- rather than inter-personal communications. The "parties to a mediation may agree in writing that all or part of the mediation communications are not confidential." ORS 36.220(1)(b). The lawyers, of course, are not parties, ORS 36.195(2), and do not get a say.

III. Mediation communications between a party and a party's lawyer are not subject to exclusion on the lawyer's request.

Even assuming that the communications at issue were "confidential" as to the other party in the mediation, there is no basis to permit the lawyer to seek their exclusion, because the confidentiality is not for the protection of the lawyer. This is akin to a standing argument, although genuine standing issues relate to the right to have a tribunal decide an issue. The issue here is about whether the lawyer has a right to mediation confidentiality or whether the right to confidentiality belongs to the parties. *See Eckles v. State of Oregon*, 306 Or 380, 383–84, (1988) (explaining distinction). Accordingly, although not technically a 'standing' issue, the problem remains that the attorney is attempting to assert a confidentiality right that is intended to protect

someone else. There is no basis in the statute to permit the lawyer to do so, and in fact, as discussed below, the legislative history shows that confidentiality was for the benefit of the parties to the mediation.

IV. The legislative purpose for the mediation statutes would be frustrated by providing *de facto* immunity for malpractice committed during mediation.

The confidentiality of mediation proceedings is intended to protect the parties to the proceeding, not the lawyers. ORS 36.100 provides "It is the policy and purpose of ORS 36.100 to 36.238 that, when two or more persons cannot settle a dispute directly between themselves, it is preferable that the disputants be encouraged and assisted to resolve their dispute with the assistance of a trusted and competent third party mediator." ORS 36.105 further explains that the purpose of the mediation statutes is to encourage dispute resolution without the need for litigation. Those statements of purpose are part of the statute's context. *US National Bank v. Boge*, 311 Or 550, 560-561 (1991).

If the parties to mediation are protected from the risk that their statements could be used against them in future litigation, they are more likely to engage in the mediation process. That will advance the statutory purpose of encouraging mediation. But depriving litigants of the protection afforded by a potential malpractice action against the lawyer will discourage litigants from mediation. Because the goal of encouraging mediation is part of the enacted statutory text, this court should allow review to ensure that the

legislature's purpose is not frustrated by an overly-technical reading of isolated provisions.

The Court of Appeals' interpretation effectively provides malpractice immunity to counsel in a mediation proceeding. ORS 36.210 expressly provides immunity for mediators and mediation programs. It does not mention the lawyers, implying that the legislature did not intend to give immunity to lawyers. *See*, *e.g.*, *State v. Bailey*, 346 Or 551 (2009) ("Generally, when the legislature includes an express provision in one statute and omits the provision from another related statute, we assume that the omission was deliberate.").

The Court of Appeals' decision will discourage mediation by providing malpractice immunity to lawyers, and therefore it is not consistent with the legislative intent underlying the mediation statutes.

V. The legislative history does not support the Court of Appeals' interpretation of the statute.

ORS 36.220 and ORS 36.222 were adopted in 1997 as part of SB 160, which became 1997 Or Laws 670. The legislative history of that provision emphasizes the importance of encouraging mediation as an alternative to litigation, and the importance of confidentiality as to the parties. Unsurprisingly, there is no mention of the protection of the lawyers or the lawyers' interest in confidentiality.

"Confidentiality is at the heart of the mediation process. The effectiveness of mediation is based on the ability to hear all sides of a conflict and peacefully bring the **parties** to the negotiating table to resolve their

conflict in a mutually satisfactory manner." Senate Committee on Business, Law, and Government, SB 160, Exhibit E, Feb. 27, 1997, (testimony of Donna Silverberg, Acting Director, Oregon Dispute Resolution Commission, appearing in the record as ER 104) (emphasis added) Ms. Silverberg goes on to say that "SB 160 was prepared in order to rectify problems with regards to the confidentiality of mediation communications. Guaranteeing the **consumers of mediation services** that the conversations and communications they have during a mediation session is a cornerstone to the effective resolution of disputes." *Id.* (emphasis added.)

James W. Nass, then-counsel for the Judicial Department, testified that "[a] key ingredient to many mediations is that parties, and their attorneys, have confidence that nothing said **in the course of 'telling the story'** can be used against them later in a court of law." Senate Committee on Business, Law, and Government, SB 160, Exhibit C, Feb. 27, 1997, (testimony of James W. Nass, appearing in the record as ER 83) (underlining in original, boldface added). In mentioning the attorneys, Mr. Nass referred to the attorneys' desire for confidentiality of their clients' stories, *i.e.*, their *inter*-party communications. Mr. Nass did not express the need for confidentiality to protect the lawyers' interests.

Another witness emphasized the importance of confidentiality for family members present for the mediation process. Senate Committee on Business, Law, and Government, SB 160, Exhibit G, Feb. 27, 1997, (testimony of DeEtte Wald Beghtol, mediator, East Metro Mediation, appearing in the record as ER 110-111). Stan Sitnick, representative of the

Oregon Mediation Association, said that he had been part of the work group developing the draft of the bill, and that, "like most consensus processes, it [had been] a slow and sometimes frustrating undertaking," but with a "generally satisfactory" outcome. He explained that "[w]ithout a broad and clearly defined confidentiality, **parties** will not enter into mediation or participate in the process fully and confidently." Senate Committee on Business, Law, and Government, SB 160, Exhibit N, May 8, 1997, testimony of Stan Sitnick, appearing in the record as ER 110-111 (emphasis added). Again, the legislative intent behind mediation confidentiality centered entirely on protecting the parties, not their lawyers.

Conclusion

Rather than encouraging mediation, depriving parties the protection provided by a possible malpractice action will discourage mediation and provide a windfall to malpracticing attorneys.

That result is contrary to the legislative intent behind the mediation confidentiality statutes. Accordingly, this court should accept review of the Court of Appeals decision to clarify that mediation proceedings are not a haven from lawyer malpractice liability.

Respectfully submitted,

/s/ Rankin Johnson IV
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Certificate of Service

I certify that I filed this brief with the State Court Administrator by e-filing it on August 28, 2014. I certify that I served it on the parties on review by e-filing it on August 28, 2014. Because counsel are registered e-filers, e-filing also constitutes service. See ORAP 16.45.

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Certificate of Compliance with Brief Length and Type Size Requirements

I certify that (1) this petition complies with the word-count limitation in 5.05(2)(b), ORAP 8.15(3) and ORAP 9.05(3)(a) and (2) the word count of this petition (as described in ORAP 5.05(2)(a)) is 1935 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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