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 Circuit
Court Case No:
1203-02980

Court of Appeals Case
No: A152391

Supreme Court Case
No: S062520

PETITIONER'S BRIEF ON MERITS OF THE CASE

Appeal from the Judgment entered August 21, 2012

In the Circuit Court for Multnomah County

Honorable Jerry B. Hodson, Judge

From the Decision of the Court of Appeals dated June 11, 2014.

Opinion by Judge Egan

Concurring Judge Armstrong and Judge Nakamoto

Counsel for Parties
List on Next Page

Filed December 17, 2014

Mark McCulloch, OSB 670791
mmculloch@fwwlaw.com
Vincent Sliwoski, OSB 105063
vsliwoski@fwwlaw.com
Farleigh Wada Witt
121 SW Morrison Street, Suite 600
Portland, OR 97204
Tel: (503) 228-6044
Of Attorneys for Plaintiff-Appellant

Thomas W. Brown, OSB 801779
tbrown@cosgravelaw.com
Wendy Margolis, OSB 945675
wmargolis@cosgravelaw.com
Cosgrave Vergeer Kester LLP
888 SW Fifth Avenue, Suite 500
Portland, OR 97204
Tel: (503) 323-9000
Of Attorneys for Defendant-Respondent

Rankin Johnson IV, OSB No. 964903
rankin@briefwright.com
Law Office of Rankin Johnson IV, LLC
208 SW First Avenue, Suite 220
Portland, OR 97204
Tel: (503) 307-9560
Of Attorneys for *amicus curiae* Oregon
Trial Lawyers Association

TABLE OF CONTENTS

I. The Legal Question Presented on Review 1

II. Petitioner's Proposed Rule of Law.....1

III. Nature of the Action for Relief Sought 1

IV. Nature of the Judgment Rendered by the Trial Court 1

V. Material Facts 1

VI. Summary of Argument.....3

VII. Argument.....4

A. Communication between a lawyer and his client are not "mediation" communications within the mediation statutes. 4

B. Allowing an attorney confidentiality in communications with his client, is inconsistent with the stated "policy" of the mediation statutes set out in ORS 36.100: ". . . it is preferable that disputants be encouraged and assisted to resolve their differences with the assistance of a trusted and third party mediator, whenever possible. . .." 7

C. The Court of Appeals decision is also inconsistent with the "declaration of purpose" stated in ORS 36.105. 8

D. There is no reasonable public policy to protect an attorney from his communications with his client during a mediation. 9

E. Legislative history does not support an intention to protect lawyers from claims by their clients. 10

VIII. CONCLUSION 12

TABLE OF AUTHORITIES

STATUTES

ORS 36.100 7
ORS 36.105 8
ORS 36.105(1) 8
ORS 36.105(1), (2), and (5) 3
ORS 36.105(2) 8
ORS 36.105(5) 9
ORS 36.110(5) 3, 4
ORS 36.220 11
ORS 36.220(1) 3
ORS 36.220(1)(a) 4
ORS 36.220(1)(b) 5, 7
ORS 36.222 11
ORS 36.222(1) 1, 11
ORS 36.224 ..... 5, 6

OTHER AUTHORITIES

Black's Law Dictionary, 5th Ed. (1979) 6
Uniform Mediation Act §2(5) 6
Uniform Mediation Act §6(a)(6) 11, 12

RULES

ORCP 68 1

I. The Legal Question Presented on Review

Shall lawyers in Oregon be protected from malpractice claims for negligence to their clients during mediations, based upon the confidentiality of mediations stated in ORS 36.222(1)?

II. Petitioner's Proposed Rule of Law

Lawyers in Oregon shall not be protected by the confidentiality of mediation stated in ORS 36.222(1) in malpractice claims for negligence to their clients during mediation.

III. Nature of the Action for Relief Sought

This is an action at law requesting money damages based upon allegations of legal malpractice. Plaintiff seeks damages of $3,775,000, plus his costs.

IV. Nature of the Judgment Rendered by the Trial Court

A General Judgment of Dismissal with prejudice was entered on August 21, 2012, pursuant to an Order granting defendant's Motion to Dismiss and Motion to Strike. The General Judgment provided that defendant's claim for costs and disbursements would be determined pursuant to ORCP 68.

V. Material Facts

Plaintiff retained defendant, an employment law lawyer, to pursue claims against plaintiff's former employer Nationwide Insurance by filing complaints with the Bureau of Labor and Industries ("BOLI"), and, later, by filing a civil complaint against Nationwide for damages. In that civil complaint, plaintiff initially alleged a common law wrongful discharge claim against Nationwide, but subsequently filed a motion to add additional claims. The motion was granted, but the defendant

did not amend the complaint. Defendant performed only limited discovery in the underlying lawsuit, and then he proposed mediation. (Court of Appeals Opinion, pp 1-2.)

A mediation conference was conducted involving a face-to-face meeting between the parties and the mediator to work toward a resolution of the dispute. Before the mediation conference, defendant advised plaintiff regarding the potential value of settling the underlying lawsuit. No resolution was reached in the mediation conference.

The day after the conference, the mediator suggested an overall settlement proposal. Over the next 16 days, defendant continued to advise plaintiff regarding the mediator's proposed settlement. During that time, defendant further advised plaintiff regarding the potential value of settling the underlying lawsuit, but significantly reduced the dollar value of his recommendation. Plaintiff ultimately signed a settlement agreement that incorporated the settlement amount proposed by the mediator. After signing the agreement, plaintiff continued to seek advice from defendant regarding the enforceability of the agreement. Defendant then failed to advise plaintiff that the former employer had not complied with some of the agreement terms, calling into question the enforceability of the agreement. (Court of Appeal Opinion, pp. 2-3.)

Plaintiff's allegations in his complaint against defendant included the following matters which were dismissed by the trial court's ruling, and the Court of Appeals decision:

a. defendant's failure to reasonably advocate for plaintiff in the mediation of the Lawsuit with Nationwide (Complaint, ¶15(G));

b. defendant's recommendation that plaintiff settle the lawsuit with Nationwide in an amount of $225,000 (Complaint, ¶15(H));

c. defendant's failure to advise that the mediator's proposal to settle for $225,000 was not enforceable because Nationwide had not accepted it on time (Complaint, ¶15(I)); and

d. defendant's advice to plaintiff that he was bound to the terms of the Agreement even though Nationwide failed to pay within the time required by the terms of the Agreement (Complaint, ¶15(J)).

VI. Summary of Argument

Defendant's alleged conduct comprising his malpractice does not include assistance or facilitation by the mediator, so it is not part of a "mediation" as defined by ORS 36.110(5).

If the legislature intended a lawyer to be protected from his client by privilege in mediations, it would not have given the "parties" (which does not include their lawyers) a right to waive the privilege by ORS 36.220(1).

Protecting lawyers with a privilege of confidentiality in mediation is inconsistent with express purposes of the mediation statutes, ORS 36.105(1), (2), and (5).

Such protection is also contrary to public policy, the Oregon legislative history behind the mediation statute, and the express exception to privilege and Commentary of the Uniform Mediation Act.

VII. Argument

A. Communication between a lawyer and his client are not "mediation" communications within the mediation statutes.

Confidentiality applies to mediation communications by ORS 36.220(1)(a):

> "Mediation communications are confidential and may not be disclosed to any other person."

Communications between an attorney and his client in mediation should not be interpreted as mediation communications.

ORS 36.110(5) defines mediation:

> ". . .a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between mediator and any party or agent of the party. . .."

Communications between a client and his attorney are not per se mediation communications, even if exchanged during a mediation process, because they do not involve the assistance or facilitation of a mediator as required by the definition of mediation under ORS 36.110(5). Communications between plaintiff and defendant in our case, on which the plaintiff bases his claims of legal malpractice, do not involve the mediator. These communications relate to poor advice and other misconduct specific to the lawyer, and communicated only to his client. There is nothing in the record to indicate the mediator was part of communication concerning the facts on which plaintiff's malpractice claim is alleged. All we can

tell from the record as far as the role of the mediator is that he made a recommendation of settlement. There is no evidence to indicate the mediator was informed of any of the circumstances which are the basis of plaintiff's claim of malpractice. There is nothing to suggest the mediator played any role in the misconduct of defendant, and plaintiff's lawsuit against defendant is not based on any communications involving the mediator.

A fair interpretation of this statute, thus, leads to a conclusion that the confidentiality of mediation does not relate to matters communicated only between a client and his lawyer. A lawyer and his client should be seen as one entity in a mediation, one side of a dispute. Any communications between them usually do not involve the opposing party or the mediator, and it is inferable in our case that the opposing party, like the mediator, was not involved in communications between the defendant and the plaintiff which form the basis of plaintiff's malpractice claim.

ORS 36.220(1)(b) states:

> "The parties to a mediation may agree in writing that all or part of the mediation communications are not confidential."

ORS 36.224 states: a "party to a mediation includes a person . . . if the person . . . participates in a mediation and has a direct interest in the controversy that is the subject of the mediation." (Emphasis added.)

Black's Law Dictionary, 5th Ed. (1979), defines "parties" as:

> "the persons who take part in the performance of any act, or who are directly involved in any affair, contract, or conveyance or are actively concerned in the prosecution or defense of any legal proceeding." ". . . in civil actions, they are called the 'plaintiff' and 'defendant'."

The definition of parties by both ORS 36.224 and *Black's Law Dictionary* excludes a lawyer in a mediation, because he does not have a "direct" interest in the controversy, and is neither a plaintiff nor defendant. To that end, the Uniform Mediation Act (UMA) is also clear that a lawyer is not a party to a mediation.[1]

The UMA §2(5) defines a "mediation party" as "a person that participates in a mediation and whose agreement is necessary to resolve the dispute." The commentary to this section is clear that "counsel for a mediation party would *not* be a mediation party, because their agreement is not necessary to the resolution of the dispute" (emphasis added).

Only the client has a direct interest in a mediation, because it is his rights and obligations that are considered, not his lawyer's. Only the client's agreement is required to settle a dispute in a mediation. The role of a lawyer in a mediation is to represent his client and assist in an attempted resolution of his client's rights and obligations. The lawyer has no personal stake, or "direct" interest in the outcome

[1] The UMA has not yet been adopted in Oregon, but it has been adopted in Washington as well as 10 other states and the District of Columbia. It is currently before the legislature in two additional states.

of a mediation.

Assuming that a lawyer is not a party to a mediation under ORS 36.220(1)(b), and parties to a mediation may agree in writing that communications are not confidential, it does not make sense that the legislature intended for a lawyer to enjoy the confidentiality of mediation communications, when the statute allows the clients as parties (and not their lawyers) to waive the confidentiality of mediation communications. If lawyers were intended to enjoy the confidentiality of mediation communications, their clients would not be given the right by statute to waive the lawyer's right of confidentiality.

B. Allowing an attorney confidentiality in communications with his client, is inconsistent with the stated "policy" of the mediation statutes set out in ORS 36.100: ". . . it is preferable that disputants be encouraged and assisted to resolve their differences with the assistance of a trusted and third party mediator, whenever possible. . .."

The Court of Appeals' decision giving lawyers the right to assert mediation confidentiality, will discourage disputants from engaging in mediation because their attorneys are protected from malpractice in the mediation process. Similar protection is not afforded attorneys in non-mediation settlement procedures, such as court supervised settlement conferences. If a lawyer is negligent in his advice to a client in a court supervised settlement conference, the lawyer cannot assert confidentiality regarding the advice.

If the Court of Appeals decision stands, parties would be discouraged from entering into mediation. They would be more encouraged to enter a non-mediation settlement process because their lawyers would be unprotected by a mediation privilege.

C. The Court of Appeals decision is also inconsistent with the "declaration of purpose" stated in ORS 36.105.

Because disputants will be discouraged from mediation as a consequence of the Court of Appeals decision, enumerated purposes in this statute will lose their intended application.

ORS 36.105(1) declares a purpose to:

> "Foster the development of community based programs that will assist citizens in resolving disputes and developing skills and conflict resolution."

If parties are discouraged from participating in mediation, the development of such community based programs will not be fostered.

ORS 36.105(2):

> "Allow flexible and diverse programs to be developed in this state, to meet specific needs in local areas and to benefit the state as a whole through experiments using a variety of models of peaceful dispute resolution."

If disputants are discouraged from using mediation, the purpose described in this statute is thwarted.

ORS 36.105(5):

> "Encourage the development and use of mediation panels for resolution of civil litigation disputes."

This purpose is not advanced if clients are discouraged from using mediations.

D. There is no reasonable public policy to protect an attorney from his communications with his client during a mediation.

There is strong public policy to support use of communications between an attorney and his client in a mediation as a basis for a claim for malpractice by the client. If the Court of Appeals decision is unchanged, an attorney may be motivated to direct his client to mediation and away from another settlement process to satisfy the attorney's interests and not his client's. In a mediation where the attorney is poorly prepared and is afraid of proceeding to trial, or wants a quick settlement, under the Court of Appeals' rule he is protected from lying or failing to disclose important information to his client. Such conduct could be central to a client deciding to settle or not settle. Many examples can be given, including a lawyer lying by stating a client has an obligation to pay attorney fees to the other side if he does not settle in the mediation, or lying by stating the client is limited to receive $10,000 on a $1,000,000 claim, if he does not settle in mediation and goes to trial.

What if a lawyer gives advice in connection with a mediation that turns out to be wrong and without any reasonable basis, and the client declines to accept a settlement offer in the mediation based on this bad advice? For example, if the

lawyer has not investigated witnesses' testimony and the witnesses testify adversely to the client resulting in a total loss at trial? What if a lawyer fails to advise about the risks of a pending summary judgment, an offer extended in mediation is declined as a result, and the summary judgment is granted against the client without any reasonable basis to oppose it?

Or, as in our case, what if the lawyer fails to properly plead claims for the client, fails to conduct adequate discovery, fails to include reasonably based non-economic damages in the mediation settlement process, and completely abandons a settlement amount recommended to the client before the mediation, without a reasonable basis for doing so?

Examples like these are limited only by one's imagination. The legislature could not have intended to protect lawyers in their communications with clients in the mediation process when such communications establish a basis for claims of legal malpractice against the lawyers.

E. Legislative history does not support an intention to protect lawyers from claims by their clients.

As stated in the Brief in Support of Petition for Review filed *amicus curiae* by the Oregon Trial Lawyers Association, and Appellant's Opening Brief in the Court of Appeals, there is nothing in the legislative history behind the Oregon mediation statutes that indicates a purpose to protect attorneys from malpractice committed during a mediation. All discussion in the legislative history about mediation confidentiality reveal an intent to protect the client.

ORS 36.220 and ORS 36.222 were adopted in 1997 as part of SB 160, which became 1997 OR Laws 670. Therefore, the legislature did not consider the UMA when drafting the Oregon statutes, as the UMA was not drafted until 2001. Predictably, UMA §6(a)(6) allows for an exception to privilege against disclosure in the mediation context for any claim "sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, non-party participant, or representative of a party based upon conduct during a mediation." This policy is consistent with the Oregon legislature's intent to protect parties and promote mediation, and it is consistent with a reasonable interpretation of the Oregon mediation statutes. The Court should declare that Oregon law does not protect an attorney from committing malpractice in a mediation process based on a claim of confidentiality in mediation communications.

Defendant in our case may claim that the confidentiality of mediations extends to lawyers because the adverse parties in the mediation are entitled to expect that the settlement offers they unsuccessfully made will not be heard in any later proceeding because of their right to confidentiality under ORS 36.222(1).

These adverse parties may argue that they have reasons for keeping the negotiations secret, even if a client's malpractice claim does not involve them in litigation.

These contentions may have some legitimacy, but are greatly outweighed by the public policy of allowing a client to proceed against his lawyer for negligence conducted by the lawyer in a mediation.

The Commentary to UMA §6(a)(6) states a policy behind the exception to privilege, which applies to our case and should be followed by this court::

> ". . .the exceptions in Section 6(a) apply . . . because society's interest in the information contained in the mediation may be said to categorically outweigh its interest in the confidentiality of mediation communications."

VIII. CONCLUSION

Oregon statutes can be easily interpreted to exclude a privilege in a mediation for conduct by a lawyer with his client. Public policy and the Uniform Mediation Act support such an exclusion. Allowing such a privilege may safeguard a lawyer from a wide range of misconduct with his client, and effectively limit the client's right to a remedy, as it has in the instant case.

DATED: December 17, 2014.

FARLEIGH WADA WITT

By: /s/ Mark M. McCulloch

Mark M. McCulloch, OSB #670791
(503) 228-6044
mmcculloch@fwwlaw.com
Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE PURSUANT TO ORAP 5.05

I certify that the brief complies with the "length" provisions of ORAP 5.05 in that:

1. It contains 2,676 words, exclusive of those items excludable under ORAP 5.05.
2. Its type face is proportionally spaced and is 14-point.
3. In preparing this certificate, I have relied on the word count of the word processing system used to prepare the brief.

DATED: December 17, 2014.

FARLEIGH WADA WITT

By: /s/ Mark M. McCulloch
Mark M. McCulloch, OSB #670791
(503) 228-6044
mmcculloch@fwwlaw.com
Attorneys for Petitioner

CERTIFICATE OF FILING AND MAILING

I hereby certify that I electronically filed the foregoing **PETITIONER'S BRIEF ON MERITS OF THE CASE** with the State Court Administrator by using the Oregon Appellate eFiling system on December 17, 2014.

I further certify that I electronically served the foregoing **PETITIONER'S BRIEF ON MERITS OF THE CASE** upon the persons listed below, by using the Oregon Appellate eFiling system on December 17, 2014:

Thomas W. Brown, OSB 801779
tbrown@cosgravelaw.com
Wendy Margolis, OSB 945675
wmargolis@cosgravelaw.com
Cosgrave Vergeer Kester LLP
888 SW Fifth Avenue, Suite 500
Portland, OR 97204
Tel: 503.323.9000

Of Attorneys for Defendant-Respondent/Respondent on Review

I further certify that I served by mail the foregoing **PETITIONER'S BRIEF ON MERITS OF THE CASE** upon the persons listed below, by

/ / /

/ / /

/ / /

placing it in an envelope with postage fully prepaid and placed in the United States mail in Portland, Oregon, on December 17, 2014 addressed as follows:

Rankin Johnson IV, OSB No. 964903
rankin@briefwright.com
Law Office of Rankin Johnson IV, LLC
208 SW First Avenue, Suite 220
Portland, OR 97204
Tel: (503) 307-9560

Of Attorneys for amicus curiae
Oregon Trial Lawyers Association

DATED: December 17, 2014.

FARLEIGH WADA WITT

By: /s/ Mark M. McCulloch
Mark M. McCulloch, OSB #670791
(503) 228-6044
mmcculloch@fwwlaw.com
Attorneys for Petitioner

CERTIFICATE OF SERVICE