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 Circuit Court
Case No. 1203-02980

Court of Appeals No. A152391

Supreme Court No. S062520

RESPONDENT ON REVIEW'S BRIEF ON THE MERITS

Review of a Decision of the Court of Appeals,
on Appeal from a Judgment of the Multnomah County Circuit Court,
Jerry B. Hodson, Judge

Date of Decision: June 11, 2014
Author: Egan, J.
Concurring Judges: Armstrong, P.J. and Nakamoto, J.

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I. INTRODUCTION

In this legal malpractice case,[1] plaintiff alleged that defendant's negligence led plaintiff to accept a settlement, the amount of which was less than what a jury would have awarded him as damages in a suit he filed against his former employer, Nationwide Insurance (Nationwide). ER 2-7. Defendant moved to strike portions of plaintiff's complaint under ORCP 21 E and to dismiss it under ORCP 21 B(6). ER 8-14. The trial court (1) accepted most of defendant's motions to strike; and (2) dismissed the complaint with prejudice because plaintiff did not (and could not) allege ultimate facts supporting any claim for relief against defendant, particularly that any negligence by defendant caused plaintiff's alleged harm. ER 70-71.

The Court of Appeals affirmed in part and reversed in part. *Alfieri v. Solomon*, 263 Or App 492, 329 P3d 26, *rev allowed*, 356 Or 516 (2014). Specifically, that court agreed with the trial court's motion-to-strike rulings with one exception – the Court of Appeals concluded that the trial court erred in striking from plaintiff's complaint allegations that defendant had failed to properly advise plaintiff that Nationwide had not complied with the executed settlement agreement's terms because, the Court of Appeals reasoned, "those communications did not occur in the course of or in

[1] Plaintiff's complaint alleged two claims – negligence and breach of fiduciary duty. ER 2-7. The claims are virtually identical and plaintiff never argued below – and does not argue now – that there is any difference between them for purposes of the trial court's challenged rulings.

connection with the mediation process and thus are not confidential mediation communications." *Id.* at 502.[2] The Court of Appeals further concluded that, in light of ORCP 23 A, and the fact that plaintiff could prove the causation element of his case without disclosing to the jury the mediated settlement amount, the trial court should not have dismissed plaintiff's complaint with prejudice. *Id.* at 504-505.

Plaintiff argues in his merits brief that the trial court and Court of Appeals erred because (1) all communications to a mediation party by the party's attorney participating in the mediation are not confidential "mediation communications" under ORS 36.110(7)(a); and (2) for various reasons, the legislature did not intend for the confidentiality protection afforded "mediation communications" and "mediation agreements" in ORS 36.220 and 36.222 to apply in a mediation-based attorney malpractice case. Accordingly, so plaintiff claims, none of the communications the trial court and Court of Appeals concluded should be stricken from his complaint were subject to non-disclosure – in discovery or at trial – under ORS 36.222(1) and (7). For the reasons that follow, this court should reject plaintiff's arguments, reverse the decision of the Court of Appeals and affirm the trial court judgment for defendant.

[2] While the Court of Appeals did not specify in its decision what particular allegations it decided were struck in error, defendant understands those allegations to be paragraphs 13 and 15J. *See* ER 5 and 6 (containing cited paragraphs).

II. FACTS

The relevant facts are either set forth in the Court of Appeals' decision, *Alfieri*, 263 Or App at 494-95, or provided where appropriate in later sections of this brief.

III. QUESTION PRESENTED

Do the rules of confidentiality arising under the mediation statutes, ORS 36.100 to 36.238, prevent a client from offering evidence of communications with his attorney in a malpractice action?

IV. PROPOSED RULE OF LAW

Unless all mediation parties agree otherwise, or the legislature has provided an applicable exception in ORS 36.220 and 36.222**,** ORS 36.222(1) and (7) prevent a client from disclosing, through discovery or evidence at trial, confidential "mediation communications" with his attorney in a malpractice action based on the mediation's outcome.

V. SUMMARY OF ARGUMENT

Plaintiff's proposed rule of law lacks merit because (1) he disregards or misapplies the well-settled statutory construction principles that govern this case; (2) he disregards the well-settled principles that define an Oregon court's role to simply interpret statutes, not make policy decisions; and (3) he disregards how the legislature very carefully and clearly chose to facilitate the use of mediation as a means of resolving disputes through both its broad definition of "mediation communications" and its broad

"mediation communications" and "mediation agreements" confidentiality protection in ORS 36.220 and 36.222.

Properly construed (1) "mediation," as defined in ORS 36.110(5), is every communication to a mediation party or the party's attorney that supports, aids or makes easier or less difficult solving a lawsuit by mutual agreement before that effort formally and definitively ends – not, as plaintiff argues, only communications by a mediator to a party or a party's attorney and (2) "mediation communications," as defined in ORS 36.110(7)(a), means all communications made to a mediation party – not, as plaintiff claims, only communications made by a mediator to a mediation party or that party's attorney – that are in any way related to, associated with, or linked to a mediation, including those made by "any other person present at the mediation proceedings."

Nothing in plaintiff's complaint – or anywhere else in the record – shows that plaintiff and Nationwide ever agreed that any "mediation communications," or any part of their "mediation agreement," would not be confidential, and no exception to the confidentiality of "mediation communications" or a "mediation agreement" in ORS 36.220 and ORS 36.222 is applicable to this case. The rule of law plaintiff proposes is not one that this court can properly adopt. It would require the court to rewrite and/or ignore the relevant parts of ORS 36.100 to 36.238. That being so, only the legislature can provide an exception to the non-disclosure of confidential "mediation communications" and a confidential "mediation

agreement" under ORS 36.222(1) and (7) in a malpractice action based on a mediation's outcome.

Finally, the Court of Appeals erred (1) in concluding that communications by defendant to plaintiff after the confidential "mediation agreement" was signed were not confidential "mediation communications," given when those communications occurred and that the sources for the communications' content were either "mediation communications" or a confidential "mediation agreement"; (2) in relying on ORCP 23 A, a provision never raised by plaintiff before the trial court or the Court of Appeals; and (3) in disregarding *Chocktoot v. Smith*, 280 Or 567, 570, 571 P2d 1255 (1977), when deciding that the jury in this case would not have to know the amount of the mediated settlement to decide whether defendant's negligence, if any, caused plaintiff's alleged harm.

VI. ARGUMENT

A. First Things First: General Points That Necessarily Frame the Proper Disposition of the Question on Review

Over time, plaintiff's arguments have substantially changed. Some arguments necessary to a proper resolution of the case have never been made by plaintiff.[3] Some arguments that plaintiff made in the trial court or

[3] For example, plaintiff has never argued that he was entitled to allege facts that would allow him to disclose through discovery and/or offer evidence at trial of (1) any communications he or defendant had with the mediator during the face-to-face mediation session; and (2) any communications during the face-to-face mediation session to or from Nationwide or its representatives or attorneys participating in the mediation that disclosed information to plaintiff, defendant or the mediator. Nor has plaintiff ever argued that (1) an attorney malpractice suit, based on the

in the Court of Appeals he has abandoned. And plaintiff has even abandoned some arguments that he made in his petition for review. But a few things about plaintiff's argument approach have remained constant at every level (1) his disregard for or misapplication of the well-settled statutory construction principles that govern the question on review presented in this case; (2) his disregard for the well-settled principles that define a court's role to simply interpret statutes, not make policy decisions; and (3) his disregard for the how the legislature very carefully and clearly chose to facilitate the use of mediation as a means of resolving disputes through its broad definition of "mediation communications" in ORS 36.110(7)(a) as well as its broad "mediation communications" and "mediation agreements" confidentiality protection in ORS 36.220 and 36.222. So, before addressing plaintiff's specific arguments in his merits briefs – and those of OTLA, too – defendant addresses first these points, all essential to a proper resolution of this case.

1. Well-settled statutory construction principles

The issue before the court involves statutory construction, which the court resolves by applying familiar principles set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), and *State*

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outcome of a mediation, is not a subsequent adjudicatory proceeding for purposes of ORS 36.222(1) and (7); (2) the parties agreed that "mediation communications" and any "mediation agreement" would not be confidential; and (3) any of the "mediation communications" that defendant made to plaintiff, or anything in the negotiated "mediation agreement," was subject to any specific exception provided in ORS 36.220 and 36.222.

v. Gaines, 346 Or 160, 171-72, 206 P3d 1042 (2009). The court's task is to attempt to discern the meaning of a statute most likely intended by the legislature, examining the text in context and any relevant legislative history offered by the parties. *Id.*

When statutory terms are defined, the court applies those definitions. *State v. Couch*, 341 Or 610, 617, 147 P3d 322 (2006); *SAIF v. Lewis*, 335 Or 92, 97, 58 P3d 814 (2002). When terms of common usage are not defined (or when words of common usage, used within defined terms, are not themselves defined), those terms are given their plain, ordinary meanings. *See PGE*, 317 Or at 610 (undefined words are given their ordinary meaning); *see also State v. Murray*, 340 Or 599, 604, 136 P3d 10 (2006) (court resorts to dictionary definitions for the common meaning of undefined statutory terms).

In considering the text of a statute, the court considers rules of construction that bear directly on how to read the statute's text, including ORS 174.010. *PGE*, 317 Or at 610-11; *accord State v. Eumana-Morachel,* 352 Or 1, 19, 277 P3d 549 (2012) (as ORS 74.010 instructs,"[i]t is the office of this court to ascertain and declare what is contained within the substance of the statute"); *Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 510, 98 P3d 1116 (2004) ("When * * * a statute contains multiple provisions, ORS 174.010 directs us to read those provisions, if possible, in a way that will give effect to all of them."); *Lane County v. LCDC*, 325 Or 569, 578, 942 P2d 278 (1997) (in construing a statute, "we do not look at

one subsection of a statute in a vacuum; rather, we construe each part together with the other parts in an attempt to produce a harmonious whole"). Consistent with the plain language of ORS 174.010, then, when applying that rule of construction, the court cannot disregard any statutory term, add any missing term, ignore related statutory provisions, conclude that words chosen by the legislature such as “or,” “any” or “all” mean something other than what each word ordinarily means, or ignore customary rules of grammar. *See Zimmerman v. Allstate Property & Casualty Co.,* 354 Or 271, 293, 311 P3d 497 (2013); *Cuff v. Department of Public Safety Standards*, 345 Or 462, 470, 198 P3d 931 (2008); *Pollin v. Department of Revenue,* 326 Or 427, 431, 952 P2d 537 (1998); *McCabe v. State of Oregon*, 314 Or 605, 610–11, 841 P2d 635 (1992); *Lommasson v. School Dist. No. 1*, 201 Or 71, 79, 261 P2d 860 (1953), *adh'd to in part on reh'g*, 201 Or 71, 267 P2d 1105 (1954) (each stating one or more of those propositions).

Finally, to the extent the court finds it helpful, the court considers the legislative history offered by the parties. ORS 174.020(3); *see also Gaines*, 346 Or at 171–72 (after considering text and context, court considers any pertinent legislative history, giving it appropriate weight); *id*. at 172 (“Legislative history may be used to confirm seemingly plain meaning and even to illuminate it * * *.”).

2. Well-settled principles defining the court's role as the interpreter of statutes, not a policy maker

The court's role in this case is to interpret the relevant statutes as written by the legislature. *See Johnson v. Swaim*, 343 Or 423, 430–31, 172 P3d 645 (2007) ("statutory construction methodology, not policy considerations[,] must be our guide in discerning the meaning of a statute.") (Internal quotation marks and citation omitted.) When the legislature's chosen language – viewed in context or in light of offered legislative history – is clear, the court's responsibility is to apply the legislature's chosen language. *See State v. Vasquez-Rubio*, 323 Or 275, 282-83, 917 P2d 494 (1996) (noting that courts are not at liberty to rewrite statutes to avoid what courts perceive to be unreasonable results*); Portland Adventist Medical Center v. Sheffield*, 303 Or 197, 200, 735 P2d 371 (1987) (observing that a court cannot rewrite a statute to fill perceived legislative omissions); *Foster v. Goss*, 180 Or 405, 408, 168 P2d 589, 175 P2d 794 (1946) (stating that "the court has no legislative powers and is not authorized to supply deficiencies in a statute"); *State ex rel. Everding v. Simon*, 20 Or 365, 373–74, 26 P 170 (1891) (commenting that where the legislature has omitted by mistake or otherwise to make the necessary provisions to carry out its intention, the court cannot by construction supply those provisions).

3. Overview of mediation confidentiality statutory scheme

a. The statutes establishing non-disclosure of confidential mediation communications and agreements

ORS 36.222 provides, in relevant part:

> "(1) *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*."
>
> "* * * * *
>
> "(7) The limitations on admissibility and disclosure in subsequent adjudicatory proceedings imposed by this section apply to any subsequent judicial proceeding, administrative proceeding or arbitration proceeding. *The limitations on disclosure imposed by this section include disclosure during any discovery conducted as part of a subsequent adjudicatory proceeding, and no person who is prohibited from disclosing information under the provisions of this section may be compelled to reveal confidential communications or agreements in any discovery proceeding conducted as part of a subsequent adjudicatory proceeding.* Any confidential mediation communication or agreement that may be disclosed in a subsequent adjudicatory proceeding under the provisions of this section may be introduced into evidence in the subsequent adjudicatory proceeding."

(Emphasis added.)

b. Overview of the operation of ORS 36.222(1) and (7) in light of other relevant aspects of ORS 36.110 to 36.238

To properly answer the question on review, the court must consider and properly interpret all relevant aspects of ORS 36.110 to 36.238. ORS

174.010; *Lane County*, 325 Or at 578. Specifically, here, that means the court must consider:

> 1. All "mediation communications" are confidential unless the parties to a mediation agree otherwise or the legislature has provided a specific exception in ORS 36.220 or 36.222 to the confidentiality of those communications.[4] ORS 36.220(1)(a).[5]
>
> 2. A "mediation agreement" is not confidential except to the extent the mediation parties agree that some or all of the agreement is confidential. ORS 36.220(2)(b).[6]
>
> 3. Attorneys for a mediation party may participate in the mediation if the mediator and all parties agree that they should participate. ORS 36.195(2).[7]
>
> 4. All confidential "mediation communications" and any confidential "mediation agreement" cannot be used in evidence in any subsequent adjudicatory proceeding or disclosed through discovery in any subsequent adjudicatory proceeding unless the legislature has provided a specific exception to the confidentiality of those communications and that agreement in ORS 36.220 to 36.328. ORS 36.222(1) and (7).

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[4] ORS 36.224 to 36.238 are inapplicable as this case does not involve any public body. Accordingly, only ORS 36.220 and 36.222 apply in considering the question presented on review.

[5] ORS 36.220(1)(a) provides that "[e]xcept as provided in ORS 36.220 [and 36.222 m]ediation communications are confidential and may not be disclosed to any other person."

[6] "'Mediation agreement' means an agreement arising out of a mediation, including any term or condition of the agreement." ORS 36.110(6). ORS 36.220(1)(b) provides that "[e]xcept as provided in ORS 36.220 [and 36.222 t]he parties to a mediation may agree that all or part of the terms of a mediation agreement are confidential."

[7] ORS 36.195(2) provides that "[a]ttorneys and other persons who are not parties to a mediation may be included in mediation discussions at the mediator's discretion, with the consent of the parties, for mediations held under the provisions of ORS 36.185 to 36.210."

B. Next Things Next: Analysis of Plaintiff's and OTLA's Arguments in Their Merits Briefs

1. Plaintiff's first argument: none of the communications by defendant to plaintiff, that the Court of Appeals agreed the trial court properly struck, are "mediation communications"

a. Mediation communications are limited to communications directly involving the mediator

Plaintiff first argues that "[c]ommunications 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)." Pltf's Merits Br at 4. As such, so plaintiff claims, any communications between plaintiff and defendant in this case that did not directly involve the mediator were not confidential mediation communications. *Id*. For two reasons, plaintiff's argument lacks merit.

First, ORS 36.110(5) provides:

> "'Mediation' means 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 a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated."[8]

[8] ORS 36.110(9) defines a "mediator" as "a third party who performs mediation. 'Mediator' includes agents and employees of the mediator or mediation program and any judge conducting a case settlement conference." "Third-party" – used in ORS 36.110(9) – means "a person other than the principals." *Webster's* at 2376. "Perform" – also used in subsection (9) – means to "carry out, accomplish." *Webster's* at 1678. So, a "mediator" is a person who is not a litigant and who carries out or accomplishes "mediation." *See also* Office of Legislative Counsel, *Bill*

While key statutory terms in ORS 36.110(5) are not defined, they all have plain, ordinary meanings. "Process" means "a progressive forward movement from one point to another on the way to completion." *Webster's Third Intl New Dictionary*, 1808 (unabridged ed 2002) (*Webster's*). "Assist" means "to give support or aid." *Webster's* at 113. "Facilitates" means "to make easier or less difficult." *Webster's* at 818. "All" means "as much as possible: the greatest possible." *Webster's* at 54. "Contacts" means "an instance of establishing communications with someone." *Webster's* at 490. "Agent" means "one that acts for or in the place of another by authority from him." *Webster's* at 40. "Resolution" means "the act of solving." *Webster's* at 1933. And "terminate" means to "end formally and definitely." *Webster's* at 2359.

The plain, ordinary meaning of "mediation" in ORS 36.110(5) encompasses *every communication to a mediation party or the party's agent* that supports, aids or makes easier or less difficult solving a lawsuit by mutual agreement before that effort formally and definitively ends. Accordingly, "mediation" does not encompass, as plaintiff claims, only communications by a mediator to a party or a party's attorney made as part of the mediation process.

Second, deciding whether a communication to a mediation party – by the party's lawyer allowed to participate in the mediation – is a "mediation

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Drafting Manual § 7.2 (2012) ("'Means' is used in [a] definition if the definition restricts or limits the meaning of a word. 'Includes' is used if the definition extends the meaning.").

communication" is properly determined by considering ORS 36.110(7). ORS 174.010; *Vsetecka*, 337 Or at 510. ORS 36.110(7)(a) defines "mediation communications" 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[.]"[9]

Again, while key statutory terms in ORS 36.110(7)(a) are not defined, they all have plain, ordinary meanings. As noted, "all" means "as much as possible: the greatest possible." *Webster's* at 54. "Any" means "to any extent" or "to any degree." *Webster's* at 97. "Other" means "not being the one first mentioned" or "a different one." *Webster's* at 1598. "Person" means "a human being." *Webster's* at 1686. And, as the Court of Appeals concluded (and plaintiff doesn't dispute), "course" and "connection" mean "related to, associated with, or linked to." *See* 263 Or App at 501 (relying on common meanings of "course" and "connection").

Properly construed, ORS 36.110(7) extends to *all communications made to a mediation party* that are in any way related to, associated with, or linked to a mediation, including those made by "any other person present at the mediation proceedings." Accordingly, "mediation communications"

[9] ORS 36.110(7)(b) includes as "mediation communications" "[a]ll 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." In his merits brief, plaintiff does not argue that ORS 36.110(7)(b) is applicable here.

are not limited, as plaintiff claims, to just communications made by a mediator to a mediation party or that party's attorney during the mediation process.

In sum, based on the plain, ordinary meaning of ORS 36.110(5) and (7), the legislature intended that "mediation communications" include all communications between a party and that party's attorney participating in the mediation. Plaintiff's contrary view requires the court to impermissibly ignore what ORS 36.110(5) and (7) plainly say and rewrite them.

b. Attorney and client are "one entity" in mediation

Plaintiff next argues that communications between attorney and client are not "mediation communications" because the attorney and client are "one entity in a mediation, one side of a dispute." Pltf's Merits Br at 5. For several reasons, that argument is flawed.

First, the plain, ordinary meaning of ORS 36.110(7)(a) extends to "a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings." Applying common grammar rules (the effect of the commas in the phrase) and the ordinary meaning of key words in the phrase ("or" and "any other person"), the phrase plainly means that if a party's attorney ("any other person") is "present at the mediation proceedings" (which plaintiff doesn't dispute defendant was), communications to the attorney are distinct from communications to a "party present at the mediation proceedings." So, then, are

communications to a party from the party's attorney participating in the mediation.

Second, other related statutes support that same conclusion. ORS 36.195(2) provides as follows:

> "Attorneys and other persons who are not parties to a mediation may be included in mediation discussions at the mediators discretion, with the consent of the parties, for mediation held under the provisions of ORS 36.185 to 36.210."

Reading ORS 36.110(7)(a) and (b) and 36.195(2) together, as the court must do, *Lane County*, 325 Or at 578, the legislature intended that attorneys may be "included in mediation discussions" under ORS 36.195(2), and that, when they are included, as defendant was here, they become "any other person present at the mediation proceeding" under ORS 36.110(7) such that communications made to them or by them to a mediation party are "mediation communications."

Moreover, ORS 36.220(7) provides:

> "A party to a mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS 40.010 to 40.585 or other provision of law. A party may disclose confidential mediation communications to any other person for the purpose of obtaining advice concerning the subject matter of the mediation, if all parties to the mediation so agree."

ORS 40.010 to 40.585, part of Oregon's Evidence Code, includes ORS 40.225 to 40.295, codifying many privileges, including the attorney-client privilege in ORS 40.225 (OEC 503(4)). Thus, ORS 36.220(7) confirms that the legislature intended that a mediation party could share confidential

"mediation communications" with the party's lawyers without losing the communication's non-disclosure protection. Accordingly, that statute further confirms that the legislature intended that a mediation party and his attorney are separate and distinct people, and their "mediation communications" to each other are separate and distinct communications.[10]

Finally, the California Supreme Court rejected the identical argument plaintiff makes here in *Cassel v. Superior Court*, 51 Cal 4th 113, 119 Cal Rptr 3d 437, 244 P3d 1080 (2011). There, the California Assembly enacted legislation that, with specified statutory exceptions, provided that neither "evidence of anything said," nor any "writing," is discoverable or admissible "in any arbitration, administrative adjudication, civil action, or

[10] ORS 36.220(7) confirms two other things critical to a proper disposition of the question presented for review (1) the legislature was aware of the attorney-client privilege, but chose not to incorporate in ORS 36.220 or 36.222 the privilege's exception "[a]s to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer," ORS 40.225(4) (OEC 503(4)(c)), even while incorporating the crime-fraud exception in ORS 40.225(4)(a) (OEC 503(4)(a)) in ORS 36.220 (ORS 36.220(6)); and (2) if a mediation party wanted to disclose confidential mediation privileges to "any other person" with whom the party's communications were otherwise not privileged, they could do so only if (a) the confidential communications are disclosed for the limited purpose of "obtaining advice about the subject matter of the mediation"; and (b) if all mediation parties agree to the disclosure. *See also Cassel v. Superior Court*, 51 Cal 4th 113, 133, 119 Cal Rptr 3d 437, 453, 244 P3d 1080, 1094 (2011) (confirming that California's substantially similar mediation statutes are not "subject to an exception, similar to that provided by the attorney-client privilege, for lawsuits between attorney and client" and that the Court of Appeal's contrary conclusion in that case "is nothing more than or less than a judicially crafted exception to the unambiguous language of the mediation confidentiality statutes in order to accommodate a competing public policy concern – here, protection of a client's right to sue his or her attorney.").

other noncriminal proceeding in which * * * testimony can be compelled to be given," if the statement was made, or the writing was prepared, "for the purpose of, in the course of, or pursuant to, a mediation* * *", Evid Code, § 1119, subds (a), (b), and that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation * * * shall remain confidential." *Id.*, subd (c). In rejecting the Court of Appeal's conclusion that a party and its attorney were a "single participant," the court noted:

> "[T]he [Court of Appeal's] majority concluded that a party to mediation, and the party's attorney, *are a single mediation 'participant' whose communications inter se are not within the intended purview of the mediation confidentiality statutes*.
>
> "But there is no persuasive basis to equate mediation 'parties' or 'disputants' with mediation 'participants,' and thus to restrict confidentiality to potentially damaging mediation-related exchanges between disputing parties[.]
>
> "* * *no reason appears why other persons attending and assisting in the mediation on behalf of the disputants, such as their counsel, are not themselves distinct 'participants[.] Though petitioner urges us to do so, we therefore decline to accept the Court of Appeal's 'single participant' characterization, which contradicts the plain import of the statutes*."

51 Cal 4th at 130-31, 119 Cal Rptr 3d 450-53, 244 P3d at 1092 (emphasis added).

In sum, based on the plain, ordinary meaning of ORS 36.110(5) and (7) and other related statutes, the legislature intended for mediation parties and their attorneys to be separate people, not one "entity," and the legislature understood that those separate people would disclose

confidential "mediation communications" to one another. Plaintiff's contrary view requires the court to ignore what ORS 36.110(5) and (7) say and impermissibly rewrite them.

c. The legislature did not intend for attorneys to "enjoy" confidentiality of mediation communications

Next, plaintiff asserts that "[i]f lawyers were intended to enjoy the confidentiality of mediation communications, their clients would not be given the right by [ORS 36.220(1)(b)] to waive the lawyer's right of confidentiality." Pltf's Merits Br at 7. For several reasons, that argument lacks merit.

First, ORS 36.220(1)(b), which provides that "[t]he parties to a mediation may agree in writing that all or part of the mediation communications are not confidential," does not alter the definition of "mediation communications" in ORS 36.110(7)(a). Rather, ORS 36.220(1)(b) simply provides who can remove the confidentiality that attaches to otherwise confidential "mediation communications."

Second, even if ORS 36.220(1)(b) affected in some way the definition of "mediation communications" in ORS 36.110(7)(a) (which is does not), plaintiff's focus on the fact the legislature did not give a mediation party's attorney the right to eliminate the confidentiality of "mediation communications" is misplaced. As ORS 36.220(1)(b) plainly says, any decision to eliminate the confidentiality of "mediation communications" can only be made by *all parties to a mediation*. Plaintiff's complaint did not

allege – and nothing in the record otherwise shows – that *all parties to the mediation* (plaintiff and Nationwide) agreed that any "mediation communications" would not be confidential if plaintiff decided to sue defendant based on the mediation's outcome. In other words, in ORS 36.220(1)(b), the legislature plainly did not allow one party to a mediation to disclose, through discovery or at trial, confidential "mediation communications" in any subsequent adjudicatory proceeding.

Third, the legislature could have, but did not, include an exception for mediation-related legal malpractice claims in ORS 36.220 or 36.222. That omission is presumably purposeful, *PGE*, 317 Or at 611, a presumption particularly apt in the circumstances here. *See* n 10; *see also PGE*, 317Or at 614 ("The legislature knows how to include qualifying language in a statute when it wants to do so."); *Cassel*, 51 Cal 4th 113, 131-33, 119 Cal Rptr 3d 437, 452-53, 244 P3d 1080, 1093-94 (construing California's substantially similar mediation confidentiality statutes and concluding that they "include no exception for legal malpractice actions by mediation disputants against their own counsel" and "[n]either the language nor the purpose of the mediation confidentiality statutes supports a conclusion that they are subject to an exception[.]").

In sum, by its plain, ordinary terms, ORS 36.220(1)(b) provides a mechanism for *all parties to agree* that some or all "mediation communications" will not be confidential. ORS 36.220(1)(b) thus further demonstrates that all "mediation communications" are confidential unless

all the parties agree otherwise (which plaintiff did not allege in his complaint or otherwise claims happened) or an express exception in ORS 36.220 or 36.222 applies (which plaintiff did not allege in his complaint or, indeed, has ever claimed exists in this case). Accordingly, plaintiff's argument would require the court to ignore what ORS 36.220 and 36.222 plainly say and rewrite them.

2. Plaintiff's second and third arguments: mediation confidentiality for attorneys conflicts with the policies and purposes expressed in ORS 36.100 and ORS 36.105

Plaintiff next contends that "giving lawyers the right to assert mediation confidentiality will discourage disputants from engaging in mediation," particularly when "similar protection is not afforded attorneys in non-mediation settlement procedures, such as court supervised settlement conferences." Pltf's Merits Br at 7-8. Again, there are several flaws in that argument.

First, the premise of plaintiff's argument is incorrect. Under ORS 36.220 and 36.222, it is plaintiff's obligation to show an agreement or exception to "mediation communications" confidentiality. Nothing in ORS 36.110 to 36.238 expressly or impliedly prohibits defendant from raising that defect in plaintiff's pleadings in the ways that he did in the trial court.

Second, plaintiff offers no factual support for his claim that construing ORS 36.110 to 36.238 to encompass communications between mediation parties and their attorneys would discourage parties from entering private

mediation and thus conflict with the policy of promoting mediation expressed in ORS 36.100 and ORS 36.105. Simply saying so does not make it so. In any event, if there is any actual support for the proposition (and defendant is not aware of any), the legislature is the body to receive and consider what to do with that information, not this court. *See* A–*1 Sandblasting & Steamcleaning Co., Inc. v. Baiden*, 293 Or 17, 23-24, 643 P2d 1260 (1982) (confirming that public policy concerns are more properly evaluated by the legislature which can "make such policy judgments on empirical or on political grounds[.]").

Third, contrary to what plaintiff claims, the broad confidentiality protection accorded "mediation communications" in ORS 36.222(1) and (7) promotes, rather than discourages, mediation. And that is so even if, as a price for promoting mediation, evidence supporting (or refuting, for that matter) a mediation-based attorney negligence claim is unavailable. *See Cassel*, 51 Cal 4th at 136, 119 Cal Rptr 3d at 455-56, 244 P3d at 1096 (detailing reasons why legislature could reasonably decide that not including an exception for legal malpractice suits in mediation confidentiality scheme promotes mediation); *see also Kurtin v. Elieff*, 215 Cal App 4th 455, 470, 155 Cal Rptr 3d 573, 585 (2013), *as modified on denial of reh'g* (May 8, 2013), *rev den* (July 31, 2013) ("The California Supreme Court has clearly signaled the policy behind the mediation privilege is so strong that California law is willing to countenance the 'high

price' of the loss of relevant evidence to protect the privilege.") (quoting *Cassel*, 51 Cal 4th at 138 (Chin, J., concurring)).

Fourth, even assuming this court could conclude that judicial settlement conferences would be used in lieu of mediations if the decision of the Court of Appeals is not reversed, judicial settlement conferences are "mediations" within ORS 36.110(5). *See* ORS 36.110(9) (providing that "any judge conducting a case settlement conference" is a "mediator"). Thus, the admissibility of confidential "mediation communications" in subsequent adjudicatory proceedings related to judicial settlement conferences and private mediations is determined by the exact same statutory scheme.

Finally, there are many types of claims that mediation parties could well be precluded from bringing in light of ORS 36.222(1) and (7), other than attorney negligence claims based on a mediation's outcome. By agreeing to mediation, a party might also lose the right to use confidential "mediation communications" to support (or defend against) many claims against another mediation party, a party's agent or any other person participating in a mediation (including other professionals such as doctors, accountants, financial advisors, business valuation experts, structured settlement experts, *etc.*), including claims such as defamation, intentional interference with business relations, and negligent misrepresentation, just to name a few. But whether that fact does or does not best further the policy of promoting mediation expressed in ORS 36.100 and ORS 36.105 –

just like whether precluding mediation-based attorney negligence claims does or does not best promote that policy – is for the legislature alone to decide, given the plain language of ORS 36.100 to 36.238. *See Johnson*, 343 Or at 430-431 (court properly guided by statutory construction methodology, not policy considerations); *see also Cassel*, 51 Cal 4th at 136, 119 Cal Rptr 3d at 456, 244 P3d at 1096 ("We express no view about whether the statutory language, thus applied, ideally balances the competing concerns or represents the soundest public policy. Such is not our responsibility or our province.").

In sum, ORS 36.222(1) and (7) plainly preclude disclosure of confidential "mediation communications" by a party's attorney to a party absent agreement of all parties to the mediation or a specific exception in ORS 36.220 or 36.222. Nothing about that result conflicts with ORS 36.100 or ORS 36.105 or, if it does, that's a problem for the legislature alone to address. Plaintiff's argument is just another impermissible attempt to have the court ignore what ORS 36.220(1)(a) and ORS 36.222(1) and (7) plainly say and rewrite them.

3. Plaintiff's fourth argument: there is no reasonable public policy to protect an attorney from his communications with his client during a mediation

Plaintiff next claims that the Court of Appeals' decision may shield bad conduct by attorneys in the context of mediation. Pltf's Merits Br at 9-10. There are several problems with this argument.

First, again, there is no basis in the record for the court to assume that any of the scenarios plaintiff postulates actually occur or, if they do, how often they occur, because of "mediation communications" confidentiality. And, as noted, even if plaintiff could offer evidentiary support for those points, it would be for the legislature to consider what do with that information, not this court. *See Baiden*, 293 Or at 23-24 (supporting conclusion).

Second, this argument again ignores completely that the legislature carefully and deliberately weighed competing policy interests implicated by confidentiality and non-disclosure in enacting ORS 36.110 to 36.238 and went to great lengths to identify agreements and specific exceptions that permit disclosure. *See, e.g.,* ORS 36.220 (1)(b) (allowing agreement by the parties to remove protection for confidential mediation communications); ORS 36.222 (2)-(6) (detailing both circumstances where communications, agreements and materials are not deemed confidential and providing exceptions to rule of non-disclosure for confidential communications, materials and agreements). Moreover, despite knowing full well that attorneys may be involved in mediations, and that the attorney client privilege contains an exception for attorney malpractice claims, the legislature decided not to create such an exception for mediation-based attorney malpractice cases, a choice that body alone had the right to make.

Third, to the extent the legislature's choice may protect attorneys who commit mediation-based malpractice, that result is no different from the

many other legislative choices that shield professional negligence in favor of competing policy interests. As noted earlier, other mediation-based claims against professionals – other than an attorney – may be lost because of the legislature's choices in drafting ORS 36.100 to 36.238. Statutes of limitation and statutes of ultimate repose are two other examples. So is ORS 676.175(7), where the legislature has chosen to make documents and orders related to any proceeding by a state health professional regulatory board inadmissible in a subsequent civil proceeding.[11] The list could go on and on. The fact is that the legislature often makes choices in order to advance competing policy interests, choices that that law making body is uniquely entitled to make and that this court does not second-guess. *See Warren v. Marion County*, 222 Or 307, 327, 353 P2d 257 (1960) ("This court represents a co-ordinate branch of government. It does not have supervising powers over the policy determinations of legislative bodies.").

Finally, plaintiff's contention that a "malpractice exception" to mediation confidentiality would best serve public policy is hardly beyond debate, even if the court could resolve this case on that basis, which it

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[11] ORS 676.175 (7) provides as follows:

> "A health professional regulatory board record or order, or any part thereof, obtained as part of or resulting from an investigation, contested case proceeding, consent order or stipulated agreement, is not admissible as evidence and may not preclude an issue or claim in any civil proceeding except in a proceeding between the board and the licensee or applicant as otherwise allowed by law."

cannot properly do. *See id.; see also Cassel*, 51 Cal 4th at 136, 119 Cal Rptr 3d at 456, 244 P3d at 1096 (construing California's substantially similar mediation confidentiality statutes and concluding that "inclusion of private attorney-client discussions in the mediation confidentiality scheme addresses several issues about which the Legislature could be rationally concerned.").[12] Indeed, plaintiff's proposed exception raises more questions than answers. Would the exception allow an attorney-defendant to offer in his defense a confidential "mediation agreement" or confidential "mediation communications" that a plaintiff does not contend the legislature intended to be disclosed, such as "mediation communications" between the party-plaintiff and the mediator, between the mediation parties, or between the attorney-defendant and the mediator? If not, how is an attorney able to

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[12] The court also noted:

> "[T]he mediation confidentiality statutes do not create a 'privilege' in favor of any particular person. Instead, they serve the public policy of encouraging the resolution of disputes by means short of litigation. The mediation confidentiality statutes govern only the narrow category of mediation-related communications, but they apply broadly within that category, and are designed to provide maximum protection for the privacy of communications in the mediation context. A principal purpose is to assure prospective participants that their interests will not be damaged, first, by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement. To assure this maximum privacy protection, the Legislature has specified that all mediation participants involved in a mediation-related communication must agree to its disclosure."

51 Cal 4th at 132-33, 119 Cal Rptr 3d at 453, 244 P3d at 1094-95.

fairly defend himself from a meritless claim of mediation-based negligence?[13] *Cf.* OEC 106 (stating "rule of completeness" designed to prevent evidence from being presented to a jury out of context when other admissible evidence would provide that context).[14] And, how is a court supposed to determine – and then what is it supposed to do if the court determines – that an attorney-defendant's claimed negligent communications actually were or were not based in whole or in part on something told to the attorney by the mediator or another mediation party or learned in whole or in part from a confidential "mediation agreement"? Even if, then, this court could say that a "malpractice exception" – an exception the legislature purposefully chose not to include in ORS 36.220 and ORS 36.222 – is "good policy" (and it cannot), whether the correct answer is "yes" or "no" is for the legislature to decide, not this or any other Oregon court.

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[13] As noted, the Court of Appeals concluded – and properly so – that it would be an "absurd result" if in a mediation malpractice action a plaintiff could offer an attorney's statements, but the attorney could not offer the other side of the exchange because the plaintiff's mediation statements are inadmissible. 263 Or App at 500. Similarly, it would be absurd to carve out an exception for communications between the attorney and his client while precluding the attorney from offering evidence of what the other mediation parties and the mediator said.

[14] OEC 106 provides, in relevant part:

> "When part of act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject, where otherwise admissible, may at that time be inquired into by the other[.]"

In sum, the court cannot ignore the legislature's clear language in ORS 36.100 to 36.238 based on whether that language does or does not reflect "good policy." And, the court cannot provide an exception to mediation confidentiality that the legislature plainly chose not to provide. Accordingly, plaintiff's public policy argument should be rejected because that argument, like his other ones, requires the court to impermissibly rewrite ORS 36.220 and ORS 36.222.

4. Plaintiff's fifth argument: legislative history does not support an intention to protect lawyers from claims by their clients

"[A]fter examining text and context," the court may consider legislative history that "appears useful to the court's analysis." *Gaines*, 346 Or at 172. Plaintiff relies only on legislative history from 1997 and claims that history "reveal[s] an intent to protect the client," Pltf's Merits Br at 10, rather than the attorney. For a number of reasons, that argument lacks merit.

In his Court of Appeals brief, defendant discussed at length legislative efforts in 1989, 1995 and 1997 to put in place a formal process for alternative dispute resolution in Oregon. Red Br at 23-30.[15] All that legislative history shows that (1) the legislature's overarching concern – particularly in 1997 – was that the statutes being enacted promote mediation through providing broad protection for confidential "mediation

[15] In lieu of repeating that discussion, copies of those pages from defendant's Court of Appeals brief are included as an appendix to this brief. However, specific source legislative history citations for key points are included in the body of this brief for the court's convenience.

communications" and confidential "mediation agreements";[16] (2) the legislature considered specifically the importance of having attorneys for parties involved in the mediation process;[17] (3) legislators and commenting parties alike considered a variety of policy implications posed by the

[16] *See, e.g.,* Tape Recording, House Judiciary Committee, SB 232, May 18, 1995, Tape 41, Side A (observations by Representative Johnston that the current confidentiality provision of *former* ORS 36.205 needed to be broadened to cover communications made outside of an actual mediation session that nevertheless related to the mediation); Testimony of Donna Silverberg on behalf of Oregon Dispute Resolution Commission, Senate Committee on Business, Law, and Government, SB 160, Feb 27, 1997, Ex E at 1 (reflecting importance of strengthening mediation communications confidentiality to best ensure mediation success); Testimony of Jim Nass on behalf of the Oregon Judicial Department, Senate Committee on Business, Law, and Government, SB 160, Feb 27, 1997, Ex A at 2-3 (noting 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.") (underline in original); Testimony of Jim Niemeyer on Behalf of the Oregon Department of Justice, Senate Business, Law, and Government Committee, SB 160, Feb 27, 1997, Ex F at 1 ("[SB 160] has gone a long way towards providing significantly greater confidentiality to mediation communications than does current law."); Testimony of Stan Sitnick, Oregon Mediation Association, Senate Committee on Business, Law, and Government, SB 160, May 8, 1997, Ex U at 1 (stating support for SB 160 because "OMA's interest in the legislation is to provide for confidentiality in the mediation process as broadly, as simply, and as understandably as possible. Without a broad and clearly defined confidentiality, parties will not enter into mediation or participate in the process fully and confidently."); Minutes, Senate Committee on Business, Law, and Government, Feb 27, 1997, 4 (statement of Representative Bryan Johnston that, with SB 160, the legislature "attempted to stress the importance of confidentiality.").

[17] *See, e.g.,* Minutes, House Judiciary Committee Subcommittee on Family Justice, Mar 17, 1989, 3 (statements from Representative Johnston that "[a]ttorneys should be present at the mediator's request in concurrence by the parties" and that he "want[ed] the parties to have the discretion of calling in their attorneys."); Testimony of Jim Nass on behalf of the Oregon Judicial Department, Senate Committee on Business, Law, and Government, SB 160, Feb 27, 1997, Ex A at 2-3 (emphasizing role of attorneys in mediations).

confidentiality protections in the proposed legislation, particularly in 1997;[18] (4) the legislature heard from a broad group of stakeholders in each session; (5) none of those stakeholders (or any member of the legislature, more importantly) ever suggested that mediation confidentiality did not extend to a party's attorney participating in the mediation process or that there should be a confidentiality exception made for mediation-related legal malpractice claims.

In sum, plaintiff ignores the 1989 and 1995 legislative history for ORS 36.110 to 36.238 and misunderstands the 1997 legislative history that he cites.[19] While it is true that there may not be a specific piece of legislative history showing that the legislature meant to "protect attorneys from mediation-based malpractice suits," that fact proves nothing. The 1989,

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[18] *See, e.g.*, Testimony of Jim Nass, Senate Committee on Business, Law, and Government, SB 160, Feb 27, 1997, Ex A at 1 (addressing implications for state agencies and other public bodies involved in mediation and on Oregon's public records laws); Testimony of Mike Niemeyer, Senate Business, Law, and Government Committee, SB 160, Feb 27, 1997, Ex F at 2 (highlighting tension between confidentiality and mandatory reporting requirements regarding information on child abuse and past crimes reported to public employees).

[19] So, too, does OTLA, whose other arguments defendant addresses later. OTLA's quote from Donna Silverberg's 1997 testimony, OTLA Merits Br at 5, is inaccurate and misleading. Ms. Silverberg does not say that *some* communications among mediation participants facilitate effective mediation and others do not – she says *all* confidential mediation communications promote successful mediation outcomes. OTLA's characterization of Jim Nass' 1997 testimony is also misleading. OTLA Br at 5. Protecting mediation communication confidentiality, in order to best facilitate "telling a party's story" by all those participating in the mediation process, is exactly why the legislature expressly provided the specific agreements and exceptions that eliminate that protection.

1995 and 1997 history as a whole clearly supports what the text and context show – the legislature understood that attorneys could participate in mediations, that it was important that they do so, and that preserving the confidentiality of all "mediation communications" or confidential "mediation agreements," subject to specifically provided for agreements and exceptions, best met, in the legislature's judgment, the purposes underlying the mediation statutes. And, finally, the 1997 legislative history shows that the legislature had a singular purpose that session – *broadening the confidentiality protections* in the existing mediation statutes to encourage mediated resolutions, the overarching policy reflected in ORS 36.100 and ORS 36.105. As a whole, then, the relevant legislative history for ORS 36.100 to 36.238 supports the trial court's motion to strike rulings.[20]

5. Plaintiff's sixth argument: The Uniform Mediation Act best reflects the policies stated in ORS 36.100 and ORS 36.105

Finally, plaintiff commends to the court Section 6(a)(6) of the Uniform Mediation Act (the Act).[21] Pltf's Merits Br at 11-12. Both before and after

[20] Indeed, in 2001, 2003, 2005, 2007, 2009, 2011 and 2013, the legislature considered and adopted amendments to ORS 36.100 to 36.238. In *none of those sessions* did the legislature make any changes to the mediation confidentiality provisions in ORS 36.220 and ORS 36.222 adopted in 1997, let alone a change to exclude otherwise confidential "mediation communications" and "mediation agreements" in mediation outcome based attorney malpractice suits.

[21] Section 6(a)(6) of the Act includes an exception for mediation communications "sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a representative of a party based on conduct occurring during a mediation[.]"

2001, when the Act was first adopted, the legislature has been well aware of uniform acts, having adopted many of them over the years. *See, e.g.,* ORS 12.410 - 480 (Uniform Conflicts of Law – Limitations Act); ORS 28.010 - 160 (Uniform Declaratory Judgment Act); ORS 28.200 - 255 (Uniform Certification of Questions of Law Act); ORS 36.600 - 740 (Uniform Arbitration Act)*;* ORS chapters 72, 72 A, 73, 74, 74A, 75, 77, 78 and 79 (Uniform Commercial Code). Yet, the legislature has not chosen to adopt the Act (even though, as noted earlier, it has frequently considered and adopted other amendments to ORS 36.100 to 36.238 since 1997).[22] There is no reason, then, to conclude that Section 6(a)(6) of the Act embodies a policy that the legislature intends ORS 36.100 to 36.238 to reflect.

6. OTLA's first argument: the legislature, in providing mediation confidentiality, intended to protect parties, not attorneys[23]

OTLA argues that the omission of attorneys in ORS 36.210 (providing qualified immunity to mediators) establishes the legislature's intent to

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Uniform Mediation Act, Section 6(a)(6) at 24, found at http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf (last visited January 23, 2015).

[22] Nor have many other legislatures. *See* The National Conference of Commissioners on Uniform State Laws (2015), http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act (last visited January 23, 2015) (showing adoption of the Act over the last 14 years in only 11 states and the District of Columbia).

[23] Plaintiff and OTLA make several identical arguments. Those have been already addressed. Defendant addresses next only OTLA's arguments not also made by plaintiff.

exclude certain communications from ORS 36.220 and 36.222. OTLA's Merits Br at 4. For several reasons, that argument fails.

First, ORS 36.210 has nothing to do with this case. That is, the fact the legislature created a qualified immunity for mediators and not attorneys has nothing logically to do with the definition of "mediation communications" in ORS 36.110(7)(a). Nor does ORS 36.210 in any way show that the legislature intended to exclude from that definition communications between a party and its attorney that are part of the mediation process.

Second, the argument rests on the flawed premise that ORS 36.210 identifies those mediation participants the legislature intended to protect and, by doing so, excludes all others. ORS 36.210 does not provide immunity to mediation parties, yet OTLA does not argue that such parties are excluded from the confidentiality and non-disclosure aspects of ORS 36.110 to 36.238 or are not shielded from a wide variety of claims that could depend on discovery of or be proven with confidential "mediation communications."

In sum, ORS 36.210 has nothing to do with whether communications between a party and its attorney are "mediation communications" under ORS 36.110(7)(a). OTLA's contrary assertion should be rejected.

7. OTLA's third argument: providing immunity for legal malpractice during mediation creates ethical conflicts for lawyers

OTLA also argues that concerns about attorney ethical conflicts of interest and state bar complaints *may* exist if mediation communications

include communications between a lawyer and a mediation party. OTLA's Merits Br at 6-7. That argument has several problems.

First, distilled to its essentials, the argument is simply a public policy plea, not one derived from application of the principles enunciated in *PGE*/*Gaines*. For that reason alone the argument should be rejected. *See Johnson*, 343 Or at 430–31 ("statutory construction methodology, not policy considerations[,] must be our guide in discerning the meaning of a statute.").

Second, OTLA offers no factual support to show whether or how often attorneys have violated ethical conflict of interest rules by advising clients to participate in mediation, then committed malpractice, and then defeated either the malpractice claim or bar complaints by asserting the confidentiality and non-disclosure statutes. Nor is defendant aware of any such support. Again, should such evidence exist, OTLA should present it to the legislature, not this court.[24]

[24] To support its argument, OTLA relies on an article published in the California Defense Counsel Journal. OTLA's Merits Br at 7 (citing Michael E. Brown & Nicholas C. Duggan, *Mediation As Malpractice? The Effect of California Mediation Confidentiality Statutes*, 79 Def Couns J 94 (2012)). But that article fails to offer any evidence showing whether or how often, under the California or Texas mediation statutes, attorneys commit ethical violations or clients are precluded from bringing bar complaints. Instead, the authors *merely speculate* that these statutory schemes may create ethical conflicts and barriers to bar complaints. *See Id*. at 97. Moreover, in so doing, they quote the following passage from the California Supreme Court's opinion in in *Cassel,* a passage that makes no reference to ethical concerns or the effect of mediation confidentiality provisions on bar complaints:

Third, even assuming advising a client to agree to mediation may create an ethical conflict of interest in the way OTLA suggests, under Oregon's Rules of Professional Conduct, attorneys can make agreements prospectively limiting liability as long as the client is independently represented. RPC 1.8(h)(1).[25] In other words, any limitation of attorney liability resulting from the way the legislature chose to write ORS 36.100 to 36.238 is not absolutely ethically prohibited.

Finally, OTLA's unsupported suggestion that ORS 36.100 to 36.238 "might" prohibit a client's right to pursue a bar complaint is simply wrong. *See* OTLA's Merits Br at 7. Bar complaints are not "subsequent adjudicatory proceedings" for purposes of ORS 36.222(1) and (7). *See* BR 1.3 (lawyer disciplinary proceedings are *sui generis*, being neither civil nor

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> "Applying the mediation confidentiality statutes in accordance with their plain meaning to protect private mediation-related discussions between a mediation disputant and the disputant's attorneys may indeed hinder the client's ability to prove a legal malpractice claim against the lawyers. However, it is for the Legislature, not the courts, to balance the competing policy concerns."

Id. (quoting *Cassel*, 51 Cal 4th at 122, 119 Cal Rptr 3d at 444, 244 P3d at 1087 (2011)). Thus, the article simply demonstrates that these public policy considerations, to the extent they may be legitimately supported empirically, are properly for the legislature to address.

[25] RPC 1.8(h)(1) provides:

> "(h) A lawyer shall not:
>
> "(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement[.]"

criminal in nature); *In Re Conduct of Barber*, 322 Or 194, 206, 905 P2d 620 (1995) (attorney disciplinary proceedings "are governed by rules of procedure adopted by the Board of Governors of the Bar and approved by this court, pursuant to ORS 9.005(6) and ORS 9.542.") (Footnote omitted.) And, even assuming a bar complaint could be precluded by ORS 36.222(1) and (7) (which it could not be), that legislative decision would violate the separation-of-powers doctrine, which prohibits "legislative action [that] unduly burdens or unduly interferes with the judicial department in the exercise of its judicial functions," and thus would be unenforceable. *See Ramstead v. Morgan*, 219 Or 383, 399, 347 P2d 594 (1959) (concluding that statute limiting power of courts to discipline attorneys unduly burdens power of the judiciary and, in that respect, violated separation-of-powers doctrine).

In sum, OTLA's arguments based on ethical and bar disciplinary considerations are both factually and legally unsupported. In any event, these arguments – to the extent they have any merit – are properly ones that should be presented to the legislature, not this court.

8. OTLA's fourth argument: mediation confidentiality can be maintained under current law

Finally, OTLA contends that construing ORS 36.100 to 36.238 as carving out a mediation malpractice exception would have little practical effect on overall mediation confidentiality because trial courts have sufficient power under ORCP 36 C to seal discovery or evidence. *See*

OTLA's Merits Br at 7-9.[26] As with OTLA's other arguments, this one is also flawed for several reasons.

First, the legislature could have limited the absolute non-disclosure provisions of ORS 36.222(7) in the way OTLA suggests, by providing that otherwise confidential and inadmissible "mediation communications" may be disclosed in subsequent malpractice actions through discovery if sealed pursuant to ORCP 36 C. The legislature chose not to do that, choosing instead to express specifically the agreements or exceptions to confidentiality attaching to those communications. Again, this court cannot provide through ORCP 36 C what the legislature chose not to provide in ORS 36.220 or ORS 36.222.

Second, merely saying that trial courts *could* seal discovery or evidence under ORCP 36 C does not mean they *will* do so in every case. In fact, Article 1, section 10 of the Oregon Constitution – which provides, in part, that "[n]o court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay[]" – limits a trial court's discretion to order evidence sealed under ORCP 36 C. *See State v. Macbale*, 353 Or 789, 806, 305 P3d 107 (2013) (discussing parameters of

[26] Alternatively, OTLA argues that only a few mediations would lead to malpractice claims and even fewer would actually go to trial. OTLA Merits Br at 8. So, OTLA posits, any disclosure of confidential "mediation communications" in these few cases would be "insufficient to justify providing malpractice immunity." *Id*. at 9. Although OTLA is probably correct that there would be few mediation malpractice claims, and even fewer trials, those facts do not support the court ignoring the plain language of ORS 36.110 to 36.238, which OTLA's arguments would require the court to do.

judicial discretion to seal proceedings in light of requirements of Article 1, section 10). As such, trial courts do not routinely order confidential evidence sealed, even when the parties stipulate to such an order. *See, e.g., Multnomah County Attorney Reference Manual*, § X (ed 2008), http://courts.oregon.gov/multnomah/docs/courtrules/arm2008.pdf (last visited January 26, 2015) ("That the order [to seal] is 'stipulated' by all litigants does not solve the Constitutional problem. If a party believes they have legal grounds for filing under seal * * * the party must cite to the Presiding Judge the legal authority for the requested action.").

In sum, ORCP 36 C has nothing to do with this case. And even if it did, there is no support for OTLA's claim that trial courts will always allow mediation-based malpractice litigants to keep "mediation communications" confidential under ORCP 36 C.[27] Should the legislature want now to create a new confidentiality limitation in light of ORCP 36 C, it can do that. This court cannot.

[27] *Doe v. Corp. of Presiding Bishop*, 352 Or 77, 280 P3d 377 (2012), on which OTLA relies, actually illustrates how little protection ORCP 36 C would provide to the other mediation participants in a mediation-based malpractice action. After trial, the trial court granted the intervenors' motion – based on Article 1, section 10 – to release previously sealed evidence of numerous child sexual abuse complaints, although with many redactions. *Id*. at 82-83. This court held that, although Article 1, section 10 did not require the trial court to release the previously sealed evidence, the court did not abuse its discretion in vacating an existing protective order and ordering the material released. *Id*. at 102. Thus, instead of supporting OTLA's theory, *Corp. of Presiding Bishop* actually shows that ORCP 36 C would offer no guaranteed protection for mediation parties or participants who are not parties to the malpractice action.

C. Last Things Last: The Court of Appeals Should Have Affirmed the Trial Court

Finally, while defendant did not file a response to plaintiff's petition for review or seek review himself, given that the court decided to accept review and its discretion under ORAP 9.20(2),[28] this court should reverse those parts of the Court of Appeals' decision (1) concluding that the trial court erred in striking the allegations in plaintiff's complaint based on discussions defendant had with plaintiff about whether Nationwide had breached the settlement agreement because those discussions were not "made in the course of or in connection with a mediation"; and (2) the trial court should not have dismissed plaintiff's complaint because of ORCP 23 A and because plaintiff could prove that defendant caused his claimed damages without disclosing through discovery or at trial the settlement amount. 263 Or App at 502-05.

1. The allegations involving discussions between plaintiff and defendant after the settlement agreement was executed involved "confidential communications"

The Court of Appeals' conclusion that the trial court erred in striking allegations involving discussions plaintiff and defendant had after the

[28] Under ORAP 9.20(2), the court may review any issue raised in Court of Appeals but not presented on review. *See Dunlap v. Dickson*, 307 Or 175, 180 n 4, 765 P2d 203 (1988) (indicating that court would exercise its discretion to reach an issue presented to the Court of Appeals (1) when there was a "close connection" between the issues, and (2) "to avoid unnecessary technicality when we may do so and doing so resolves issues fairly raised below "); *see also Miller v. City of Portland*, 356 Or 410 n 4, 338 P3d 685 (2014) (confirming that court may reach issue decided by Court of Appeals even when party asking court to do so did not file response to petition for review or seek review in its own right).

settlement agreement was signed conflicts with the plain language of ORS 36.110(7)(a). As noted earlier, "course" and "connection" commonly mean "related to, associated with, or linked to." A discussion of a specific settlement term that, as far as plaintiff's complaint (or anything else in the record) shows, is made soon after the settlement agreement is signed – and is based solely on information known by defendant because of either confidential "mediation communications" or its inclusion in a "mediation agreement" that plaintiff and Nationwide agreed would be confidential – is plainly "related to, associated with, or linked to" plaintiff's mediation with Nationwide. The Court of Appeals erred in concluding otherwise.

2. The trial court's dismissal of plaintiff's complaint with prejudice was proper

The Court of Appeals' conclusion that plaintiff's complaint was improperly dismissed with prejudice because of ORCP 23 A, and because plaintiff could prove the causation element of his case without using confidential "mediation communications" or a confidential "mediation agreement," was incorrect for two reasons. First, plaintiff never filed a motion to amend under ORCP 23 A, never objected to the form of general judgment the trial court entered that dismissed his complaint with prejudice, and never argued in the trial court or in the Court of Appeals that the trial court erred in not allowing him to amend his complaint under ORCP 23 A. *See* Register of Actions for MCCC Case No. 1203-02980 at 1 (reflecting that plaintiff did not file motion to amend under ORCP 23 A or file any

objection to the form of judgment entered by trial court); ER 20-21(reflecting that plaintiff did not rely on ORCP 23 A in response to defendant's motion to dismiss); TR 1-23 (same); Blue Brief at 8-16 (reflecting plaintiff did not rely on ORCP 23 A in opening brief in Court of Appeals); Gray Brief at 5-12 (reflecting plaintiff did not rely on ORCP 23 A in reply brief in Court of Appeals). Accordingly, the Court of Appeals improperly reversed the trial court's dismissal of plaintiff's complaint with prejudice because of ORCP 23 A. *See Shields v. Campbell,* 277 Or 71, 77, 559 P2d 1275 (1977) ("A party owes the trial court the obligation of a sound, clear and articulate motion, objection or exception, so as to permit the trial judge a chance to consider the legal contention or to correct an error already made."); *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008) (summarizing policies underlying preservation requirements).[29]

Second, the Court of Appeals concluded that, for a jury in this case to determine, as it must, that defendant's negligence, if any, caused plaintiff's claimed harm, *see Stevens v. Bispham*, 316 Or 221, 228, 851 P2d 556 (1993) ("In the traditional legal malpractice action * * * the plaintiff usually must allege and prove * * * (4) causation, *i.e.*, a causal link between the

[29] The Court of Appeals did not say that it was addressing ORCP 23 A under the "plain error doctrine" or, if it was, why the court was doing that. In fact, that doctrine is inapplicable here. *See Ailes v. Portland Meadows, Inc*., 312 Or 376, 381–82, 823 P2d 956 (1991) (addressing requirements for plain error doctrine). And, even assuming the plain-error doctrine was applicable, the Court of Appeals did not comply with the requirements this court has set for applying the doctrine. *See id.* at 382-83 (requiring findings by Court of Appeals, when it relies on plain error doctrine, supporting why it chose to rely on the doctrine).

breach of duty and the harm.") (Emphasis in original omitted.), the jury would not necessarily have to know the amount of the settlement; the trial court could come up with a process to ensure plaintiff does not obtain a double recovery based on that amount. 263 Or App at 504-05. That conclusion is inconsistent with *Chocktoot,* 280 Or 560. There, this court held that, in a legal malpractice case based on the litigation of the underlying case, "a jury cannot award damages for plaintiff's loss *unless it concludes that the negligence led to an unfavorable or less favorable outcome for plaintiff*." *Id.* at 567 (emphasis added). And that means that, in the ordinary case, the outcome of the earlier case is simply submitted to the jury to determine "the probable behavior" of a jury deciding the earlier case but for the negligence of the defendant. *Id.* at 571.

The same principle logically applies to a legal malpractice case based on a mediation's outcome. Under *Chocktoot*, it is for the jury – not the trial court – to decide whether defendant's alleged negligence caused plaintiff to receive less in his settlement with Nationwide than he would have received but for defendant's claimed negligence. *Cf. Simpson v. Sisters of Charity of Providence*, 284 Or 547, 588 P2d 4 (1978) (in negligence actions, causation is usually a question of fact for a jury). Here, *Chocktoot*'s causation determination necessarily requires disclosure to the jury of information protected from disclosure under ORS 36.220 and ORS 36.222, including, for example, the amount of the settlement, the views of defendant, the mediator and Nationwide's attorneys and representatives of

the value of plaintiff's claim, or the views of experts retained by plaintiff or defendant of the value of plaintiff's claim, information that would necessarily be based, in whole or in part, on confidential "mediation communications" or the parties' confidential "mediation agreement." The Court of Appeals erred in concluding this evidence would not have to be heard by a jury.

In sum, defendant's discussions with plaintiff after the mediation agreement was signed were confidential "mediation communications." Moreover, the Court of Appeals impermissibly relied on ORCP 23 A as a reason to reverse the trial court. And, finally, contrary to the Court of Appeals, under *Chocktoot*, it is for a jury in this case to decide whether defendant's claimed negligence caused plaintiff's alleged damages and, for the jury to do that, it would have to know the settlement amount and evidence supporting it, something it is not allowed to know under ORS 36.222(1) and (7).

VII. CONCLUSION

The Court of Appeals' decision should be reversed and the trial court judgment for defendant should be affirmed.

DATED: February 3, 2015

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CERTIFICATE OF COMPLIANCE
PURSUANT TO ORAP 5.05(2)(b)(ii)

I certify that the brief complies with the "length" provisions of ORAP 5.05(2)(b)(i) in that:

1. It contains 11,525 words, exclusive of those items excludable under ORAP 5.05(2)(a).

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: February 3, 2015

/s/ Thomas W. Brown
Thomas W. Brown

CERTIFICATE OF FILING AND MAILING

I hereby certify that I electronically filed the **RESPONDENT ON REVIEW'S BRIEF ON THE MERITS** with the State Court Administrator by using the Oregon Appellate eFiling system on the 3rd day of February, 2015.

I further certify that I electronically-served the foregoing **RESPONDENT ON REVIEW'S BRIEF ON THE MERITS** upon the persons listed below that are registered efilers, by using the Oregon Appellate eFiling system on the 3rd day of February, 2015.

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