IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Marriage of:	)	
PATRICIA POLLOCK,	)	Yamhill County
	)	Circuit Court Case
	)	No. D008-0256
Petitioner- Respondent	)	
Cross-Appellant,	)	
Petitioner on Review,	)	
and	)	Case No. A147846
	)	
WILLIAM LAWRENCE POLLOCK,	)	**Supreme Court # S062000**
	)	
Respondent-Appellant	)	
Cross-Respondent,	)	
Respondent on Review.	)	

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Review of Decision of the Court of Appeals from a Judgment of the Circuit Court for Yamhill County; Honorable Carroll Tichenor, Judge.

Opinion Filed: October 30, 2013
Author: J. Egan
Concurring Judges: Armstrong, Nakamoto

Helen C. Tompkins, OSB # 872100
Law Office of Helen C. Tompkins, PC
333 S. State St., Suite V121
Lake Oswego, OR 97034
503-534-5020
htompkinslaw@aol.com

Attorney for Respondent on Review

David N. Hobson, Jr., OSB 852364
Hobson & Associates, LLP
18255 SW Tualatin Valley Hwy
Aloha, OR 97006
503-649-6333
david@hobsonandangell.com

William R. Valent, OSB 854394
6500 SW Macadam, Suite 300
Portland, OR 97239
503-245-1211
Wilrv#aol.com

Attorneys for Petitioner on Review

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Introduction: This case settled in September 2009 after an all-day mediation with Bill Schulte, a highly respected family law mediator. Prior to the mediation, wife and her attorney spent an entire week going through the discovery that had been provided. This activity coupled with wife's involvement throughout the marriage in paying the family bills with the family's bookkeeper positioned her well to evaluate and consider an appropriate division of the parties' assets and liabilities.

As the trial court found, wife was: "fully represented by competent counsel during the negotiations"; "fully competent to understand and participate in the negotiations"; "read and understood the nature and terms of the mediated settlement agreement before [she] signed the agreement"; "had access to [husband's] financial records during the course of their marriage and had filed joint tax returns with [husband] during their marriage"; and she "entered into the mediated settlement agreement freely and voluntarily". (ER 34)

Both parties immediately began performing the settlement and wife accepted all of the benefits of her bargain including ownership and control of the largest marital asset, the 100-acre ranch. She readily accepted husband's monthly spousal support payments of $15,000 and insisted on

other aspects of the settlement including the transfer of vehicles and personal property and his obligation to provide life insurance with her as the beneficiary. Only months later, wife fired her attorney and repudiated the bargain.

Omitted from the Petitioner's brief are several critical points:

(1) Unlike many family law cases, this case involves a prenuptial agreement which was contested by wife but upheld after several days of trial and at considerable expense in costs and attorney fees. Husband incurred costs and fees of $45,000 but negotiated them away in the September 2009 mediation;

(2) The existence and validity of the prenuptial agreement dictated, in part, the trial court's discovery rulings and guided its issuance of a protective order. The trial court's discovery rulings flowed from the valid prenuptial agreement and were not a general limitation on discovery especially where broad ranging discovery had already occurred;

(3) Wife settled in September 2009 at a time when the allegedly erroneous trial court discovery rulings had already been made and thus waived her challenges to the subject rulings;

(4) PRIOR to settling, wife, a sophisticated, highly educated woman with a Masters Degree in Chemical Engineering, spent a full week at her attorney's office reviewing detailed documentation and financial records relevant to the settlement issues; and

(5) Contrary to wife's repeated argument and labelling the settlement as not "equitable", the trial court specifically found the opposite – it concluded the parties' mediated settlement was "just and proper":

> **"The Court specifically finds that the mediated settlement agreement without the [loan], with the values of the property adjusted as discussed above, is within the range of possible property divisions that are just and proper in all of the circumstances of this case."** (Citing *Patterson and Kanga*, *Grossman and Grossman* and ORS 107.105(1)(f))

(Trial court finding # 12, Letter Opinion p. 17; ER 35)(Emphasis added)

Response to Legal Questions Presented

(Note: Husband recites, and responds to, the issues on review verbatim from this court's Media Release announcing its grant of review.)

Question 1: "Does ORS 107.104(1)(a) authorize a trial court to specifically enforce provisions of mediated agreements between spouses that have not yet been reduced to judgment, irrespective of whether those provisions are equitable, because such enforcement supports the Oregon policy of promoting settlement?" (April 17, 2014 Media Release)

Responses: Husband offers two responses. First, trial courts have a statutory obligation to determine whether a settlement is "just and proper" and only then to enforce its terms. ORS 107.104(1) a trial court finding that a settlement is not "equitable" should result in a refusal to enforce the agreement. Thus, the suggestion that a trial court would enforce a settlement that is not "equitable" is both wrong and inconsistent with the statutory mandate and with the facts of this case. Second, the trial court in this case, specifically determined that the settlement (without alteration) was "just and proper" so that the terms of the mediated agreement should be specifically enforced.

Question 2: "Does a statement in the parties' mediated agreement to the effect that the agreement was to 'resolve all claims between the parties' necessarily suggest waiver by the parties of their rights to pursue discovery

beyond the signing of the mediated agreement?" (April 17, 2014 Media Release)

Response: Trial courts should continue to exercise discretion in granting discovery (before or after settlement) and in interpreting agreements. Where, as in this case, the trial court has granted a protective order limiting discovery and wife chooses to mediate and settle anyway, she has waived her right to pursue a challenge to the protective order and to pursue further discovery. Furthermore, the statement that the mediated agreement (which was initialed on each page and signed at the end by wife) was to resolve all claims indicates the type of finality that parties seek in agreeing to settle, instead of, litigating cases. Without this finality cases would never settle. Resolution of all claims and waiver of a right to continue challenging court rulings are critical components of family law settlements as with other negotiated bargains that end litigation.

ORS 107.089 mandates broad discovery on the initiation of a dissolution petition. The listed discovery is mandatory and must occur within the first 30 days of a case. Parties are thus amply protected from settling without knowing the existence and valuation of relevant assets. This is not a case which presents the issue of the denial of discovery because wife was not denied discovery. Rather, discovery was appropriately limited by

the existence and judicially declared validity of the parties' prenuptial agreement.

Question 3: "Should a trial court presume that parties to a mediated agreement pending divorce have fully considered the nature and extent of the parties' assets?" (April 17, 2014 Media Release)

Responses: (1) As with the prior two questions, this case does not present the issue because the record demonstrates wife had full access to the relevant financial documents and settled rather than contesting the discovery protective order which had been entered months before the mediation.

(2) The trial court findings that wife was: "fully represented by competent counsel during the negotiations"; "fully competent to understand and participate in the negotiations"; "read and understood the nature and terms of the mediated settlement agreement before [she] signed the agreement"; "had access to [husband's] financial records during the course of their marriage and had filed joint tax returns with [husband] during their marriage"; and she "entered into the mediated settlement agreement freely and voluntarily" were never challenged on appeal and thus are the law of the case.

(3) Against that backdrop, this court should conclude that trial courts, as part of their statutory review to determine whether settlements are just

and proper, retain discretion to determine whether parties are adequately informed of the available assets and asset values when they agree to end the litigation.

(4) Here, wife attempted to challenge the settlement based on alleged duress. Thus, she testified she was tired at the mediation and her attorney was not prepared for trial. She also insisted the settlement was "unfair". The trial court rejected all of her challenges to the mediated settlement and this court should too. The trial court "specifically" found this settlement to be "within the range of possible property divisions that are just and proper in all of the circumstances". (Finding 12; ER 34) Whether additional discovery should be permitted in a particular case is subject to trial court discretion. Here, the trial court appropriately exercised its discretion to limit discovery following the mediated settlement and did so based on the valid prenuptial agreement.

RESPONDENT'S PROPOSED RULE OF LAW

Trial courts in family law cases are entrusted with the determination of whether a settlement is "just and proper" under all of the circumstances. In its discretion, if a trial court determines that additional discovery is necessary even after a mediated settlement, it may order the additional discovery.

NOTE: The circumstances in which this would occur should be rare since, at the time of filing a family law case, certain disclosures are mandated. (See ORS 107.089 – listing the categories of discovery which "must" be furnished within 30 days after service and declaring the trial court's authority to compel production under ORCP 46.) Family law practitioners will always make sure they have adequate discovery prior to engaging in mediation in order to protect their clients.

Here, wife had detailed knowledge of the parties' assets and the trial court record demonstrates she did not need additional discovery. Nowhere in either her Petition for Review or in her brief to this court does wife identify what information she was lacking. The court of appeals noted this vacuum: "she does not cite with any specificity the documents that she seeks". Pollock and Pollock, 259 Or App 230, at 243, 313 P3d 367 (2013). Wife argued generally in the court of appeals that she wanted to know the value of husband's separate property. However, she already lost that battle when Judge Cinnegar conducted two days of trial and declared the prenuptial agreement valid and enforceable. His ruling was never appealed and is thus final.

Husband's separate property was substantial at the time of the marriage and was and is protected under the prenuptial agreement. Wife

also had substantial premarital assets that enjoyed protection. Whether either party's separate assets had increased 10% or 20% by the time of the settlement is wholly irrelevant because, by mutual agreement, the assets remain separate.

The record establishes wife had detailed knowledge regarding the marital assets and their values. In its letter opinion at pages 11 – 14 (ER 29-32), the trial court reveals it considered evidence offered by both parties on the values for: the 100-acre ranch; the line of credit; the Red House; the horses; the tack; the John Lyons Pens property; the Red House equipment; the wine collection; and both parties' personal property. Wife had enough information about each and every one of these assets to have them appraised and to offer evidence to the trial court concerning their value. Her evidence of values was detailed. For example, wife presented valuation evidence for the parties' wine collection at $204,000 and included a spreadsheet showing the parties' wine purchases for 2007. (Letter Opinion, p. 13; ER 31) How could wife now argue that she was prejudiced by any alleged trial court limit on discovery?

Response to Nature of the Action and Relief Sought

Procedurally, this case has a lengthy history. Husband suggests the key stages include the following:

(1) Wife filed this dissolution case in April 2008;

(2) Wife contested the parties' Premarital Agreement so wife was allowed discovery to prepare for her challenge to the agreement;

(3) Senior Judge Ronald Cinnegar conducted two days of hearings in January 2009 and concluded the Premarital Agreement was valid and enforceable. (Ex. 102; Limited Judgment Re: Premarital Agreement) No appeal was taken from this Limited Judgment and no error assigned in the court of appeals;

(4) Among his fifty-four individual findings of fact, Judge Cinnegar concluded: "The parties are both educated, intelligent, accomplished professional individuals"; wife had multiple opportunities to review the proposed Prenuptial Agreement; wife in fact made multiple changes to the first proposed Agreement; wife had an attorney review the Agreement on her behalf; wife ultimately signed the Prenuptial Agreement because the "final Prenuptial Agreement language was satisfactory to Wife"; and

"The Prenuptial agreement is valid and enforceable." (Ex. 102, pp. 1-8)

(5) Wife's Request for Production of documents filed on September 4, 2008 was resolved by the trial court on June 3, 2009. The court permitted discovery of all "records that pertained to joint property or to the separate property of [wife] that was used to pay the debts of [husband's] separate property or to increase the value of [husband's] separate property" but entered a protective order covering husband's separate assets;

(6) The trial court left open wife's additional discovery requests to see if the parties' could resolve the case and/or the discovery requests: "The parties were further advised that the court was keeping further ruling on the motion to compel to permit the parties to further attempt to resolve the discovery issues based on the ruling of the court. If they were able to reach an agreement, there was no need for them to return to court; however, if they could not reach an agreement, they could return to court for a determination by the court." (Findings, p. 5 of 17; ER 23);

(7) The parties engaged in mediation and settled on September 21, 2009 at which time they executed a signed settlement agreement;

(8) Both parties immediately implemented the settlement while at the same time working on the form of judgment;

(9) Only after providing her then attorney with minor edits to the form of judgment and only after receiving the fruits of her bargain did wife fire her attorney, retain new counsel and repudiate the deal;

(10) The argument that inadequate discovery somehow prejudiced wife only appeared after new counsel came on the scene in December 2009. The very limit on discovery of which wife complains was actually part of a trial court order in June 2009, months before mediation and settlement. That order left "open" the discovery issues unless settlement was achieved. Wife freely and voluntarily settled without the allegedly missing information.

Summary of Respondent on Review's Argument

Oregon law encourages settlement as a way to decrease litigation and avoid the adversarial process. Thus, parties to dissolution cases **either** settle **or** they litigate. As this court said in McDonnal and McDonnal, 294 Or 772, 779, 652 P2d 1247 (1982) and Matar and Harake, 353 Or 446, 457, 300 P3d 144 (2013): "where parties have foregone their opportunity to litigate

and have chosen instead to enter into an agreement, 'their reliance on [that] agreement can be presumed."

These parties settled in mediation with Mr. Schulte nearly 5 years ago. Throughout the entire time, wife has enjoyed the benefits of that settlement, including an unusually high spousal support payment and receipt of the largest marital asset available for distribution –the 100-acre ranch.

Wife's challenge to the settlement was based on alleged duress which was never proven. Wife offered her own testimony that she was tired and her attorney ill-prepared. The trial court rejected this contention as it rejected her other arguments regarding the settlement process. The trial court instead found that wife was fully informed and well represented throughout the process.

Wife repeatedly argued to the trial court that the settlement was "unfair" (Tr. 350, 356, 357, 369, 376, 403, 406-07, 408, 409, 411). Wife's trial counsel argued husband received over $2 million in the settlement and wife only received $586,000 so the settlement is unfair. (Tr. 409) Of course, this conclusion is contrary to the record and does not accurately reflect that wife received the parties' most valuable asset, the 100-acre ranch. Wife's trial counsel also argued wife should have more than $15,000 per month in spousal support so she could maintain the 100-acre ranch. (Tr.

411) Mediator Schulte testified he urged wife not to ask for the ranch because "she didn't have enough income to support it." (August 2 Tr. 144) Thus, the lack of discovery was not the issue at trial. Wife knew all that she needed to know about the parties' assets and simply had buyer's remorse regarding the settlement.

Wife never argued the settlement was unfair for lack of discovery until she did so in the court of appeals. Wife's appeal never challenged the trial court's findings regarding her access to information, her ability to negotiate and settle, the capability and availability of counsel and that she settled freely and voluntarily. Those findings are thus the law of the case and undermine her arguments regarding discovery.

For months after settling and after initialing each page and signing the back of the settlement document, wife and her trial attorney participated in editing various versions of the stipulated judgment and wife accepted the benefits of her settlement by receiving $15,000 per month in spousal support beginning in October 2009 and continuing. The parties partially performed the settlement. Wife exercised exclusive control over the parties' ranch. Both parties: exchanged personal property; transferred vehicle titles and insurance; transferred homeowner's insurance; and husband fulfilled all of his obligations under the Mediated Agreement.

After wife repudiated the settlement, husband moved to enforce it. The trial court conducted two days of hearing which it explicitly restricted to the issue of whether the parties settled. The trial court correctly declared it would either enter judgment in accord with the settlement **or** the case would be set for trial. After considering all of the evidence, the trial court declared that: the parties had settled; wife was not under duress; and the settlement was "just and proper".

Having specifically concluded that the Mediated Settlement was "just and proper", the trial court was compelled to enter judgment reflecting the specific settlement reached by the parties. ORS 107.104(1)(b); McDonnal, 293 Or at 779 ("[The statutory objectives] are most effectively advanced when proposed property and support agreements are accepted by the court and incorporated into the dissolution decree."); Patterson and Kanaga, 206 Or App 341, 347, 136 P3d 1177 (2006)(Patterson I); Patterson and Kanaga, 242 Or App 452, 470, 255 P3d 634 (2011)(Patterson II). Although the court of appeals agreed with husband that the parties settled and the settlement was "just and proper", it erroneously declined to enter the judgment husband sought – specific enforcement of the mediated settlement.

In order to settle family law cases, parties waive various rights and claims. Nothing in Oregon law prohibits such waiver: "adults with the

capacity to do so generally are free to waive a panoply of rights, statutory and constitutional, so long as the waiver is knowing and intentional." McInnis and McInnis, 199 Or App 223, 236, 110 P3d 639 (2005) rev dismissed 338 Or 681 (2005); See also State v. Hunter, 316 Or 192, 199-200, 850 P2d 366 (1993)(Waiver of statutory right to speedy trial); McMillan v. Follansbee, 194 Or App 145, 154, 93 P3d 809 (2004) (Approving waiver of statutory right to partition).

In agreeing to a settlement after the trial court entered its protective order and its other rulings on discovery, wife waived her right to contest the discovery rulings. Such a waiver is proper and is enforceable. Matar and Harake, 353 Or at 464 (Upholding father's waiver of right to seek child support modification); McInnis, 199 Or App at 236.

Wife's presentation to this court is a red herring. Lack of discovery was not the basis for her challenge to the mediated settlement. Her challenge was duress and unfairness and she failed to persuade the trial court that the settlement was unfair – See Finding # 12 (ER 34)(Settlement is "just and proper").

Statement of the Facts

Note: Wife's Brief on the Merits (at pages 3-5) recites as "fact" her view of the trial court's discovery rulings. The rulings speak for themselves and should be viewed solely from the text of the court's rulings. What wife was allegedly "told" is not before the court. Wife never appealed the trial court rulings, rather she chose to settle in mediation.

Background

This dissolution case was filed in April 2008 and settled in September 2009 following extensive discovery and an all-day mediation.

Wife, who was 48 years old at the time of trial, holds a Master of Science degree and has worked as a chemical engineer. (August 2 Tr. 286; August 3 Tr. 424) In her work as a chemical engineer she has experience reviewing legal documents, including patent applications. (August 3 Tr. 287)

Husband is a successful business owner with valuable separate assets governed by the parties' Premarital Agreement. (Ex. 101)

Wife was represented by counsel at every stage of the case and she personally edited and then signed off on the parties' Mediated Settlement Agreement. (Ex. 113; ER 36-39) After the mediator, Mr. Schulte, drafted

Ex. 113, wife hand wrote certain additions on the document. (August 2 Tr. 126, 246-47)

After hearing two days of evidence on husband's Motion to Enforce the Settlement, the trial judge concluded wife "was fully competent to understand and participate in the [settlement] negotiations" and "was not coerced into agreeing to the mediated settlement" and that "the parties intended the Mediated Settlement Agreement to resolve all issues regarding the marital property distribution, spousal support and joint liabilities". (Letter Opinion, p. 16; ER 34)

Premarital Agreement Declared Valid

The parties entered into a Premarital Agreement which governed their assets. (Ex. 101) Among other provisions, the Agreement provided that both parties had been previously married and that they desired to keep their separate property separate. (See Ex. 101, page 1) As is relevant, the Agreement defined "Separate Property" and declared that each party's "Separate Property" along with income, rents, profits, and increases in value would remain "Separate Property". (Ex. 101, page 3, paragraphs 5 and 6).

However, as part of her trial strategy, wife challenged the validity of the Premarital Agreement. Senior Judge Ronald Cinnegar conducted two days of hearings in January 2009 and concluded the Premarital Agreement

was valid and enforceable. (Ex. 102; Limited Judgment Re: Premarital Agreement) In his 54 individual findings, Judge Cinnegar concluded: "The parties are both educated, intelligent, accomplished professional individuals"; wife had multiple opportunities to review the proposed Prenuptial Agreement; wife in fact made multiple changes to the first proposed Agreement; wife had an attorney review the Agreement on her behalf; wife ultimately signed the Prenuptial Agreement because the "final Prenuptial Agreement language was satisfactory to Wife"; and "The Prenuptial agreement is valid and enforceable." (Ex. 102, pp. 1-8)

Husband filed a Petition for Attorney fees and a cost bill totaling $45,000 for defending the Premarital Agreement, but his Petition was never addressed by the court because the parties subsequently mediated and settled this case.

The court's decision on the validity of the Premarital Agreement dictated a subsequent ruling limiting the scope of discovery. (Letter Opinion, p. 4; ER 22). Because the Premarital Agreement was determined to be valid and enforceable, wife was not permitted to freely investigate husband's separate assets. Rather, discovery was limited to joint assets or to wife's separate property used to pay joint debts or to increase husband's separate property. (Letter Opinion, p. 4; ER 22)

The Parties Settled

In September 2009, the parties were preparing for a trial set for September 22, 2009. Because the Premarital Agreement had been upheld, trial would proceed only to resolve the division of the parties' joint assets and spousal support. (See Ex. 130 at ER 46-48 for a spreadsheet listing the assets to be distributed)

On September 21, 2009, the parties and their attorneys engaged in mediation with Mr. Schulte and fully resolved all of their disputes. (August 2 Tr. 126; Ex. 113; ER 36-39) The parties signed the Mediated Settlement Agreement which had been handwritten by Mr. Schulte and contained the terms of their agreement. (ER 39) At ER 39, in paragraph 13, the documents recites: "This resolves all claims between the parties and each shall pay their own fees and costs." Wife signed below that statement at ER 39. Wife testified that paragraph 13 meant the parties had resolved their case. She stated: "The plain meaning is that we're done." (August 3 Tr. 443, line 3)

A stipulated judgment accurately reflecting the terms of the Mediated Settlement was prepared and changes/corrections exchanged between counsel – Ms. Laura Rackner for husband and Mr. David Hall for wife. (Exs. 114-120)

A final version of the judgment implementing the settlement was presented to the trial judge on December 3, 2009. (Ex. 117) Wife and her attorney had minor objections to the form of Stipulated Judgment (Ex. 119) and therefore in December 2009, the court scheduled a hearing to occur in February 2010 to consider wife's objections to husband's form of stipulated judgment. However, between the time she provided minor edits to the judgment in December 2009 and the scheduled hearing, wife had buyer's remorse and fired her attorney, Mr. Hall, and retained her current counsel.

Wife was aware of all the parties' assets including the Loan from husband's separate account

Prior to the Mediation, wife and her attorney spent "virtually the entire week" reviewing documents regarding the parties' assets. (August 2 Tr. 191-92; Ex. 103) Wife and her attorney were "tracing assets and income." (Id.) Wife "wanted to be actively involved in the process." (August 2 Tr. 192) As part of her trial preparation process, wife personally obtained expert appraisals of the parties' real property. (Id.)

Prior to the settlement reached on September 21, 2009, wife knew that husband had lent money to Ms. (August 3 Tr. 613, 653) Wife confirmed her understanding the loan was from husband's "separate checking account" ending in "4446". (August 3 Tr. 653)

"Q: When did you know that [husband] had made that loan?

A: I knew it before the mediation.

Q: Because he had told you about it, or how did you find out about it?

A: I didn't - - I'm not sure I knew the total amount. But I saw checks in his separate checking account that were made out to her." (August 3 Tr. 653, lines 5-12)

Wife repeatedly confirmed she knew about the loan prior to the May 2009 mediation and nonetheless negotiated away her right to claim an interest in the loan. (Ex. 131; Wife's June 22, 2010 Deposition Testimony) Wife specifically testified she signed the Schulte Mediated Settlement with full knowledge of the loan:

> "Q: So when you signed [the Mediated Settlement Agreement], you had knowledge that [Ms. had received some money during the marriage. Is that an accurate statement?"
>
> "A: Yes."
>
> (Ex. 131, page 48, lines 10-14; ER 48)

August Trial Limited to Validity of Agreement

Prior to the August 2010 trial on husband's Motion to Enforce the Mediated Settlement Agreement, the trial court conducted a hearing on motions to compel. (July 26, 2010 Transcript) The court made clear that its

August hearing would be limited to determining whether the parties settled and whether that settlement was enforceable:

> Court: **"What we're first going to look at is as to whether there's an enforceable agreement in this case. If there's an enforceable agreement in this case, we're not going to trial.** And we put them all at the same time where there's going to be one decision before another. So there may or may not be a trial. And if the agreement is found not to be enforceable, then we'll proceed with the trial."
> * * *.
> **"But if the agreement is enforceable, the discovery is moot. * * *. And the only thing we would be looking at is the form of the judgment and whether the judgment accurately incorporates the agreement or doesn't, and then we'll make a decision on that."**
>
> (July 26, 2010 Tr. 58, lines 3-21; Emphasis added)

The trial court's decision was memorialized in its July 26, 2010 Memorandum of Decision which is set forth as ER 19-35. As a result of its decision, the trial court prohibited wife's counsel from asking deposition questions or otherwise taking discovery on pre-marital property: "The materials that you're asking for or the questions you're going to be asking for on deposition can be related to marital property but not prenuptial property." (July 26, 2010 Tr. 59, lines 7-10) Wife's counsel urged the court to consider all property, but the trial court refused because of the prior determination that the Premarital Agreement is valid. (July 26, 2010 Tr. 59, lines 14-20)

The trial court ruled that the **sole issue** for August 2010 was the fairness of the settlement:

> "Right now I made the decision **we are not going to trial on Monday**. So don't come in with all your witnesses to have a trial on Monday. **We are going on that agreement**, and we'll see where we go from there. So bring your witnesses in on the agreement."
> * * *.
> "But that is the issue: **Is the agreement valid or not valid?** That's Monday. And that may set the terms as to what happens in looking at the consideration of discovery." * * *. But anyway, the trial is off on Monday. The validity of the agreement - - **and if the agreement is valid, we will go into the form of the judgment**."
>
> (July 26, 2010 Tr. 87, line 8 to Tr. 36, line 3, Emphasis added)

During the August trial on whether the parties had settled, the court continued to restrict testimony to the validity of the agreement: "I don't intend today to go into any issue other than is that marital - - or is that Mediation Agreement enforceable." (August 2, Tr.113, lines 11-13); "[I]f the agreement is thrown out, then it would be back to a trial and you would have the opportunity to prepare for the rest of the trial. If the agreement is valid, then we'll go into the form of the judgment." (August 2, Tr. 114, lines 5-9)

Wife's counsel admitted there was a signed Mediated Settlement Agreement but disputed whether it was "fair and equitable". (August 2, Tr. 116, lines 20-24): "there clearly is a signed document dated September 21,

2009, that's signed by the parties. There's no question. There shouldn't be any dispute as to that. We don't believe that to be fair and equitable."

Mediator Schulte Confirmed the Parties Settled

Mr. Schulte, a well-respected family law mediator who has been practicing since 1966, testified the parties mediated and settled. (August 2 2010 Tr. 123) Mr. Schulte identified Ex. 113 as the signed, Mediated Settlement Agreement between the parties dated September 21, 2009. Mr. Schulte hand wrote most of the document and wife hand wrote some of it. (August 2 Tr. 126) Among other material terms, the Agreement provides at paragraph 8 that, husband received "all accounts in his name". (ER 37)

The agreement is signed by each of the parties and by their respective counsel, Mr. Hall for wife and Ms. Rackner for husband. (ER 39) Wife initialed each page of the Agreement. (ER 36 to 39).

The Mediated Settlement Agreement was the result of an extended mediation at Mr. Schulte's office: "And after a number of meetings with the various parties and the lawyers, we came up with this agreement and I wrote it out." (August 2 Tr. 123, lines 18-21) Mr. Schulte denied wife was under any duress. (August 2 Tr. 124)

Wife never expressed any concern to Mr. Schulte regarding her ability to comprehend what was occurring. Rather, she interjected several

additional terms that she wanted into the handwritten agreement. (August 2 Tr. 123, 126; Ex. 113) The Mediated Settlement Agreement includes a release of all claims and an agreement that each will pay their own attorney fees. (ER 39)

Because wife received the parties' most valuable asset, the ranch, wife agreed to be responsible for both the mortgage and the line of credit secured by the ranch. (Ex. 113, p. 1; ER 36) In order to protect his credit, it was agreed that husband would make the line of credit payments as well as the mortgage payments and he would then receive credit toward the monthly spousal support payments of $15,000 for making these payments. (Ex. 113, p. 3, ¶¶ 10-11; ER 38)

Mr. Schulte testified the $15,000 per month spousal support negotiated by the parties was "very high spousal support." (August 2 Tr. 129) He confirmed Ex. 113 was intended to be a comprehensive settlement covering all of the issues. (August 2, Tr. 129-130) Mr. Schulte denied anyone pressured wife into signing the agreement. (August 2 Tr. 130)

Mr. Schulte concluded wife was "completely informed" about the parties' assets. (August 2 Tr. 144) He discussed with her the desire to keep the ranch and the need to have substantial spousal support in order to maintain the ranch. (August 2 Tr. 144) The parties exchanged settlement

offers. Among other things, wife did not want husband living in the parties' second house on the ranch property. (August 2 Tr. 145) This issue was resolved by awarding the second house to husband but prohibiting him from residing there and requiring him to sell it. (Ex. 113, page 1; ER 36)

Settlement is implemented

Following the Mediation, the parties began exchanging forms of judgment to reflect their agreement. (August 2 Tr. 165; Exs. 114-120) In Exhibit 119, dated December 14, 2009, wife's attorney provided detailed suggestions for editing the stipulated judgment. Wife's attorney wrote to the trial court: "I note Ms. Rackner's [suggestion] that you allow me reasonable opportunity to relay my objections to the form of the proposed judgment. I will have a list of objections to Ms. Rackner by Monday, December 14, 2009. If we cannot resolve those issues, then I would ask the court to set the matter for a judicial conference to iron out the language of the proposed judgment." (Ex. 119)

On December 14, 2009, wife helped her attorney prepare a list of line by line objections to the form of Stipulated Judgment of Dissolution. (Ex. 119; August 2 Tr. 294-95) By Email, wife corresponded with husband regarding the implementation of their Mediated Settlement Agreement. (Ex. 121; August 2 Tr. 250) Among other things, wife requested that husband

comply with their agreement regarding life insurance on him with her as beneficiary. (August 2 Tr. 240;Ex. 121) This life insurance obligation was created in paragraph 12 of the Mediated Settlement Agreement. (Ex. 113;ER 38)

The parties performed various aspects of the settlement. (August 2 Tr. 250-55). The parties exchanged personal property, transferred vehicle titles and insurance and undertook ownership duties for the real property awarded to each of them. (Id.) Based on the Mediated Settlement, husband moved out of the Red House. By Email dated December 10, 2009, wife solicited an appointment to give husband his piano, guns, gun case and wine which were awarded to him in the Mediated Settlement. (Ex. 122; August 2 Tr. 297) Wife's attorney proposed revisions to the form of stipulated judgment that husband "lease-back" to wife some of the pasture land awarded to him in the settlement for $1 per year for 5 years and that he lock in that obligation for subsequent owners. (Ex. 119, p. 2)

For his part, husband began paying his spousal support obligation of $15,000 per month in October 2009 and wife has continued to insist on such payments even though she repudiated the Agreement. (ER 45; Attorney Hobson's February 2010 letter demanding that payment of the negotiated spousal support continue even though wife has "repudiated that agreement").

Husband also performed his other obligations such as maintaining life insurance and permitting wife to have exclusive control over the parties' ranch.

The Loan

Husband lent Ms. money from his separate bank account ending in # 4446 (August 3 Tr. 416, lines 16-18) Wife confirmed that the account ending in #4446 is husband's separate property. (August 3 Tr. 653, 669) Wife previously admitted in her deposition that she knew about the loan "before" the mediation in which she agreed to settle this case. (Ex. 131, p. 48; ER 42)

Account #4446 was husband's separate bank account. He deposited profits or gains from his separate assets, including proceeds from his separate real property and stock buy-ins from his separate asset, his business. (August 3, Tr. 675) All of those sources of funds are his separate property under the Premarital Agreement. (August 3 Tr. 675-76) Bank statements for account 4446 dated between January 2004 and March 2009 were provided to wife and her trial attorney in July 2009 as part of the comprehensive discovery provided. (Ex. 109; August 3 Tr. 677)

According to the trial court, the Premarital Agreement evidenced "a clear intent of the parties to this marriage to retain the identity of their

separate property that each brought into the marriage". (Trial Ct Opinion, p. 1; ER 19). The Mediated Settlement Agreement distributed husband's separate property to him. (Ex. 113, p. 2; ER 37; August 2 Tr. 162)

Wife Accepts the Benefits of the Settlement

As part of their Settlement, husband agreed to forego his claim to about over $45,000 in costs and attorney fees for upholding the Premarital Agreement. (Ex. 104; August 3 Tr. 695) Paragraph 13 of the Mediated Settlement provided that each party would pay their own attorney fees. (ER 39) Per wife's first attorney, Mr. Hall, husband negotiated away his right to the attorney fees as reflected in Ex. 113, paragraph 13. (August 2 Tr. 198-99)

Following the mediation, the parties and their attorneys "proceeded as if they'd settled the case, because they had." (August 2 Tr. 166) The parties: exchanged personal property; transferred vehicle titles and insurance; and transferred utility accounts. (August 2 Tr. 250-52) Wife placed many of husband's personal belongings in a trailer and brought them to the Red House. (August 2 Tr. 246).

Wife undertook exclusive control of the ranch awarded to her. (August 2 Tr. 248) Per his agreement, husband moved out of the Red House. Wife accepted the benefit of the settlement – exclusive ownership and

possession of the most valuable marital asset – the ranch – and payment of $15,000 spousal support each month. (August 2 Tr. 248, 252)

Months after the Mediated Settlement, wife negotiated for husband to pay for her to take a trip to London, but wanted to make sure the trip "should not be tied to the rest of our settlement". (Ex. 121- Dec. 10, 2009 Email from wife; August 2 Tr. 249) Rather wife proposed exchanging the trip to London for her permitting husband to hunt on the ranch. (Id.) Wife only controlled access to the ranch because of the September 2009 Mediated Settlement which awarded it to her.

Between September 2009 and the middle of January 2010, wife fulfilled her obligations under the Mediated Settlement by part performance and she accepted husband's performance, notably, the payment of $15,000 per month in spousal support. (August 2 Tr. 252) Wife never advised husband that their case was not settled. (August 2 Tr. 251) Instead, she immediately began receiving the benefits of the settlement, including husband's waiver of the attorney fees incurred to enforce the Pre-nuptial Agreement and his payment to her of $15,000 per month in spousal support. (August 2 Tr. 251-52)

By letter dated February 8, 2010, wife's new trial attorney explicitly declared that wife would retain the benefits of the Mediated Settlement –

payment by husband of spousal support of $15,000 per month even though she repudiated the settlement: "Your client has made several spousal support payments over the past few months pursuant to the memorandum signed at mediation by the parties. **Although we have repudiated that agreement, it is my client's intention to cash and deposit those checks.**" (Feb. 8, 2010 Hobson letter; Motion to Enforce, Ex. 9; ER 45; Emphasis added)

Trial Court Ruling

After the two-day trial in August 2010, the trial court issued its Letter Opinion contained at ER 19-35. The trial court concluded that the parties' Mediated Settlement was "just and proper" and "within the range of possible property divisions that are just and proper in all of the circumstances of this case. (Letter Opinion; p. 17; ER 35) Nonetheless the trial court purported to modify the settlement by an "adjustment" to the settlement transferring husband's separate asset worth $300,000 to wife. (ER 35; Finding 13). This alteration of the parties' mediated settlement was the sole reason for husband's appeal and he succeeded on that issue in the court of appeals.

The trial court held: "The parties were informed that if the Settlement Agreement was determined to be enforceable, the court then would entertain the issues on the form of the judgment that reflected the

settlement agreement. If the Settlement Agreement was determined not to be enforceable the court would then set a hearing date for a hearing on the motion for additional discovery by [wife]'s new counsel and a new trial date would be set." (Opinion, p. 6; ER 24)

After discussing the case law encouraging settlement and enforcing marital settlement agreements by their terms, the trial court concluded the parties' mediated settlement was valid and enforceable. (Opinion, p. 17; ER 35) The trial court further concluded that, based on the validity of the Premarital Agreement and its review of the various assets, the mediated settlement was "just and proper" under all of the circumstances. (Opinion, p. 17; ER 35)

ARGUMENT

Marital settlement agreements are valid and enforceable under Oregon law. ORS 107.104(1); Grossman and Grossman, 338 Or 99, 107, 106 P3d 618 (2005); McDonnal and McDonnal, 293 Or 772, 779; Patterson and Kanaga, 206 or App 341, 347 (Patterson I); Patterson and Kanaga, 242 Or App 452, 470 (Patterson II). Once the parties have reached agreement, the trial court plays a limited role of evaluating whether the negotiated settlement is fair and equitable. Patterson II, 242 Or App at 469-70. Once a trial court concludes its analysis and finds a settlement to be fair and

equitable, the correct result is entry of a judgment accurately reflecting the parties' agreement. Patterson II, 242 Or App at 470, quoting McInnis and McInnis, 199 Or App at 230.

The only error in the trial court decision was its failure to enter a judgment strictly in accord with the settlement. Haggerty and Haggerty, 261 Or App 159, 166, 322 P3d 1101 (2014)("[e]ven when they are not incorporated into a judgment, martial settlement agreements 'enjoy presumptive enforceability.'")(citation omitted) Here, the court of appeals agreed with husband that the trial court's purported alteration of the settlement was error and it reversed on that basis. Pollock and Pollock, 259 Or App at 240, reversing the trial court's judgment because of the alteration of $300,000 and reversing the trial court denial of attorney fees.

This court warned of the very danger that occurred here:

> "To allow the trial court to exercise such broad discretion despite an otherwise valid marital settlement agreement between two parties in a dissolution proceeding would be inconsistent with this court's cases that encourage settlement of such proceedings".
>
> Grossman, 338 Or at 107, citing McDonnal.

In McDonnal, this court recognized the unfairness of partial enforcement:

> "Inequity may result if this court adopts a policy of less than full enforcement of mutually agreed upon property and support agreements."

McDonnal, 293 Or at 779.

The Oregon legislature "has expressed a strong policy in favor of the enforceability of settlement agreements executed in the context of dissolution disputes." Patterson I, 206 Or App at 347, citing ORS 107.104. By the plain language of the statute, such agreements are to be enforced "to the fullest extent possible". ORS 107.104(1)(b); Patterson I, 206 Or App at 347. The policy of enforcing settlements has long been recognized in Oregon:

> "It is axiomatic that public policy requires that persons of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice; and it is only when some other overpowering rule of public policy intervenes, rendering such agreements unfair or illegal, that they will not be enforced."

McDonnal, 293 Or at 779, quoted with approval in Matar and Harake, 353 Or at 457.

Here, it is undisputed that the parties reached a Mediated Settlement fully resolving their dissolution case. The handwritten terms contained in Ex. 113 at ER 36-39 should be incorporated into a judgment and entered by this court. Wife altered those terms by inserting changes in her own handwriting where she desired and then willingly signed the Mediated

Agreement and initialed each page. Perhaps more importantly, she immediately began reaping all of the benefits of the Mediated Agreement, including $15,000 per month in spousal support and exclusive control over the 100 acre ranch.

The trial court should have fully and faithfully enforced the Mediated Settlement but instead purported to "adjust" the settlement by materially changing the negotiated terms, to husband's significant detriment. The court of appeals correctly rejected the alteration of the settlement and declared wife's waiver of further discovery and of any and all claims she may have had.

Declared public policy requires that settlement agreements be enforced according to their terms unless to do so would violate the law or contravene public policy. ORS 107.104(1)(b). This case is a stunning example of the inequity which results if the court adopts a policy of less than full enforcement of mutually agreed upon property and support agreements. McDonnal and McDonnal, 293 Or at 779 ("[S]hort of conflict with the statutory powers of the court we recognize the court's responsibility to discover and give effect to the intent of the parties as reflected in the incorporated settlement agreement.")

Nothing in the parties' Mediated Settlement violates the law or is against public policy. Indeed, the Settlement awards wife the parties' most valuable asset and a "very high" spousal support payment. As mandated by their Premarital Agreement, the Settlement awards husband his separate assets, including the loan. Of the parties' joint assets available for distribution, husband actually received the short half.

Discovery in Family Law

Family law cases are unique in that, in addition to the usual discovery rules in ORCP, by statute, additional discovery is required and it occurs very early in the case. ORS 107.089 provides:

"(1) If served with a copy of this section as provided in ORS 107.088, each party in a suit for legal separation or dissolution shall provide to the other party copies of the following documents in their possession or control:

(a) All federal and state income tax returns filed by either party for the last three calendar years.
(b) If income tax returns for the last calendar year have not been filed, all W-2 statements, year-end payroll statements, interest and dividend statements and all other records of income earned or received by either party during the last calendar year.
(c) All records showing any income earned or received by either party for the current calendar year.
(d) All financial statements, statements of net worth and credit card and loan applications prepared by or for either party during the last two calendar years.
(e) All documents such as deeds, real estate contracts, appraisals and most recent statements of assessed value relating to real property in which either party has any interest.

(f) All documents showing debts of either party, including the most recent statement of any loan, credit line or charge card balance due.
(g) [Title and registration for vehicles and boats]
(h) Documents showing stocks, bonds, secured notes, mutual funds and other investments in which either party has any interest.
(i) The most recent statement describing any retirement plan, IRA pension plan, profit-sharing plan, stock option plan or deferred compensation plan in which either party has any interest.
(j) All financial institution or brokerage account records on any account in which either party has had any interest or signing privileges in the past year, whether or not the account is currently open or closed."

The extensive disclosures are mandatory and are subject to the trial court's enforcement powers in ORCP 46. ORS 107.089(3).

Prior to engaging in mediation, the usual practice will be to review the above-listed documentation and to prepare a proposed listing of the marital assets to be divided. Discovery and mediation are thus not conflicting exercises but happen in the logical sequence. Adequate discovery is completed prior to any negotiations and certainly prior to settlements. Trial judges are vested with discretionary authority to monitor discovery and settlement. ORS 107.089; ORCP 46; ORS 107.104.

Trial courts in family law cases exercise discretion on discovery issues as they do on numerous other matters. In that proper exercise of discretion, trial courts can limit discovery, order additional discovery and/or award sanctions for failure to provide discovery.

All of what is described above relating to discovery occurred in this case in a timely manner. The parties exchanged extensive discovery at all stages of these lengthy proceedings. For example, wife had sufficient discovery in advance of the trial on the validity of the prenuptial agreement that the trial took two full days before Judge Cinnegar. Again later in the process, after the prenuptial agreement was upheld, husband provided so much discovery that wife spent the entire week prior to mediation at her attorney's office going over all of the documents because she wanted to be very involved and fully informed.

Of course, wife already knew about all of husband's assets and the marital assets as the trial court specifically concluded: "Petitioner had access to the Respondent's financial records during the course of their marriage and had filed joint tax returns with the Respondent during their marriage." (Letter Opinion, p. 17; ER 35) Wife and her bookkeeper, paid all of the family bills and prepared the necessary documentation to be given to the CPA for tax returns. (Tr. 600, 679) Wife and the bookkeeper continued in this role until well after the settlement in June 2010. (Tr. 679)

The court of appeals' opinion addresses this issue correctly when it recognizes two key aspects: (1) wife "does not cite with specificity the documents that she seeks"; and (2) wife "waived" the right to insist on

discovery by signing the settlement agreement. Pollock and Pollock, 259 Or App at 243.

The fact that wife does not identify any documents she should have received that would have altered her settlement position is critical and should be dispositive. The appellate courts in this state address only "prejudicial" error and wife fails to identify any prejudice to her in the trial court's limitation on discovery. ORS 19.415(2); Purdy v. Deere & Co., 355 Or 204, 225-26, 324 P3d 455 (2014) Because of the judicially declared binding premarital agreement, wife's lack of up to date balances on husband's separate assets was not prejudicial. She was not entitled to share in those assets anyway. Whether their value had risen or fallen during the marriage was of no consequence to wife's settlement posture.

Settlement is a waiver of further proceedings and this court should endorse that conclusion as it did in 1982 in McDonnal, 293 Or at 778. There, this court recognized the policy reasons to enforce a choice to forego litigation and settle instead: "the legislature sought in part to avoid unnecessary litigation and use of judicial resources to encourage parties to settle their disputes more amicably." Otherwise, conscientious family law practitioners will never settle cases. It would be much safer, and would create finality to simply litigate every case to completion since finality

would be elusive if wife's arguments to this court are upheld. This case serves as an extreme example of what would happen if belated allegations of insufficient discovery can serve as an excuse for noncompliance with mediated settlements. Nearly 5 years and tens of thousands of dollars later, wife seeks to undo the bargain she freely made in mediation after spending an entire week studying the extensive discovery she was provided. There is a real danger in allowing the repudiation of negotiated settlements in family law and this court should so hold.

Conclusion

A trial court judgment should be entered fully and faithfully reflecting the mediated settlement which the trial court has already declared "just and proper in all of the circumstances of this case". The court of appeals' opinion should be affirmed, but the remedy changed to entry of a judgment specifically enforcing the mediated settlement.

Husband should recover his costs and attorney fees at trial and on appeal. ORS 107.105(1)(j).

Respectfully submitted this 19th day of June 2014

_/s/ Helen C. Tompkins_____
Helen C. Tompkins, OSB # 872100
Attorney for Respondent on Review

CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is **8642** words.

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

_/s/ Helen C. Tompkins_____
Helen C. Tompkins, OSB 872100
Law Office of Helen C. Tompkins, PC

Attorney for Respondent on Review

Certificate of Service

I hereby certify that on this date I served the foregoing BRIEF ON THE MERITS OF RESPONDENT ON REVIEW on the attorneys of record for Respondent by notification via eFiling where both attorneys are registered users:

David N. Hobson, Jr.
Hobson & Angell, LLP
18255 SW Tualatin Valley Hwy
Aloha, OR 97006
david@hobsonlawoffice.com

William R. Valent
6500 SW Macadam, Suite 300
Portland, OR 97239
wilrv@aol.com

I hereby certify that on this date I filed the foregoing BRIEF ON THE MERITS OF RESPONDENT ON REVIEW by eFiling, addressed as follows:

State Court Administrator
Records Section
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

Dated this 19th day of June 2014

_/s/ Helen C. Tompkins_____
Helen C. Tompkins, OSB # 872100
Attorney for Respondent on Review