IN THE COURT OF APPEALS OF THE STATE OF OREGON

PHILLIP ALFIERI, Plaintiff-Appellant, v. GLENN SOLOMON, Defendant-Respondent.	Multnomah County Circuit Court Case No. 1203-02980 Court of Appeals No. A152391

APPELLANT'S OPENING BRIEF AND EXCERPT OF RECORD

Appeal from the Judgment entered on August 21, 2012 in the Circuit Court for Multnomah County; Honorable Jerry B. Hodson, Judge.

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STATEMENT OF THE CASE

I. Nature of the Action and Relief Sought

This is an action at law based upon allegations of legal malpractice. The relief sought by Plaintiff is $3,775,000.00, plus Plaintiff's costs.

II. Nature of the Judgment

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

III. Appellate Jurisdiction

Appellate jurisdiction is based on ORS 2.516 and 19.205(1).

IV. Notice of Appeal Dates

The trial court entered General Judgment on August 21, 2012, and Plaintiff filed a Notice of Appeal on September 4, 2012.

V. Questions Presented

Question Presented 1: Does ORS 36.222 prevent a client from presenting evidence of malpractice committed by an attorney that was not specifically prepared for use in mediation?

Question Presented 2: Does ORS 36.110 et seq. provide a safe harbor for attorney malpractice committed in the context of mediation?

VI. Summary of Arguments

The trial court wrongly held that Plaintiff's allegations of legal malpractice are barred by Oregon's mediation confidentiality statutes. Mediation is not a safe haven for legal malpractice. The *Fehr* and *Bidwell* decisions, to the extent that they apply, fail to adequately consider statutory construction, legislative history and sensible public policy. The Circuit Court Order and General Judgment striking and dismissing Plaintiff's claims against Defendant should be dismissed, and this case should be remanded for a trial on the merits.

VII. Concise Summary of Material Facts

This case concerns allegations of gross legal malpractice that were dismissed at circuit court solely because the alleged malpractice occurred in relation to a mediation. Defendant successfully argued that, per ORS 36.220(1)(a) "mediation communications are confidential and may not be disclosed to any other person." (ER-10). Therefore, Defendant concluded, and the circuit court agreed, that "Plaintiff cannot allege or prove his alleged damages or the causal connection between [Defendant's] alleged conduct and Plaintiff's alleged damages." (ER-13).

Defendant's alleged conduct in this case is disturbing. In July 2008, Plaintiff retained Defendant to pursue a claim against Nationwide Insurance ("Nationwide"),

Plaintiff's former employer. (ER-2). Defendant filed a complaint on Plaintiff's behalf with the Oregon Bureau of Labor and Industries ("BOLI"), alleging age and disability discrimination by Nationwide. (*Id.*). After the BOLI complaint was filed, Plaintiff suffered adverse treatment from Nationwide, including disciplinary suspensions. (*Id.*). Defendant then filed an additional complaint with BOLI alleging retaliation. (*Id.* at 2-3).

The BOLI complaints were dismissed, and Defendant filed a state court complaint on behalf of Plaintiff. (*Id.* at 3). In that complaint, Defendant neglected to allege numerous state and federal causes of action,[1] and instead alleged only a single claim against Nationwide– common law wrongful discharge. (*Id.*). Defendant later filed a motion to amend the deficient complaint, but only to add allegations of retaliation. (*Id.*). The motion was granted, but Defendant failed to amend. (*Id.*).

Defendant also failed to conduct meaningful discovery on behalf of Plaintiff. (*Id.*). While Nationwide served interrogatories and requests for admission on Plaintiff, Defendant served none of these on Nationwide. Defendant also failed to

[1] Among these claims are: (1) Age Discrimination under the ADEA; (2) Age Discrimination under ORS 659A; (3) Disability Discrimination under the ADA, including Failure to Reasonably Accommodate, Failure to Engage in Good Faith Processes and Retaliation; (4) Disability Discrimination under ORS 659A, including Failure to Reasonably Accommodate and Retaliation; (5) Breach of Contract; (6) Breach of the Covenant of Good Faith and Fair Dealing; (7) Intentional Infliction of Emotional Distress; and (8) Intentional Interference with Contractual or Business Relations.

pursue or schedule depositions. (*Id.*). Instead, without making a competent investigation of Plaintiff's claims, Defendant proposed to Nationwide that Plaintiff's claims be resolved by confidential mediation. (*Id.*).

In preparation for mediation, Defendant curiously advised Plaintiff that the claim should be valued for settlement purposes solely by Plaintiff's economic damages. (*Id.* at 4). Defendant failed to consider Plaintiff's non-economic damages, which would have been substantial given Plaintiff's treatment by nationwide, emotional status and relevant claims. In addition, the mediation memorandum submitted by Defendant, like his complaint, failed to address nearly all of Plaintiff's claims. (*Id.*). To make matters worse, Defendant substantially lowered his recommendation for settlement to Plaintiff once the mediation began. (*Id.*). As could be predicted, the mediation failed. (*Id.*).

The day after the failed mediation, the mediator suggested a settlement amount of $225,000.00. (*Id.*). In the ensuing days, Plaintiff made several attempts to reject the proposed offer, but Defendant ultimately prevailed upon him to acquiesce to the mediator's proposal (the "Agreement"). (*Id.*). When Plaintiff met with Defendant, over two weeks after the mediation, he again stated to Defendant that he did not want to sign the Agreement. Defendant told Plaintiff he had no choice because of "substantial performance." (*Id.*).

Once the signed Agreement was delivered to Nationwide, the Agreement required payment of the settlement amount by Nationwide within 10 days. (*Id.*). Nationwide failed to comply with this material term. (*Id.*). On that basis, Plaintiff attempted to void the Agreement, but Defendant chastised Plaintiff and advised him in error that the deal could not be undone. (*Id.*).

FIRST ASSIGMENT OF ERROR

The trial court erred in granting Defendant's Motion to strike under ORS 21 E.

I. Preservation of Error

Defendant moved the court to strike paragraphs 10, 11, 12, 13, 15G, 15H, 15I, 15J, 15K, 15L, 15M, 15N, 16, and the last sentence of paragraph 17 of Plaintiff's Complaint under ORS 21 E, arguing:

> 'Mediation communications are confidential and may not be disclosed to any other person.' ORS 36.220(1)(a). The parties to a mediation may agree that the terms of the settlement agreement are also confidential. ORS 36.110(6) and 36.220(2)(b). In this case, Plaintiff agreed to keep confidential the settlement agreement terms and the settlement amount.

ER-10.

Plaintiff responded that, under case law cited by Defendant and ORS 36.220(3):

> Anything prepared by Defendant in his representation of Plaintiff not specifically prepared for use in mediation, including all communications between plaintiff and defendant after the mediation concluded, is subject to disclosure.

ER-15.

II. Standard of Review

In reviewing a grant of a motion to strike which "collectively dispose[s] of plaintiff's claims" the Court "review[s] those rulings for errors of law." *Garcez v. Freightliner Corp.*, 188 Or. App. 397, 399 (2003) (citing *Harris v. Pameco Corp.*, 170 Or.App. 164, 166 (2000) (stating standard for directed verdict)); *Callahan v. Sellers*, 106 Or.App. 298, 300 n. 1, *rev. den.*, 311 Or. 349 (1991) (applying standard of review for denial of motion for directed verdict to denial at trial of motion to strike portion of pleading)).

III. Argument

This Court has held that "ORS 36.222(3) makes non-confidential … discoverable materials submitted in the course of or in connection with mediation proceedings that were not specifically prepared for use in mediation." *Bidwell & Bidwell*, 173 Or.App. 288, 296 (2001) ("*Bidwell*"). Even if this Court finds merit in Defendant's position that mediation confidentiality preempts Plaintiff's claims of malpractice, anything not specifically prepared by Defendant for use in mediation,

including all communications between Plaintiff and Defendant related to post-mediation settlement, is subject to disclosure.

Defendant's Motion to strike was granted in part in accordance with his argument that:

> [p]ursuant to ORS 36.222, Plaintiff cannot disclose or present <u>any evidence</u> in these proceedings regarding the mediation communications, the mediated settlement agreement, or the mediated settlement amount. ORS 36.222(1) and (7); *Fehr v. Kennedy*, *supra*, (the prohibition against use of such confidential information in "'subsequent adjudicatory proceeding' applies to legal malpractice actions); *Bidwell & Bidwell*, 173 Or App 288, 296 (2001) (prohibiting using confidential mediation communications as evidence in a proceeding).

(ER-11) (emphasis in original).

Defendant's analysis is overbroad. Neither ORS 36.222(1) nor (7) prohibit the use of any evidence prepared by Defendant that was not specifically prepared for use in mediation. These statutory provisions do not address such evidence. Rather, as stated above, "ORS 36.222(3) makes <u>non-confidential</u> … discoverable materials submitted in the course of or in connection with mediation proceedings that were not specifically prepared for use in mediation." *Bidwell & Bidwell*, 173 Or.App. 288, 296 ("*Bidwell*") (emphasis added). The other case cited by Defendant, *Fehr v.*

Kennedy, 387 Fed.Appx. 789 (2010) ("*Fehr*"), does not address this issue.

Non-confidential materials subject to disclosure in this case include all communications between Plaintiff and Defendant after the mediator issued his settlement proposal on March 4, 2010. From this point forward, Defendant and Plaintiff discussed settlement of the malpractice claim. These discussions did not involve or relate to the finished mediation process, and had no relationship with mediation, the mediator, or mediation communications as defined by ORS 36.110(7).

Among the ORS 36.222(3) non-confidential communications in this matter are: (1) Plaintiff's attempts to undo the $225,000.00 settlement agreement with Nationwide; (2) the substance of the settlement agreement; and (3) all related communications between Defendant and Plaintiff on these topics. Under ORS 36.222(3) and *Bidwell*, the Circuit Court erred when it struck paragraphs 11, 12, 13, 15H, 16 and the last sentence of paragraph 17 from Plaintiff's Complaint. Thus, even if Defendant successfully argues that the mediation and related communications shield him from malpractice liability, Plaintiff can still prove his case.

SECOND ASSIGMENT OF ERROR

The trial court erred in granting Defendant's Motion for dismissal with prejudice under ORS 21 A(8).

I. Preservation of Error

Defendant moved the court for dismissal of all claims, arguing:

> Plaintiff's claims against [Defendant] rely entirely on his confidential and inadmissible allegations concerning the confidential mediation communications, the confidential mediated settlement agreement, and the confidential mediated settlement amount … Once the court strikes these allegations, Plaintiff could never state ultimate facts sufficient to state a claim.

(ER-12-13).

Plaintiff responded that:

> Plaintiff's claims do not rely entirely on confidential mediation communications. Rather, post-mediation discussion by Plaintiff and Defendant regarding the unconfidential matters [throughout] Plaintiff's complaint regarding settlement for $225,000.00 prove Defendant's fiduciary breach and do not involve confidential information. Moreover, Plaintiff has alleged ultimate facts sufficient to state a claim regarding Defendant's action throughout the course of his representation of Plaintiff.

(ER-20-21).

II. Standard of Review

The standard of review for a motion to dismiss is review for "errors of law." *Cloyd v. Lebanon Sch. Dist. 16C*, 161 Or. App. 572, 574 (1999) (citing *Shockey v. City of Portland*, 313 Or. 414, 418-422 (1992)). Specifically, "in reviewing a trial court ruling on a motion to dismiss for failure to state a claim for relief, ORCP 21 A(8), [the Court will] accept as true all of the allegations and give the nonmoving party the benefit of all favorable inferences that can be drawn from those allegations." *Am. Fed'n of Teachers-Oregon, AFT, AFL-CIO v. Oregon Taxpayers United PAC*, 345 Or. 1, 18 (2008) (citing *Bailey v. Lewis Farm, Inc.*, 343 Or. 276, 278 (2007)).

III. Argument

As demonstrated above, Plaintiff's allegations do not rely entirely on confidential and inadmissible communications. Even if this were the case, however, ORS 36.110 et seq. should not be interpreted as a safe harbor for legal malpractice. It could not have been the intent of the legislature to protect negligent, reckless and even malicious attorneys at the expense of innocent clients. The cases cited by Defendant, to the extent that they govern, take a shortsighted view of the law. Still, the Circuit Court held that an attorney cannot be found liable for malpractice committed in relation to mediation, however egregious his actions, because

"mediation communications" are confidential. Plaintiff's malpractice claim against Defendant was dismissed with prejudice per this highly problematic policy.

A. ORS 36.110 Et Seq. Should Not Be Construed to Protect Attorneys from Malpractice Committed During Mediation.

Three related statutes govern this case. ORS 36.220(1)(a) provides that: "mediation communications are confidential and may not be disclosed to any other person." ORS 36.222 provides that "mediation communications and mediation agreements that are confidential under ORS 36.220 are not admissible as evidence in any subsequent adjudicatory proceeding…". Finally, ORS 36.110(7) defines "mediation communications" as "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" as well as all materials submitted "in the course of or in connection with a mediation…".

The Circuit Court decision to bar Defendant's claim not only reads professional accountability out of the confidentiality requirements of ORS 36.110 *et seq*., but promotes and protects legal malpractice in the mediation context. In his Motion to dismiss, Defendant successfully argued that because Defendant was a "person present at the mediation proceedings", ORS 36.110(7) directs that all communications made by Defendant – even those between Defendant and Plaintiff – are confidential. (ER-11-12). Defendant's construction misses the mark: it is

axiomatic that all conversation between a party and his attorney, in mediation or otherwise, are confidential. As such, they are protected by the attorney-client privilege.

B. The Circuit Court's Interpretation of ORS 36.110 Et Seq. Causes Irreconcilable Conflict With ORS 40.225.

In addition to rendering the attorney-client privilege redundant from the client's perspective, a literal reading of ORS 36.110(7) directly conflicts with ORS 40.225(4)(c), which states that an attorney may not claim attorney-client privilege "as to communication relevant to an issue of breach of duty by the lawyer to the client." Legal malpractice committed in relation to mediation is a "breach of duty by the lawyer to the client." A client's right to waive the attorney-client privilege under ORS 40.280 should not be barred simply because of the context in which a privileged communication occurred.

Furthermore, reading ORS 36.110(7) to overrule ORS 40.225(4)(c) in favor of a negligent, reckless, or malicious attorney cuts against the rule of interpretation that "statutes should be read together and harmonized, if possible, while giving effect to consistent legislative policy." *Lewis v. CIGNA Ins. Co.*, 339 Or. 342, 350 (2005) (citing *State v. Guzek*, 322 Or. 245, 268 (1995)). These statutes can be harmonized. Under ORS 36.110(7), an attorney should not be considered an "other person" for purposes of confidentiality. An attorney and client share the same interest in

mediation. As such, an "attorney is engaged by the client to use his or her expertise for the benefit and protection of the client's interests." *Onita Pac. Corp. v. Trustees of Bronson*, 315 Or. 149 (1992). With regard to ORS 36.110(7) and ORS 40.225(4)(c), consistent legislative policy is the protection of individuals represented by attorneys, and the advancement of a client's best interests by his attorney, including during mediation.

C. The Legislative History of SB 160 Reveals that the Legislature Did Not Intend to Protect Attorneys from Malpractice Committed During Mediation.

"In the construction of a statute, a court shall pursue the intention of the legislature if possible." ORS 174.020(1). In addition, "to assist a court in its construction of a statute, a party may offer the history of the statute." *Id.* A review of the legislative history behind ORS 36.110 et seq. reveals that the legislature was wholly unaware that these statutes could be read to protect a negligent, reckless or malicious attorney. (ER-75-158). Instead, all testimony regarding mediation confidentiality reveals the desire of the legislature and the commenting parties to protect the client, only. *Id.* This is because the client owns the contested stake in the outcome of the mediation.

In its comments on SB 160, which amended the Oregon mediation privilege, the Oregon Justice Department noted 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." (ER-82-83). Likewise, the Oregon Dispute Resolution Commission, which submitted SB 160, focused on client protection only, submitting that "parties to a mediation may seek guidance during the course of the mediation from spouses, attorneys, and other privileged relationships." (ER-105). At no time did any legislator or commenting party discuss the statutory scheme as offering protection for negligent, reckless or malicious attorneys. Tellingly, however, the Oregon Justice Department expressed its "concern[] that … the language chosen is very unartful and is likely to cause severe interpretation problems." (ER-81).

D. Case Law Should Not Be Construed to Protect Attorneys from Malpractice Committed During Mediation.

In the underlying matter, Defendant persuasively argued that the Federal District Court, in the unpublished *Fehr* decision, held that ORS 36.222 bars Plaintiff from alleging malpractice under ORS 36.222. (ER-11-12). *Fehr* misconstrues the statute by identifying attorneys as distinct and "other" from their clients in the mediation context, and fails to consider the arguments of statutory construction mentioned above, much less the policy implications of providing a safe harbor for legal malpractice.

To that end, the *Fehr* reading of ORS 36.222 directly conflicts with the Uniform Mediation Act ("UMA"), which sensibly allows for an exception to the privilege against disclosure in the mediation context for any claim "sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation." UMA § 6(a)(6) (ER-24-25). Under the UMA, as with a discerning reading of the Oregon statutory scheme, attorneys are not free to commit gross legal errors in mediation and then hide behind an impenetrable shield of confidentiality. *Fehr* should be disregarded.

As stated in Defendant's Motion, "to state a claim for legal malpractice, Plaintiff must allege that Plaintiff was damaged and that Solomon caused the alleged damage." (citing *Parker v. Harris Pine Mills, Inc.*, 206 Or. 187 (1955); *Ridenour v. Lewis*, 21 Or.App. 416, 419 (1993); *Stevens v. Bispham*, 316 Or. 221, 228 (1993)). (ER-13). As shown above, Plaintiff can make this claim under Oregon law. If *Fehr* were followed, however, an attorney could never be subject to a malpractice claim stemming from a confidential "mediation communication", even where the attorney threatened her client with violence or injury.

ORS 36.110 et seq. should be read in accordance with the Uniform Mediation Act and in accordance with sensible public policy. This Court is not beholden to an unsound, unpublished federal court decision purporting to interpret Oregon law.

Instead, this Court should expand upon *Bidwell* and follow the lead of other jurisdictions, where an exception to the mediation privilege has been found where "necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally." *In re Paternity of Emily C.B.*, 271 Wis. 2d 818 (Ct.App. 2004).

CONCLUSION

Legal malpractice can have a devastating impact on a victim client. The Oregon statutes on mediation confidentiality can be read to preserve the rights of individuals who have suffered from malpractice actions in the mediation context, while avoiding any conflict with the law of attorney-client privilege as codified at ORS 40.225(4)(c). Fundamental fairness dictates that Plaintiff should have the opportunity to pursue his allegations against Defendant, and sensible public policy dictates that attorneys should not enjoy a safe harbor from legal malpractice claims– especially after steering their clients into confidential mediation.

Plaintiff respectfully requests that this Court reverse the Circuit Court's Order and General Judgment, and remand this case for a trial on the merits.

DATED: November 20, 2012 Powers, McCulloch & Bennett, LLP

/s/ Mark McCulloch
Mark McCulloch, OSB #670791
Of Attorneys for Plaintiff

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

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 is 3,840 words.

Type Size

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

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CERTIFICATE OF MAILING

I hereby certify that on November 20, 2012, a true and correct copy of the foregoing Opening Brief was filed with the State Court Administrator electronically.

_____/s/ Mark McCulloch____
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I further certify that on November 20, 2012, I served a true and correct copy of Plaintiff's Opening Brief on the following individuals, by electronic mail at the email addresses set forth below:

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