Supreme Court Case Number S_____

**IN THE SUPREME COURT**
**OF THE STATE OF CALIFORNIA**

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JOHN PORTER and DEBORAH BLAIR PORTER,

Plaintiffs and Petitioners,

vs.

STEVEN WYNER *et al.*,

Defendants and Respondents.

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After a Decision of the Court of Appeal
Second Appellate District, Division Eight
Case No. B211398
Los Angeles Superior Court Case No. BC347671
The Honorable Warren L. Ettinger

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# PETITION FOR REVIEW

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**TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:**

Plaintiffs and Petitioners John Porter and Deborah Blair Porter (collectively the "Porters") hereby respectfully petition this Court for review of the Opinion of the Court of Appeal, Second Appellate District, Division Eight in this case and present the following issues for consideration by this Court.

## I. ISSUES PRESENTED

1. Who controls the decision to waive mediation confidentiality? Specifically, where all parties to a dispute have expressly waived mediation confidentiality, should non-party participants to the mediation be allowed to thwart that decision?

2. Does a documented waiver of mediation confidentiality contained in a fully executed Settlement Agreement require the signatures of all non-party participants to the mediation in order to constitute a valid express waiver of mediation confidentiality?

## II. WHY REVIEW SHOULD BE GRANTED

In light of the burgeoning increase in mediations, propelled by court-mandated use of alternate dispute resolution, and by the desire of disputants for quicker, more efficient resolution processes, attention has been focused on California's mediation confidentiality statutes.

This Court's decision in *Simmons v. Ghaderi,* 44 Cal.App.4th 570 (2008) *("Simmons")*, (the case upon which the Superior Court overturned a

jury verdict in the Porters' favor, resulting in the Porters' original appeal) explored the issue of express vs. implied waiver, finding a party cannot impliedly waive mediation confidentiality by conduct. In its recent decision in *Cassel v. Superior Court*, 51 Cal.4th 113 (2011) ("*Cassel*") this Court determined mediation confidentiality applies to communications between a client and his attorney in mediation proceedings.

However, the *Porter v. Wyner* matter, which was reviewed and held in conjunction with *Cassel*, raises an issue of equal importance that has not yet been directly addressed by any court in California and is of profound significance to both litigants, their counsel, and the courts. Specifically, since *Cassel* makes it abundantly clear that attorney-client communications made for the purpose of, in the course of, or pursuant to a mediation will be protected from disclosure *absent an express waiver*, clarification of control of the express waiver process must be made by the Court, in order to protect litigants who choose to waive confidentiality, and avoid absurd results such as occurred in the *Porter* matter.

The goal of mediation is to "facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." [*Evidence Code* ("EC") §1115(a)] The process is designed to benefit disputants and to provide them a means to settle their dispute short of trial. The decision whether or not to settle through mediation rests solely with the parties. Likewise, the decision whether or not to waive mediation confidentiality must rest in the sole discretion of the parties to the dispute, i.e., the disputants. The goal of mediation will be subverted if the mediation confidentiality statutes are read as the Court of Appeal has read them, so as to allow non-parties to subvert and thwart the parties' intent, as has occurred in this case.

Just as it is the parties to a dispute who must agree to and execute any settlement agreement, so too it is the parties to the dispute who must agree to waive mediation confidentiality. Similarly, just as no one other than the parties is required to agree to the terms of any settlement reached at mediation, no one other than the parties is required to agree to waive confidentiality, and no one should be allowed to subvert or thwart the waiver of mediation confidentiality expressly agreed to by all parties in their settlement agreement.[1]

The Court in *Simmons* clearly confirmed "the Legislature intended section 1122 to give litigants control over whether a mediation communication will be used in subsequent litigation," (*Simmons* at 587) and that the statutory scheme, taken as a whole, reflects it is the parties alone who can choose to enter into settlement agreements as a result of mediation and choose to waive confidentiality with regard to the mediation. Since the waiver of confidentiality is most often included within the settlement agreement, the statute's express language that only the parties need sign the settlement agreement is a clear indication that only the parties need waive mediation confidentiality. Accordingly, where the waiver of mediation confidentiality is contained within the settlement agreement, as it was here, the consent of all parties to the waiver cannot be subverted or set aside by the fact that extraneous third parties did not sign the settlement agreement. That would, and did, lead to an absurd result that clearly undermines the statutory purpose, where the express intent of all parties in the underlying

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[1] In that same vein, just as a peripheral participant to the mediation could not void the settlement agreement reached by the parties by his failure to sign it, neither should he be allowed to void the waiver of mediation confidentiality agreed to by all parties.

litigation to waive mediation confidentiality has been thwarted by a non-party.

Review should be granted to preserve the Legislature's intent and the paramount goal of the mediation process, i.e., to ensure disputants/litigants have control over the process, including whether to waive mediation confidentiality, in order to reach a "mutually acceptable agreement." If parties are not allowed to determine the terms upon which they settle, they will no longer consider mediation a viable alternative. If parties no longer consider mediation a viable alternative, they will take their unresolved disputes to Court, further burdening an already stressed system. Accordingly, this is an issue of utmost importance requiring resolution in order to preserve the rights and expectations of litigants who choose mediation, and to safeguard the process of mediation where the parties control how their disputes are resolved.

Moreover, review is necessary to maintain uniformity of decision, as the appellate court's ruling below not only directly contradicts the plain language of the statute and Legislative intent, but conflicts with every other decision that has considered who must agree to an express waiver of mediation confidentiality for it to be enforceable. While prior decisions have recognized that a waiver of mediation confidentiality is valid if each litigant has expressly agreed to it, the appellate court has held otherwise. Parties, attorneys, mediators and judges alike require confirmation of the meaning of the statutory language supporting this precept in order to safeguard the institution of mediation as one where litigants, rather than third parties, exercise control over the process and the outcome.

Ultimately, review is necessary as the appellate court has interpreted the statute so that control over dispute resolution is transferred from the

parties to the non-party participants in a manner the Legislature clearly did not intend. This interpretation will lead to absurd results, by stripping parties of control over the process the Legislature enacted specifically for their benefit, and preventing them from resolving their disputes on their own terms.

## III. STATEMENT OF FACTS[2]

### A. The Underlying Federal Action.

The action from which this appeal is taken arose from an earlier federal lawsuit (hereinafter the "Federal Action"), brought by the Porters on behalf of their son against Manhattan Beach Unified School District ("MBUSD") and the California Department of Education ("CDE"), *et al.* (collectively the "Federal Defendants"), in which the Porters alleged violations of their son's right to a "free appropriate public education" under the Individuals with Disabilities Education Act ("IDEA") and Section 504 of the Rehabilitation Act.[3] Defendants Steven Wyner, Marcy J.K. Tiffany and Wyner & Tiffany (collectively "W&T") represented the Porters in the Federal Action. The fee agreement originally entered into between the Porters and Steven Wyner (the "Fee Agreement") provided that if a settlement were reached in the Federal Action, and Wyner recovered more

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[2] The Porters timely requested the appellate court modify its Opinion to correct certain facts, based upon documents in the appellate record. The appellate court made only one change, reflected in the Order Modifying Opinion filed August 18, 2011, a true and correct copy of which is attached hereto.

[3] A comprehensive history of the Federal Action is found in Appellants' Appendix lodged in their appeal. ("AA"), Tab 18.

than the total amount of fees and costs billed to the Porters, the Porters would be reimbursed all fees and costs paid. [AA, Tab 1]

On October 4, 2004, after nearly six years of litigation, District Court Judge Gary Allen Feess granted partial summary judgment in the Porters' favor, finding the Federal Defendants had repeatedly failed to adequately provide for the educational needs of the Porters' son. At the summary judgment hearing the court characterized MBUSD's inaction, stating: "[T]he district has completely failed this child over and over again."

Soon thereafter, W&T insisted the Porters renegotiate their fee agreement, giving W&T the opportunity to recover their fees at the higher of their current hourly rates or a contingency fee. [AA, Tab 4] However, the fee agreement specifically provided W&T "shall not be entitled to collect both hourly fees and a contingent fee." [AA, Tab 4, ¶5.2.3]

**B. Mrs. Porter's Employment by W&T.**

In October 2000, Mrs. Porter began working as a paralegal for Steven Wyner, working on her son's case, the Federal Action, and other students' cases. Mrs. Porter and Mr. Wyner subsequently entered into a written agreement that her compensation would be offset against legal fees and costs the Porters owed Mr. Wyner for his work on the Federal Action. [AA, Tabs 2 and 3]. In October 2004, at the same time W&T insisted on renegotiating their fee agreement with the Porters, they also insisted Mrs. Porter enter into a revised agreement for her pay which ostensibly dealt with lost wages. [Supplemental Appendix to Combined Appellants' Reply Brief and Cross-respondents' Brief Tab 4] In January 2005, Mrs. Porter and W&T executed a written agreement providing that if W&T recovered fees for Mrs. Porter's time on the Federal Action at her "newly established rate

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of $140", she would be paid $75 an hour for all hours worked on the Federal Action. [AA, Tab 5]

### C. The Settlement and Express Waiver of Mediation Confidentiality.

#### 1. The Mediation.

On April 26, 2005, the parties to the Federal Action participated in a mediation (the "Mediation"). W&T acted as counsel for the Porters, and Robert Feldhake, an attorney for the Alliance of Schools for Cooperative Insurance Programs, acted as chief negotiator for the Federal Defendants.

The mediation participants were presented with a JAMS Confidentiality Agreement to sign (the "Confidentiality Agreement"), which stated "[i]n order to promote communications among the parties and to facilitate resolution of the dispute, the participants agree" to its provisions, including that the "provisions of California Evidence Code §§ 1115-1128 and 703.5 . . . apply to this mediation." [AA, Tab 7, ¶2] The Confidentiality Agreement also stated "[t]he participants' sole purpose in conducting or participating in mediation, is to compromise, settle or resolve their dispute, in whole or in part." [AA, Tab 7, ¶3]

During the Mediation, W&T insisted the Porters ensure they were compensated at their current, rather than historical, hourly rates, which W&T admitted would net them an additional $500,000 more than the actual fees incurred as of the Mediation. Despite feeling they were having to negotiate with their own attorneys as well as the Federal Defendants, the Porters agreed to W&T's demand. [4RT309:11-310:13, 313:7-18, 331:4-27][4]

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[4] The designation "RT" herein refers to the Reporter's Transcript prepared in connection with the appeal in this matter.

During the Mediation, Steven Wyner stated to the Porters, in the presence of the mediator and Feldhake, that the Federal Defendants had raised the issue of potential "double dipping" with regard to Mrs. Porter's lost wages claim. Specifically, he said there was concern that if Mrs. Porter were paid lost wages through the settlement, and also paid through W&T's legal fees collected for her time, that would constitute "double-dipping." During private conversations between the Porters and W&T, Mr. Wyner told Mrs. Porter "drop your lost wages claim, and I will pay you through our legal fees. . . at your current rate just like Wyner & Tiffany." The Porters agreed to this arrangement at Mr. Wyner's insistence. [4RT 313:19-315:10 and 329:15-21] W&T also told the Porters the settlement proceeds paid for their son would not be taxable. [4RT 315:13-316:12][5]

At the Mediation, all the parties, including the Federal Defendants and the Porters, agreed to settlement terms. [AA, Tab 8] The Stipulation for Settlement stated "Counsel for each of the parties to this agreement represents that he/she has fully explained the legal effect of this agreement and that upon execution and delivery of a definitive settlement agreement by all parties, the settlement and compromise stated herein will be final and conclusive. . ." [AA, Tab 8, ¶1 ]

**2. W&T's Conduct Leading to the Porters' Lawsuit Against Them.**

Soon after the Mediation, for the first time, W&T suggested the settlement proceeds might be taxable as income to the Porters. This was a

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[5] Unbeknownst to the Porters, during the mediation, W&T were negotiating on their own behalf with regard to their legal fees, and on behalf of W&T's interests as against the interests of Mrs. Porter, their employee. (*See,* Respondents and Cross/Appellants' Letter Brief re: New Legal Authority, dated December 17, 2009, at pages 7-8)

great shock to the Porters, as W&T had advised them the recovery would be personal injury damages, and not taxable. [4RT 333:3-21] The Porters had no reason to question or doubt this advice, as Mr. Wyner boasted to them that he had been a tax lawyer for many years. [4RT 329:28-330:11]

Despite never having mentioned the need for separate tax counsel at any time before, during or after the Mediation, on May 4, 2005 W&T suggested separate tax counsel should be retained to assist in structuring the settlement. [AA, Tab 9] At this point, W&T finally admitted to the Porters they lacked the expertise to advise the Porters regarding tax issues. Thereafter, W&T retained Robert Wood, Esq. to provide tax advice to the Porters and W&T regarding the potential settlement, and forwarded him a $10,000 retainer. [AA, Tab 9]

From May 2005 through July 2005, the parties in the underlying Federal Action engaged in intensive negotiation of the definitive settlement documents. Approximately a week or so before the settlement was finalized, W&T insisted the Porters sign a document purporting to release W&T of any and all liability "related to tax advice provided to, or hereinafter provided to, [the Porters] concerning the tax consequences of the Lawsuit," while offering to pay half the costs of the tax attorney as consideration for the waiver. In that same document, W&T attempted to force the Porters to amend the Fee Agreement and pay additional funds beyond the $1.65 million in attorneys' fees W&T had agreed to in the Mediation, by stating that if post-mediation fees and costs exceeded the $1.65 million in fees agreed to at the Mediation, the Porters would be responsible for such excess amounts. [AA, Tab 14]

At this time, while engaged in critical negotiation of the definitive settlement documents, the Porters felt besieged not only by the Federal

Defendants, but now by their own counsel, who seemed to be threatening to quit the case if the Porters did not agree to execute the Release and amend the Fee Agreement. The Porters insisted W&T remove the portion of the draft release pertaining to modification of the Fee Agreement. However, because the Porters lacked the resources necessary to pay 100% of the fees of the tax attorney, they were powerless to demand further changes to the draft release. Under extreme economic duress and without benefit of advice from an independent attorney, the Porters executed a document entitled "Tax Advice & Release", dated July 25, 2005 (the "Release"). [AA, Tab 16] [4T376:15-379:12, 381:7-18; 5RT582:25-583:16 and 549:20-550:3]

### 3. Settlement Agreement and Waiver of Mediation Confidentiality, ¶19.

In August 2005, all the parties in the underlying Federal Action executed a formal settlement agreement encompassing the terms negotiated at the Mediation (the "Settlement Agreement"), drafted largely by W&T. [AA, Tab 17][6] The material terms included $1,650,000 to W&T for attorneys' fees and costs, calculated at their current hourly rates, including an additional $9,000 W&T estimated would cover all post-mediation legal fees and costs, which W&T represented to the federal court was the total compensation it would receive for its services in connection with the settlement. [AA, Tab 18, page 0105-0106, ¶¶8, 11]. Nothing in the Settlement Agreement indicated any portion of the award pertained to a lost

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[6] The parties executing the agreement included the Porters, MBUSD, CDE, and individual defendants Jack O'Connell, Gerald F. Davis, Linda M. Jones and Eloise Thompson. [AA, Tab 17, pages 0082-0087]

earnings claim. The settlement did not allocate any monies to Mrs. Porter that would eliminate W&T's obligation to pay wages owed her by them.

In executing the Settlement Agreement, all parties agreed to the following express waiver of mediation confidentiality:

> Upon the full execution of this Agreement, the Parties, and each of them, waive the terms and provisions of that certain Judicial Arbitration Mediation Service Confidentiality Agreement (California), dated April 26, 2005. The Parties acknowledge and agree that the terms and provisions of this Agreement are not confidential. [AA, Tab 17, ¶19][7]

Mr. Wyner and attorneys representing MBUSD and CDE signed the agreement under the words "Approved as to Form." [AA, Tab 17, pages 88-90]

On August 10, 2005, the trial court in the Federal Action approved the settlement.[8] On September 14, 2005, the sum of $1,650,000 was paid to

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[7] A waiver of confidentiality was important to the Porters, as they did not want MBUSD or CDE to hide from the public any aspect of their failure to ensure an appropriate education for the Porters' son. It was their hope that through such transparency, other children and their families might be spared similar non-compliance by school districts and CDE.

[8] The Settlement Agreement required court approval which was granted through the federal court's "Order Approving Minor's Compromise," which required the parties to comply with the terms and provisions of the Settlement Agreement, including the waiver of confidentiality in ¶19, with the federal court retaining "jurisdiction to enforce the terms and provisions of the Settlement Agreement" and related orders. (*See,* AA, Tab 18, pages 0098, 0104-0106) The waiver also ensured the federal court unfettered access to the terms of settlement in order to

W&T, representing the total legal fees and costs incurred on behalf of the Porters in the Federal Action, including all Mrs. Porter's time as W&T's employee.

On September 28, 2005, approximately one week after the lawsuit was dismissed, W&T gave the Porters a letter in which they claimed for the first time that the Porters owed W&T an additional $454,916, under a convoluted theory they were due a contingency fee, in addition to the hourly fees they had already collected, which would bring their total recovery to $2,104,916. [AA, Tab 20] This new demand was contrary to the express terms of the Fee Agreement and W&T's representations to the District Court, the Federal Defendants and the Porters that they were entitled to only $1.65 million, and did not expect to receive additional compensation for their services in the Federal Action. [*See,* AA, Tab 18, ¶¶ 8, 11] In their letter, W&T further exacerbated their conflict of interest by taking the position that they were not required to reimburse attorneys' fees and costs advanced by the Porters [AA, Tab 20 at p. 4] and did not owe and would not pay Mrs. Porter the wages owed her from their $1.65 million fee award, based on their claim she had been paid through the settlement. [AA, Tab 20, p. 6]

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ensure the Porters' son's interests were protected. The federal court's jurisdiction ended June 30, 2011. At no time in the past six years has any party or participant to the Mediation challenged the waiver in federal court or challenged the federal court's jurisdiction in this regard.

### D. W&T's Subsequent Acknowledgment an Express Waiver of Mediation Confidentiality had been Effected by the Settlement Agreement.

The Porters filed suit against W&T on January 27, 2006. In the early litigation, W&T made no mention of and raised no objections regarding mediation confidentiality, initially producing and relying upon mediation-related documents in several of its filings with the court. It was not until November 2006, a year and three months after the underlying Federal Action had settled, that W&T first raised mediation confidentiality, and thereafter repeatedly raised it, including refusing to respond to any questions at deposition that might impinge on the statutory protection. [AA Tabs 23 and 24]

In February 2008, just before trial, W&T filed a motion *in limine*, seeking to preclude "the introduction of any evidence of, or testimony regarding, communications made during the Mediation . . . ." [AA, Tab 25] The Porters opposed the motion arguing, among other things, that the parties in the underlying Federal Action had expressly waived mediation confidentiality in the Settlement Agreement. [AA, Tab 26]

Nevertheless, the Porters prepared to try their case without evidence pertaining to the Mediation, in the event W&T's motion *in limine* was granted. In a wholly unanticipated maneuver at the outset of trial, W&T abruptly changed their position, and without warning, withdrew their motion. Specifically, on the morning trial was set to begin, W&T's counsel, responding to a direct inquiry from the court, stated the following, on the record, in the presence of his clients, the Porters and their counsel:

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COURT: But did everybody sign a waiver of confidentiality?

MR. KVETON: Your Honor, I may be able to shortcut any discussion on this, if I may . . . Based on the arguments that were made and raised by the plaintiff in their opposition, ***including the issue of waiver by all participants, and the waiver in the final settlement agreement,*** we will withdraw the motion. [2RT 50:15-51:3] [Emphasis added.]

The Court then confirmed on the record W&T's position, that mediation confidentiality had been properly waived through the Settlement Agreement, stating " . . . you have waived it and [] we all agree on it." [2RT 54:14-55:3] Based on that express acknowledgment of the valid waiver of mediation confidentiality in the Settlement Agreement in the underlying Federal Action, the Court, at the Porters' counsel's insistence, ordered the depositions of W&T reopened, so the Porters' counsel could ask questions about the Mediation to which objections had been, or would have been, asserted previously. The Court also ordered the deposition of Robert Feldhake, chief negotiator for the Federal Defendants at the Mediation. [2RT 51:14-58:9]

Accordingly, based on W&T's acknowledgment through their counsel in open court that mediation confidentiality had been properly waived through the Settlement Agreement, evidence pertaining to the Mediation was introduced at trial. Defense counsel referred in his opening

statement to negotiations that occurred during the Mediation, and specifically told the jury Robert Feldhake, who took the lead in negotiating the settlement at the Mediation, would testify regarding those negotiations, particularly with respect to Mrs. Porter's wage claim. [3RT 135:1-20 and 138:13-23]. W&T then called Mr. Feldhake, examining him and each of the parties, extensively, on precisely what occurred at the Mediation. [8RT 1214:26-1249:11] The Porters likewise introduced evidence of what occurred at the Mediation without objection by W&T.

### E. Events Leading up to the Granting of W&T's Motion for New Trial.

On March 7, 2008, after a two-week trial, the jury returned a verdict in favor of the Porters, specifically finding: (1) W&T owed Mrs. Porter $211,000 in back wages; (2) W&T owed the Porters $51,000 for breach of the Fee Agreement; and (3) the Release should be rescinded. Judgment was entered on the verdict on June 23, 2008. [AA, Tab 27] Approximately one month later, this Court issued *Simmons v. Ghaderi*, 44 Cal.App.4th 570 (2008)("*Simmons*"), which held a party cannot impliedly waive mediation confidentiality by conduct. W&T used the *Simmons* opinion as the basis for their motion for new trial. While claiming an "irregularity in the proceedings", W&T's motion for new trial omitted any mention of the express waiver by the parties in the Settlement Agreement in the underlying Federal Action, as well as its own role in ensuring the introduction of the very evidence it now claimed caused the "irregularity." The trial court granted W&T's motion for new trial and vacated the judgment, stating simply, "Motion for New Trial is granted pursuant to Simmons . . . ." [AA, 34]

## IV. POST-TRIAL PROCEDURAL EVENTS

In its initial opinion filed April 8, 2010, the appellate court overturned the trial court's order for new trial, finding mediation confidentiality did not extend to conversations and conduct solely among the Porters and their counsel, held outside the presence of any third party. Because the appellate court limited its ruling to this narrow ground, it found it unnecessary to address the issue of the parties' express waiver of mediation confidentiality contained in the Settlement Agreement. *Porter v. Wyner*, 183 Cal.App.4th 949, 965, footnote 10 (2010)("*Porter*").

Thereafter, W&T petitioned this Court for review of the appellate decision. As review of the *Cassel* matter was pending, the Porter case was placed on "review and hold" status, pending a ruling on *Cassel*. On January 13, 2011, this Court filed its opinion in *Cassel*, holding that communications between counsel and client that are materially related to the mediation, even if they are not made to another party or the mediator, are 'for the purpose of' or 'pursuant to' mediation." *Cassel v. Superior Court*, 51 Cal. 4th 113, 135 (2011), citing *Benesch v. Green* (N.D.Cal. 2009) 2009 WL 4885215.

In his concurring opinion in *Cassel*, Justice Chin presaged the precise issue presented here: whether the litigants can be stripped of their express decision to waive confidentiality where counsel for one side belatedly claims he did not agree to the waiver:

> This case does not present the question of what happens if every participant in the mediation *except the attorney* waives confidentiality. Could the attorney even then prevent disclosure so as to be immune from a malpractice action?

> I can imagine no valid policy reason for the Legislature to shield attorneys even in that situation. I doubt greatly that one of the Legislature's purposes in mandating confidentiality was to permit attorneys to commit malpractice without accountability. Interpreting the statute to require confidentiality even when everyone but the attorney has waived it might well result in absurd consequences that the Legislature did not intend. That question will have to await another case. *Cassel* at 139-140.

Thereafter, this matter was transferred back to the appellate court, with directions to reconsider it in light of *Cassel*.

On July 27, 2011, the appellate court issued its Opinion, stating:

1) "We find *Cassel* is controlling and the mediation confidentiality provisions demonstrate the trial court did not abuse its discretion in granting a new trial." [Opinion, p. 12]

2) "[T]he settlement agreement did not include an express waiver of mediation confidentiality. . . [fn 12] The settlement agreement provided only that the '[p]arties,' a description that did not include respondents Wyner Tiffany, waived the provisions of the mediation confidentiality agreement and that the '[p]arties acknowledge and agree that the terms and provisions of *this Agreement* are not confidential.' (Italics added.)" [Opinion, p. 15]

3) "[T]he settlement agreement was not signed by all participants to the mediation. Based on the signatures on the mediation confidentiality

agreement, there were at least 19 participants in the mediation, in addition to the mediator. Neither the mediator, nor the majority of the persons who participated in the mediation, signed the settlement agreement. . . [A]lthough Wyner did sign the settlement agreement, he did not sign as a party but, as with the other attorneys of record in the underlying action, signed only approving the agreement 'as to form,' indicating he was not bound by its substantive provisions. . . [R]espondent Tiffany did not sign the settlement agreement at all." [Opinion, pp. 15-16]

4) "In their supplemental brief, the Porters claim that this case falls within the 'absurd result' scenario discussed by Justice Chin in his concurring opinion in *Cassel, supra*, 51 Cal.4th at pages 139-140. There, Justice Chin indicated that if all participants in a mediation waived confidentiality except the attorney, it might result in absurd consequences if the attorney could prevent disclosure of the communication and thus shield himself from a malpractice action. The analysis is not apt here, however, as many of the participants aside from the attorneys did not sign the agreement." [Opinion, p. 19, fn. 13]

While the Porters urged the appellate court repeatedly to consider carefully the import of the express waiver in the settlement agreement entered into by all parties in the Federal Action, the appellate court sidestepped that critical issue. Focusing on the fact that all mediation "participants" had not signed the Settlement Agreement, the appellate court rendered the parties' express waiver invalid without acknowledging the exact consequence described by Justice Chin had actually occurred: one "participant", the Porters' counsel, after drafting the Settlement Agreement containing the express waiver, assuring the Porters it was proper as to form, and greatly benefitting from its terms by collecting $1.65 million in fees,

subsequently asserted mediation confidentiality for the sole purpose of shielding themselves from liability for self-dealing, by claiming long after the settlement was complete that the clear intent of the parties to the Federal Action to waive mediation confidentiality should be overridden because non-party participants did not sign the Settlement Agreement. This result, on its face, is illogical and contrary to the statute, Legislative intent and all reason or common sense.

As the appellate court had already considered the Porters' case twice, without fully exploring the express waiver issue, the Porters did not file a petition for rehearing.

## V. LEGAL DISCUSSION

### A. The Statutory Scheme Taken as a Whole Demonstrates the Parties Alone Control Whether Mediation Confidentiality Is to Be Waived.

In *Simmons*, after documenting the statutory scheme at EC 1115-1128, this Court stated unequivocally:

> "Section 1122 plainly states that mediation communications or writings may be admitted *only on agreement* of all participants. Such agreement *must be express, not implied.* We recognized that the Legislature intended section 1122 to give litigants control over whether a mediation communication will be used in subsequent litigation. (See *Rojas*, *supra*, 33 Cal.4th at p. 423.) However, the section does not limit this control other than as stated

> through sections 1123 and 1124. (Cal. Law Rev. Com., *supra*, foll. §1122, p. 252.) Thus, the language of the statutory scheme reflects that it was intended to be complete." *Simmons* 587.

The Legislature's intent that §1122 gives ***litigants*** control over whether a mediation communication will be used in subsequent litigation is reflected in the very statutes dealing with how an effective waiver is accomplished, and in very specific references to parties only.

For example, §1123 which deals with written settlement agreements arrived at through mediation (as occurred in the underlying Federal Action) states such an agreement will not be protected from disclosure where it "is signed by ***the settling parties***" and "***[a]ll parties*** to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure." Section 1118, which defines "oral agreement," specifically states the terms of any oral agreement are to be recited on the record in the presence of ***the parties*** and the mediator; that ***the parties*** must express on the record they agree to the terms recited; and ***the parties*** must sign the writing reflecting that agreement. The Legislature thus made it clear that no mediation participants ***other than the parties*** are required to effect an oral agreement of waiver, that the decision to waive confidentiality within a settlement agreement rests solely with the parties, and that non-party participants have no role in the decision and need not consent to or sign any settlement agreement for a valid waiver of mediation confidentiality to occur.

The Legislature could not have intended otherwise. Waivers of confidentiality, when they occur, nearly always appear in the written settlement agreements arrived at as a result of mediation. Since no one but

the parties can agree to settle the dispute, only the parties execute the settlement agreement. Just as non-parties do not need to provide consent to the settlement agreement, nor is their consent needed for any specific provision of the settlement agreement, including a waiver of mediation confidentiality. Indeed, non-parties could not properly be included as signatories to the settlement agreement.

Section 1124 dealing with the admissibility of oral agreements reached through mediation likewise requires only that all ***parties*** to the agreement agree to disclosure. Once again, the Legislature stated the obvious: since only disputants themselves can enter into agreements at mediation, no consent other than that of disputants is necessary to waive confidentiality of such agreements.

Finally, §1124 states that oral agreements made in the course of, or pursuant to a mediation will not be protected from disclosure where ***all parties to the agreement*** agree in writing or orally to disclosure of the agreement. The consent of any other participants to the mediation, again, is not required.

If the Legislature intended participants to sign settlement agreements, such a requirement would be included in the express language of the statute. No such language is in the statute. Viewing the statutory scheme in its entirety, as is required, demonstrates unequivocally that the Legislature did not intend to allow non-party, peripheral participants to a mediation any power in determining whether mediation confidentiality was to be waived. To find otherwise would inevitably thwart the parties' express intent, and as discussed below, would lead to absurd results.

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### B. Cases That Have Explored Express Waivers of Mediation Confidentiality Follow The Legislative Intent That The Parties Alone Control Whether Mediation Confidentiality Is To Be Waived.

Again, in *Simmons*, this Court left no doubt it is the *litigants* who control whether mediation confidentiality is to be waived: "We recognized that the Legislature intended section 1122 to give ***litigants*** control over whether a mediation communication will be used in subsequent litigation." *Simmons* at 587. [Emphasis added] This Court in *Simmons* recognized an exception to mediation confidentiality exists where "***the parties themselves*** expressly waived confidentiality", *Simmons* at 582, citing to *Olam v. Congress Mortgage Co.*, 68 F.Supp.2d 1110 (N.D.Cal.1999)("Olam"). [Emphasis added.]

The control rests entirely with the litigants, as it should, in light of the goal of mediation to "facilitate communication between *the disputants* to assist them in reaching a mutually acceptable agreement." EC §1115(a)(emphasis added). Critical to that process is the "concept of self-determination, leaving the parties in control of resolving their dispute." *Travelers Casualty and Surety Co., v. Superior Court*, 126 Cal.App.4th 1131, 1139 (2005). There is no legislative intent, or need, to provide such control to anyone but the litigants.

This clear indication that the primary purpose of mediation confidentiality is to protect parties' control over dissemination of mediation information was explored in depth in *Olam*, a case relied on and cited with approval in *Simmons*. *Olam* is particularly instructive as it deals with the precise issue here: whether an express waiver signed by the litigants but not other mediation participants should be upheld. In *Olam*, federal magistrate

judge Wayne Brazil upheld an express waiver by the parties to a mediation *even though the mediator had not likewise waived mediation confidentiality.*[9] The parties waived mediation confidentiality in order to compel the mediator to testify regarding plaintiff's behavior at mediation, given her claim she was subject to undue influence. *Id.* at 1129.

In determining the *parties'* need to use the protected information outweighed any interest of the mediator in maintaining confidentiality, the *Olam* court found the parties' waivers alone were "deemed sufficient under §1122(a)(1) of the California *Evidence Code* to remove §1119 as a barrier to the admission of the evidence the court accepted during the evidentiary hearing." *Id.* at 1130. Specifically, the *Olam* court found that since the *parties* had expressly waived mediation confidentiality, the failure of other participants to likewise waive confidentiality was not an impediment to introduction of evidence of what occurred at the mediation. Rather, it was only a factor in analyzing whether the mediator's testimony could be compelled.[10]

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[9] At the time of the *Olam* hearing, Judge Brazil had been responsible for ADR programs in the Northern District of California for 15 years. *Id.* at 1134.

[10] Magistrate Brazil specifically found that while §1119 allows the confidentiality provisions to be asserted by the mediator as well, this simply means that "a waiver by the parties is not a sufficient basis for a court to permit a mediator to testify. Rather, an independent determination must be made before testimony from a mediator should be permitted or ordered." *Id.* at 1130. Never did the *Olam* court suggest the parties themselves should be foreclosed from introducing evidence of what occurred at the mediation, simply because the mediator had not waived the confidentiality provisions. Yet that is precisely the position W&T took in their motion for new trial. To give credence to such an argument would be to elevate form over substance, as expressly recognized by the *Olam* court, by allowing non-parties to thwart the intent of the parties to waive confidentiality.

The *Olam* court answered the precise issue raised here: whether the parties' waivers alone are sufficient under §1122(a)(1) to remove any barrier to the subsequent admission of evidence of what occurred at the Mediation. In finding the parties' waivers sufficient, even without the waiver of other participants such as the mediator, the *Olam* court emphasized that the primary motive of the Legislature in enacting the provisions at issue was to protect the "confidentiality expectations of the participants". *Id.* at 1128. In light of the parties' express waiver of confidentiality in *Olam*, the court found that no damage could possibly be done to that legislative goal if the mediator's testimony were compelled, *even though the mediator had not waived confidentiality.* This finding was based on the court's general observation that the state policy of assuring confidentiality to mediation participants has "appreciably less force when, as here, ***the parties to the mediation have waived confidentiality protections.***" *Id.* at 1133.

In *Eisendrath v. Superior Court*, 109 Cal.App.4th 351 (2003) ("*Eisendrath*"), the court of appeal specifically found that if the two parties involved in the mediation both expressly waived confidentiality, evidence of conversations between them regarding what occurred at the mediation ***would be admissible.*** *Id.* at 365. *Eisendrath* makes clear that no other participants to the mediation, such as the mediator or attorneys, need sign the waiver. In fact, the *Eisendrath* court acknowledged numerous times that express waivers need be signed only by the *parties*, and not by any other participants, implying that the mediator's signature would only be required *if he were to be questioned as a witness*:[11]

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[11] The parties to the Eisendrath mediation, in which a spousal support agreement was reached, were the husband, Eisendrath, and his former wife,

- "As we explain below, confidential mediation communications are not admissible absent Eisendrath's express consent." *Id.* at 357.
- "We will therefore remand the matter to the trial court to give the mediation participants (including, **if necessary**, [the mediator]) an opportunity to enter express waivers regarding the confidential communications . . . ." *Id.* at 357 (emphasis added).
- "Evidence of these conversations is inadmissible absent express waivers from Eisendrath and Rogers." *Id.* at 365.

This closely parallels the finding in *Olam*, that while §1119 allows the confidentiality provisions to be asserted by the mediator as well, this simply means "a waiver by the parties is not a sufficient basis for a court to permit a mediator to testify." *Id.* at 1130. Never did the *Olam* court even suggest the parties themselves should be foreclosed from introducing evidence of what occurred at the mediation, simply because the mediator had not waived the confidentiality provisions. In fact, *Olam* held the exact opposite, by compelling the mediator to testify against his will. To find otherwise would allow non-parties to thwart the unequivocal intent of the parties to waive confidentiality, as expressly recognized by the *Olam* court.

The appellate court had occasion to consider this issue again in *In re Marriage of Kieturakis*, 138 Cal.App.4th 56 (2006) ("*Kieturakis*"), in which it affirmed *Olam*. In *Kieturakis*, one party was willing to waive mediation confidentiality but the other was not, as in *Eisendrath*. Once again, the appellate court implied if both *parties* were to waive confidentiality, the

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Rogers. Rogers had indicated she was willing to waive mediation confidentiality.

mediator could be compelled to testify, despite the fact she had not signed a waiver and resisted giving testimony:

> . . . *Olam* could at least arguably be extended to cover the situation that would exist here if the matter were remanded for a retrial, where both sides would be waiving the mediation privilege. Here, as in *Olam*, the mediator could be seen as the source of the most probative evidence on the merits of the parties' dispute, and compelling that evidence could be viewed as doing relatively little damage to mediation confidentiality. *Kieturakis* at 94.

In *Stewart v. Preston Pipeline Inc.*, 134 Cal.App.4th 1565 (2005)("*Stewart*"), the appellate court upheld an express waiver of mediation confidentiality even though one of the parties had not signed the agreement containing the waiver. Since the party's attorney had signed in place of the party, the appellate court overlooked the absence of the party's signature. As stated in *Stewart*, a waiver of mediation confidentiality is simply "a strategic stipulation allowing for the admissibility of certain evidence." *Id.* at 1582-1583.

It is noteworthy that in each of these cases, the courts uniformly considered only the ***parties'*** waivers were required. In none of those cases did the court suggest that the parties' counsel, or any other peripheral participants, would be required to likewise waive, in order for a waiver to be effective. The appellate court's decision in *Porter* is in direct contrast to this line of cases, in stripping from the litigants the right to control mediation confidentiality and the dissemination of mediation

communications, and handing it instead to non-party participants. Clearly, review is warranted to guide litigants, counsel, mediators and courts in what is required for an express waiver of mediation confidentiality.

### C. To Allow Non-Party Participants To Thwart The Parties' Intent To Waive Mediation Confidentiality Would Undermine The Legislative Intent to Promote Mediation.

The stated intent of the mediation statutes, to further the informal resolution of cases, would be undermined if mediation confidentiality could be used to thwart the intent of the parties in settling an action or overturn subsequent jury verdicts, as occurred here. How can *disputants* hope to reach "a mutually acceptable agreement" if the recalcitrance of one non-party participant could defeat the parties' mutual desire to settle and waive confidentiality? Again, the appellate court decision improperly elevates the status of non-parties over the rights of parties, thereby damaging the concept of mediation.

In practice, allowing the *Porter* ruling to stand would put an incredible burden on trial judges who discover confidentiality had been waived in a prior mediation. In order to avoid an irregularity in the proceedings, they would be required to ascertain before beginning trial whether every single mediation participant had properly waived mediation confidentiality ***even if, as occurred here, every litigant had signed the underlying Settlement Agreement and the parties before the trial court, through their legal counsel, expressly acknowledged on the record that mediation confidentiality had been waived in the prior litigation.***

Even more disturbing is how the *Porter* ruling, if allowed to stand, will undermine the attorney-client relationship. It will reward those attorneys, like W&T, who draft unenforceable waiver provisions or fail to

secure signatures of all participants, as they can then hide behind the confidentiality provisions to shield themselves from liability for anything occurring during the mediation. It would essentially shift the burden from counsel to their clients to ensure that waivers of mediation confidentiality were properly drafted and fully executed by all participants.

Clearly the Legislature did not intend either such a radical upending of the rights of litigants to control mediation confidentiality or such a drastic alteration of the attorney-client relationship. In order to preserve the integrity of the mediation process and maintain the self-determination of the litigants who choose to avail themselves of the process, this Court should confirm that the right to control mediation confidentiality, including the right to determine it should be waived, rests solely with the parties, as the statute provides.

### D. To Allow Non-Party Participants to Thwart the Parties' Intent to Waive Mediation Confidentiality Would Lead to Absurd Results.

Without question, all participants to a mediation are bound by mediation confidentiality, as the expectation of confidentiality is essential to a productive mediation. Accordingly, not only the parties, but everyone who participates in mediation, no matter how peripherally, must be bound should the parties desire to maintain confidentiality. That precept, however, does not automatically arm peripheral participants with any power over whether or not *parties* can choose to waive mediation confidentiality. But for the dispute among the disputants, there would be no mediation. Anyone other than the disputants attends a mediation to assist or support the disputants in some manner, or is a wholly disinterested third party such as an observer. While each of these participants must be bound by mediation

confidentiality, none has an independent right to wield that trumps those rights of the disputants themselves, simply by virtue of their presence at the mediation. Rights of peripheral, non-essential parties cannot trump the rights of the settling parties. Yet this is precisely what the appellate court held.

It is not uncommon for paralegals and other support persons to attend a mediation. Similarly, a law firm's summer interns might be invited to observe a mediation. Any such peripheral participants might leave the proceedings after a short time, or otherwise be unavailable to sign any express waiver of mediation confidentiality should the litigants later opt for waiver. Under the appellate court's analysis, any of these indisputably marginal participants has the power to thwart the parties' unanimous decision to waive mediation confidentiality. This is an absurd result.

Similarly, it would be the height of absurdity to allow an attorney for a party to draft, at his client's direction, a settlement agreement containing a waiver of mediation confidentiality as a result of a successful mediation; to then represent to his client that the waiver was fully compliant and enforceable, by expressly approving it as to form; only years later to claim the waiver was invalid because he himself had not executed the settlement agreement.

This is not only what Justice Chin warned about; this is precisely what occurred in this case. W&T purported to negotiate, draft and document the Settlement Agreement, including the waiver of confidentiality at ¶19 between the parties to the underlying Federal Action. Steven Wyner went so far as to approve the Settlement Agreement as to form, signing on behalf of W&T, thus leading the Porters to believe it was in all respects compliant. Now, years later, in order to overturn a jury verdict against them,

W&T claim the waiver was invalid because it was not signed by all participants.[12] The great mischief allowed by the appellate court's Opinion is clear: an attorney can thwart his client's clear intent and directive to waive mediation confidentiality by failing to sign the waiver himself. That is an absurd result.

The plain language of the statute confirms the right of parties to expressly waive mediation confidentiality, just as the parties in the underlying Federal Action did. To throw out the express waiver of mediation confidentiality by the parties in the underlying Federal Action would produce an absurd result, by allowing non-essential participants to control a critical aspect of the process, rather than the litigants. Indeed, the appellate court opinion allows precisely such an absurd result. A federal judge approved the Settlement Agreement, including the parties' express waiver of mediation confidentiality, which ultimately resulted in W&T collecting their sizable fee. Years later, a state court judge, reviewing the same express waiver likewise determines it valid and enforceable, only to later reverse himself based on the claim that non-party participants at the

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[12] The particular facts in this case have led to an incredibly absurd result, where W&T have effectively used mediation confidentiality as both a sword and a shield. Specifically, W&T included a waiver of mediation confidentiality at ¶19 in the Settlement Agreement to secure their clients' consent to the agreement in order to obtain the federal court's Order Approving Minor's Compromise, based on the terms of the settlement reached at the Mediation, which was necessary in order for W&T to collect its $1.65 million fee negotiated at the Mediation. Thus, W&T relied on the validity of the parties' express waiver of mediation confidentiality when it suited them in order to collect their fee, only to subsequently claim the waiver was invalid when they wanted to shield their Mediation communications from view. To allow such gamesmanship is to allow an absurd result at the expense of the parties themselves.

Mediation had not signed the Settlement Agreement. In essence, two judges within California, applying the same law, viewing the same waiver, came to two different conclusions as to its enforceability, leading to the absurd result where mediation communications could be considered in the Federal Action, but were deemed to have caused an "irregularity in the proceedings" two and a half years later in the trial in state court.

To strip litigants of the right to determine if mediation communications are to be kept confidential will not only do significant damage to the mediation process, as parties can no longer settle on their own terms, but will lead to absurd results and inconsistent rulings, as occurred here.

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## VI. CONCLUSION.

In light of the significant utility of mediation to both litigants and the overburdened court system, the Porters respectfully urge this Court to accept this petition and reiterate the Legislature's intent regarding the rights of parties to waive mediation confidentiality. Without this Court's guidance, litigants are at risk of losing that right, simply because the consent of peripheral, non-party participants was not or cannot be obtained or because their attorneys allowed for an incomplete waiver, in order to shield their unethical or incompetent conduct at mediation. Such an outcome not only runs afoul of the expectations of the mediating parties, but also undermines the legislative mandate that parties control the manner in which their disputes are settled through mediation.

Respectfully submitted,

DATED: September 2, 2011

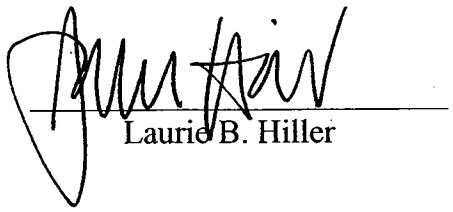
SAUER & WAGNER LLP

By: _____
Laurie B. Hiller
Attorneys for Plaintiffs and
Petitioners John Porter and
Deborah Blair Porter

## CERTIFICATE OF WORD COUNT

I hereby certify that, as counted by the WordPerfect software program, the Petition for Review (including footnotes) contains 8,395 words.

DATED: September 2, 2011



Laurie B. Hiller

**Court of Appeal Opinion**
**Filed July 27, 2011**

Filed 7/27/11 Porter v. Wyner CA2/8
Opinion following transfer from Supreme Court

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

| | |
|---|---|
| JOHN PORTER et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>STEVEN WYNER et al.,<br><br>Defendants and Respondents. | B211398<br><br>(Los Angeles County<br>Super. Ct. No. BC347671) |

APPEAL from an order of the Superior Court of Los Angeles County. Warren L. Ettinger, Judge. Affirmed in part and remanded.

Sauer & Wagner, Gerald L. Sauer and Laurie B. Hiller for Plaintiffs and Appellants.

Robie & Matthai, Kyle Kveton & Leah K. Bolea; Wyner & Tiffany, Steven Wyner and Marcy J.K. Tiffany for Defendants and Respondents.

**Introduction**

Plaintiffs and appellants John Porter and Deborah Blair Porter (the Porters) appeal an order granting a motion for new trial in favor of defendants and respondents, Steven Wyner and Marcy Tiffany (Wyner Tiffany) following a jury verdict that (1) awarded Mrs. Porter $211,000 in back wages and the Porters $51,000 for breach of an attorney fee agreement; and (2) rescinded a release the Porters gave Wyner Tiffany regarding tax advice.

Wyner Tiffany had previously represented the Porters in a separate lawsuit brought by the Porters against the Manhattan Beach Unified School District and the California Department of Education. The instant lawsuit arose as a result of Wyner Tiffany's failure to follow through on a promise that was allegedly made to the Porters during a mediation of that underlying action wherein Wyner Tiffany promised to pay the Porters certain proceeds from their attorneys' fees. Though Wyner Tiffany initially objected to the admissibility of the communications made during the mediation of the underlying lawsuit, they later withdrew the objection. At trial, evidence of the communications between Wyner Tiffany and the Porters with respect to the promises made at the mediation were admitted. Approximately a month after the trial court entered judgment, it granted a motion for new trial because it believed the then newly decided case of *Simmons v. Ghaderi* (2008) 44 Cal.4th 570 (*Simmons*), mandated such a result. *Simmons* held that the doctrines of estoppel and implied waiver are not exceptions to the mediation confidentiality statutes.

Appellants claim the trial court erred in granting the new trial, as the communications between an attorney and its client do not fall within the purview of mediation confidentiality. Even if it did, appellants claim Wyner Tiffany waived mediation confidentiality, are both judicially and equitably estopped from belatedly raising the issue and that applying *Simmons* to this case would lead to absurd results. Wyner Tiffany contend the trial court properly granted their motion for a new trial because the jury's consideration of confidential mediation communications created an

irregularity in the proceedings statutorily mandating a new trial. Wyner Tiffany also cross-appeal, contending the trial court erred in ruling their motion for a judgment notwithstanding the verdict (JNOV) as to the cross-complaint Wyner Tiffany had filed against the Porters was moot.

We initially issued an opinion reversing the trial court's order. In the intervening time, the California Supreme Court granted review of our case. On April 20, 2011, the matter was transferred back to this court, with directions to reconsider the cause in light of *Cassel v. Superior Court* (2011) 51 Cal.4th 113 (*Cassel*). *Cassel* determined that the mediation confidentiality provisions apply to communications between a client and an attorney who represents him in mediation proceedings. We now affirm the order granting a new trial and remand the matter back to the trial court to rule on the JNOV.

## FACTS

### 1. Underlying Action

Wyner Tiffany are partners in a law firm that focuses on the educational rights of disabled students. In 1999, the Porters retained Steven Wyner, then a sole practitioner, to assist in obtaining special education services for their son. Wyner filed a lawsuit in the federal district court (the underlying action) on behalf of the Porters and their son against the Manhattan Beach Unified School District (District) and the California Department of Education (Department). The district court dismissed the underlying action, but that dismissal was reversed by the Ninth Circuit Court of Appeals. (*Porter v. Board of Trustees of Manhattan Beach* (9th Cir. 2002) 307 F.3d 1064.)

After the reversal, Wyner obtained for the Porters a partial summary adjudication on liability and the appointment of a special master to oversee the Porter child's education.

### 2. Mediation and Settlement

Wyner Tiffany then brought a second motion for partial summary judgment on the Porters' behalf. Just before the second motion for partial summary judgment was to be heard in April 2005, the parties in the underlying action participated in a private mediation conducted by a retired judge.

The District and the Department were represented by their individual counsel of record and by an attorney acting as chief negotiator for the defense. Nineteen persons, excluding the mediator, signed a confidentiality agreement prepared by the mediation service. The confidentiality agreement expressly provided that the provisions of California Evidence Code sections 1115 through 1128 and 703.5 would apply to the mediation.[1]

At the conclusion of the mediation session, the District and the Department signed a stipulation for settlement in which they agreed to fund up to $1,131,650 for the education of the Porters' son, to be overseen by the special master, and to pay $5,600,000 for general damages, special damages, attorney fees and costs.[2] Although it was not separately broken out in the stipulation, Wyner Tiffany and the Porters came to an understanding that $1,650,000 of the settlement would be allocated to attorney fees and costs. The stipulation for settlement did not include any provision waiving mediation confidentiality for purposes of enforcement, and proposed provisions for waiving mediation confidentiality were crossed out in the printed form.[3]

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1 All further statutory references are to the Evidence Code unless otherwise indicated. Sections 1115 through 1128 set forth a far-reaching statutory scheme protecting the confidentiality of mediation proceedings with specified exceptions. Section 703.5 provides, with certain exceptions, that mediators are not "competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with" the mediation.

2 Under a fee-shifting statute, if the District and the Department in the underlying action were found liable, they were also responsible to pay the Porters' attorney fees and costs.

3 Throughout their briefs, the Porters refer to a "mediation privilege." As other courts have noted, the term "mediation confidentiality" more accurately describes the protections provided to communications made in connection with mediation under section 1115 et seq. in that the mediation confidentiality rules are not "privileges" as such in the traditional sense. (See *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 150, fn. 4; *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 61-62 and fn. 2 (*Kieturakis*); *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 362-363 (*Eisendrath*).)

### 3. Negotiation of Definitive Settlement Documents

Over the next three months, the parties negotiated over the form of the definitive settlement agreement.

#### A. Retention of Tax Attorney

A few days after the mediation meeting, Wyner Tiffany became aware of a possibility that the settlement proceeds the Porters were to receive might be taxable, and they so informed the Porters. Wyner Tiffany recommended that the Porters retain Robert Wood, an attorney who specialized in providing tax advice on litigation payments, to help structure the settlement. The Porters expressed their agreement, and, in early May 2005, Wyner Tiffany retained Wood to provide advice on minimizing the tax consequences of the settlement.

#### B. Agreement to Share Responsibility for Tax Attorney's Fees

In July 2005, the Porters signed an agreement whereby, in exchange for Wyner Tiffany paying one half of Wood's fees, the Porters agreed to release Wyner Tiffany from liability for any tax advice given the Porters.[4] Wyner Tiffany funded Wood's initial retainer.

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[4] The release, written on Wyner Tiffany letterhead, expressly stated: "Rule 3-400 of the California Rules of Professional Conduct require[s] that we advise you that you have the right to seek advice of an independent lawyer of your choice regarding [this release]. The Rule states that: [¶] Rule 3-400. Limiting Liability to Client [¶] A member shall not: [¶] (A) Contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice; or [¶] (B) Settle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice."

The Porters testified changes were made to the release at their request, but they did not consult another attorney before they signed it. Nonetheless, they testified they signed under duress because they were concerned the settlement would unravel if they refused.

**4. Formal Settlement**

In early August 2005, the parties to the underlying action executed a formal settlement agreement encompassing the terms negotiated at the mediation meeting. Under the definitive settlement agreement, the District and the Department agreed to deposit $1,131,650 in the special master's fund, pay $1,580,000 into a special needs trust being established for the Porters' son, pay $2,370,000 into an existing Porter family trust and pay Wyner Tiffany $1,650,000 for attorney fees and costs.

Paragraph 19 of the settlement agreement recited: "Upon the full execution of this Agreement, the Parties, and each of them, waive the terms and provisions of that certain Judicial Arbitration Mediation Service Confidentiality Agreement (California), dated April 26, 2005. The Parties acknowledge and agree that the terms and provisions of this Agreement are not confidential."[5]

Though not all the parties to the mediation signed the settlement agreement, the Porters, and representatives of the District signed as parties. Wyner signed at the end of the agreement on behalf of Wyner Tiffany under the words, "APPROVED AS TO FORM."

The district court approved the settlement, including the payment of attorney fees, and issued a stipulated dismissal of the underlying action.

The settlement sums were deposited and paid by the District and the Department in the underlying action as stipulated.

**5. Subsequent Attorney-Client Dispute**

After the underlying action was concluded, a dispute arose between the Porters and Wyner Tiffany over several matters, including Wyner Tiffany's failure to reimburse the Porters for the attorney fees and costs the Porters had previously paid and Wyner Tiffany's alleged rendering of incorrect tax advice to the Porters regarding settlement proceeds. The Porters also claimed Wyner Tiffany failed to pay Mrs. Porter for services

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[5] The opening paragraphs of the settlement agreement expressly listed each plaintiff and each defendant in the underlying action and stated that "[t]he [p]laintiffs and the [d]efendants may sometimes hereinafter be referred to collectively as the 'Parties.'"

she rendered as a paralegal in the underlying action out of the $1,650,000 Wyner Tiffany received in the settlement.

Wyner Tiffany asserted they were not required to reimburse the Porters for attorney fees and costs the Porters previously advanced because the amount Wyner Tiffany received under the settlement was less than the amount they could have claimed under a contingency fee provision in their retainer agreement. Wyner Tiffany further asserted they were not required to pay Mrs. Porter's fees as a paralegal from Wyner Tiffany's portion of the settlement because Mrs. Porter had been fully compensated for her loss of wages in the settlement.

## PROCEDURAL HISTORY

### I. Complaint and Cross-Complaint

In February 2006, the Porters filed the present action against Wyner Tiffany in the superior court. A second amended complaint asserted claims including legal malpractice, breach of fiduciary duty, constructive fraud, negligent misrepresentation, breach of fee agreement, rescission, unjust enrichment and liability for unpaid wages.[6]

Wyner Tiffany filed a cross-complaint against the Porters. The cross-complaint purportedly included a claim by Wyner Tiffany against the Porters for breach of the tax advice and release agreement under which the Porters had promised to pay one-half of attorney Wood's fees and costs.[7]

### II. Objections Based on Mediation Confidentiality

Wyner Tiffany moved to strike all allegations in the second amended complaint concerning communications at the mediation of the underlying action. That motion was denied by the trial court.

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[6] Just prior to trial, the court sustained Wyner Tiffany's demurrer to the Porters' claim of malpractice after they admitted they suffered no injury from Wyner Tiffany's allegedly incorrect tax advice.

[7] The record before us does not include a copy of Wyner Tiffany's cross-complaint.

Wyner Tiffany also objected during discovery to the disclosure or use of any information relating to the mediation of the underlying action. The trial court denied the motion to compel further responses solely on the ground that Wyner Tiffany's existing responses and objections were sufficient.

At the beginning of trial, Wyner Tiffany brought a motion in limine asking the trial court to bar the admission of any evidence subject to mediation confidentiality.

The Porters opposed the motion to exclude such evidence. They maintained that all signatories to the settlement agreement had expressly and voluntarily waived mediation confidentiality and that Wyner had executed the settlement agreement on Wyner Tiffany's behalf. The Porters argued that even if Wyner Tiffany had not waived mediation confidentiality, it would be unjust, when there is a claimed breach of duty arising out of the attorney-client relationship, to allow a client or an attorney to bar the other from producing pertinent evidence.

The Porters urged the trial court to apply section 958 to preclude application of mediation confidentiality to communications between attorney and client.[8] The Porters additionally contended that Wyner Tiffany had waived the mediation "privilege" pursuant to section 912 by producing without coercion during discovery documents "prepared for the purpose of, in the course of, or pursuant to" the mediation, such as Wyner's handwritten mediation notes and his copy of the stipulation for settlement.[9]

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[8] Section 958 provides: "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."

[9] Section 912 provides: "(a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence counselor-victim privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the

The Porters further claimed Wyner Tiffany had relied on the very documents they were seeking to protect in pleadings filed with the court, such as a response to a separate statement in support of a motion to compel further responses to written discovery.

**III. Withdrawal of Motion in Limine**

In a conference with the judge prior to trial, counsel for Wyner Tiffany withdrew the motion in limine, stating the withdrawal was "[b]ased on the arguments that were made and raised by the [Porters] in their opposition, including the issue of waiver by all participants, and the waiver in the final settlement agreement." The court therefore allowed counsel to reopen discovery to allow witnesses to answer questions to which objections had been interposed based on mediation confidentiality, "[s]ince [respondents] have waived it and since we all agree."

**IV. Trial and Verdict**

At trial, the Porters testified to communications that occurred with respect to, in the course of or pursuant to the mediation and introduced documentary evidence of mediation communications.

Both Wyner and Tiffany were called by the Porters as adverse witnesses during the Porters' case-in-chief. Wyner and Tiffany were questioned by the Porters' counsel regarding mediation negotiations. Wyner and Tiffany were then examined by their own counsel in rebuttal to the Porters' claims and in support of Wyner Tiffany's cross-complaint. Wyner testified his notes of the mediation expressly indicated the Porters made an initial settlement demand and such amount included Mrs. Porter's lost wages. Wyner also testified that, several days after the agreement to settle at the mediation, he and Mrs. Porter discussed with tax attorney Wood the advisability of her reporting some of the settlement as income to the Internal Revenue Service. Tiffany testified that the settlement agreement covered all of the claims brought by the Porters, which included Mrs. Porter's loss of wage claim.

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privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege."

In March 2008, the jury returned a verdict awarding the Porters a total of $262,000, plus interest. The jury found that Wyner Tiffany owed Mrs. Porter $211,000 in back wages for her services as a paralegal and the Porters $51,000 for breach of the attorney-client fee agreement. The jury also determined the tax advice and release agreement between Wyner Tiffany and the Porters should be rescinded. The jury found, however, that Wyner Tiffany did not breach any fiduciary duty and were not liable to the Porters for constructive fraud, negligent misrepresentation or unjust enrichment.

As to the cross-complaint, the jury found the Porters did not breach the tax advice and release agreement regarding their obligation to pay attorney Wood's fees and costs.

The trial court entered a judgment based on the verdict in June 2008.

## V. Motions for New Trial and JNOV

About a month later, in July 2008, the California Supreme Court issued its opinion in *Simmons, supra,* 44 Cal.4th 570, and Wyner Tiffany moved for a new trial on the ground that they were prevented from having a fair trial because of an irregularity in the proceedings. In support of the motion for new trial, Wyner Tiffany cited *Simmons*, arguing evidence concerning mediation in the underlying action was improperly placed before the jury. At the same time, Wyner Tiffany filed a notice of motion for JNOV, and presumably, a motion was filed afterwards indicating the points and authorities in support thereof, but it was not made part of the record on appeal.

Based on *Simmons,* the trial court granted the motion for new trial. The court orally stated the *Simmons* case "makes it mandatory for me to grant a motion for new trial," adding, "I don't need to go into any of the other matters because I think they are all subsumed under the rationale of the California Supreme Court." The court's minute order stated simply that the motion for new trial was granted "pursuant to *Simmons*" and ordered the judgment set aside and vacated.

## VI. Appeal and Cross-Appeal

The Porters timely appealed from the order granting a new trial and setting aside and vacating the judgment. Wyner Tiffany cross-appealed from the trial court's ruling that their motion for judgment notwithstanding the verdict was moot.

## CONTENTIONS

In their appeal, the Porters contend *Simmons* provides no proper ground to order a new trial because (1) the facts in this case are distinguishable, (2) respondents twice waived mediation confidentiality, (3) respondents were estopped from belatedly raising mediation confidentiality, (4) respondents were equitably estopped from raising mediation confidentiality, and (5) upholding the application of *Simmons* would lead to absurd results. The Porters also contend that the grant of a new trial was procedurally improper on numerous additional grounds. They further contend that substantial evidence supported the jury's verdict with respect to their claims for breach of contract and for rescission.

On cross-appeal, respondents contend the trial court should have granted their motion for judgment notwithstanding the verdict as to Mrs. Porter's wage claim against respondents, the Porters' claim for rescission and refund of attorney fees and costs, respondents' claim for breach of contract against the Porters and a claim respondents asserted for conversion of documents and electronic records against Mrs. Porter.

## STANDARD OF REVIEW

"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not finally dispose of the matter. So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside." (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387; see also *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747 (*Malkasian*); see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859 (*Aguilar*).)

A determination underlying any order is scrutinized under the test appropriate to such determination. (*Aguilar, supra,* 25 Cal.4th at p. 859.) The interpretation and application of a statute is reviewed de novo. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) When the language of a statute is clear and unambiguous, judicial construction of

the statute is not permitted unless it cannot be applied according to its terms or doing so would lead to absurd results and violate the presumed intent of the Legislature. (*Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14 (*Foxgate*).)

"A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support. [Citation.]" (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

We review the record to ascertain whether substantial evidence supports the jury's verdict and the trial court's decision, i.e., whether the plaintiffs proved every element of their cause of action. (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 703; see also *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845.)

## DISCUSSION

### Appeal

### I. The Communications Between Attorney and Client Fall Within Mediation Confidentiality

The Porters argue that the mediation confidentiality statutes do not apply because the communications complained of were between Mrs. Porter and her attorney. They assert the mediation confidentiality statutes do not apply to communications made between parties on the " 'same side' of the equation" at a mediation. However, the California Supreme Court recently rejected this argument in *Cassel v. Superior Court, supra,* 51 Cal.4th 113. We find *Cassel* is controlling and the mediation confidentiality provisions demonstrate the trial court did not abuse its discretion in granting a new trial.

Under Evidence Code section 1119, subdivisions (a) and (b), evidence of anything said or admissions made for the purpose of, in the course of, or pursuant to a mediation cannot be disclosed in a legal proceeding, with certain statutory exceptions. Writings prepared for the purpose of, in the course of, or pursuant to a mediation are also protected

from disclosure.[10] Under subdivision (c), "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."

The California Supreme Court has repeatedly described the mediation confidentiality provisions as "clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected. (*Simmons,*[*supra,* 44 Cal.4th at p. 580]; *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194 . . . ; *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 415-416, . . . ; *Foxgate,* [*supra,* 26 Cal.4th at pp. 13-14, 17].)" (*Cassel, supra,* 51 Cal.4th at p. 118.) Accordingly in *Cassel*, the court rejected the very argument the Porters make here. In that case, the appellant filed a complaint alleging his attorneys breached their professional, fiduciary, and contractual duties in a previous legal matter. (*Id.* at p. 119.) Several of the appellant's claims were based on allegations that the attorneys improperly kept him at a mediation and pressured him to accept a settlement for an amount he and the attorneys had previously agreed was too low. (*Id.* at p. 120.) The attorneys moved in limine under the mediation confidentiality statutes to exclude evidence of communications between the appellant and the attorneys that were related to the mediation. (*Id.* at p. 121.) The trial court excluded mediation-related communications between the appellant and the attorneys, but the Court of Appeal

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[10] Evidence Code section 1119, subdivisions (a) and (b) state: "Except as otherwise provided in this chapter: (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given."

reversed the trial court ruling, finding that the mediation confidentiality provisions did not apply to communications between a party and his or her own counsel.

Our high court reversed the Court of Appeal's decision. The court noted its previous discussion in *Simmons* of revisions the Legislature made to the mediation confidentiality provisions that extended section 1119, subdivision (a) to " 'oral communications made *for the purpose of* or *pursuant to* a mediation, not just to oral communications made *in the course of* the mediation. [Citation.] [Citations.]" (*Cassel, supra,* 51 Cal.4th at p. 128.) The court then concluded:

"The obvious purpose of the expanded language is to ensure that the statutory protection extends beyond discussions carried out directly between the opposing parties to the dispute, or with the mediator, during the mediation proceedings themselves. All oral or written communications are covered, if they are made 'for the purpose of' or 'pursuant to' a mediation. (§ 1119, subds. (a), (b).) It follows that, absent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure. Plainly, such communications include those between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants." (*Cassel, supra,* 51 Cal.4th at p. 128, fn. omitted.)

In the case before us, the claims asserted in the Porter's complaint are largely based on what was said during or in preparation for the mediation. Aside from the attorney-client communications, testimony was also introduced at trial about the communications between and among the mediation participants. Mrs. Porter herself testified in direct examination concerning the Porters' meeting with the mediator and with lead opposing counsel during the mediation. Mrs. Porter testified that the Porters met with the mediator and at one point during the mediation, were told that the defendants in the underlying action were concerned about a "double-dipping" issue relating to her lost earnings claim. She testified that afterwards, Wyner advised her to resolve this issue by dropping her lost earnings claim. She claimed he assured her she would be paid out of the attorney fee recovery and that she waived her lost earnings claim after receiving this assurance from Wyner. The Porters introduced contemporaneous notes Mrs. Porter had made that tracked the course of mediation. Mrs. Porter also

testified regarding various spreadsheets that were used during the mediation, which reflected the offers and counteroffers both sides made during the negotiations. As *Cassel* made clear, section 1119 renders such evidence inadmissible. Accordingly, we find the trial court properly granted the motion for new trial.

**II. The mediation privilege was not waived.**

Section 1122, subdivision (a)(1) provides two exceptions to the blanket prohibition against disclosure of protected mediation communications. The first exception permits disclosure if: "[*a*]*ll persons who conduct or otherwise participate in* the mediation expressly agree in writing, or orally in accordance with section 1118, to disclosure of the communication, document, or writing." (Italics added.)[11] The second exception permits disclosure of a communication, document, or writing prepared by or on behalf of fewer than all the mediation participants, if "those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure," and "the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation." (§ 1122, subd. (a)(2).)

The Porters' argument that Wyner Tiffany gave express, written agreement to waive mediation confidentiality rests entirely upon Wyner's signature on the settlement agreement in the underlying action. There are a number of problems with the factual basis for this contention. First, the settlement agreement did not include an express waiver of mediation confidentiality.[12] Second, the settlement agreement was not signed

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11 Section 1118 requires that an oral agreement be recorded by a court reporter or some reliable means, that the terms of the agreement are recited on the record in the presence of the parties and the mediator, that the parties express their agreement to those terms and acknowledge that it is enforceable and binding. Further, the statute also requires that the terms be reduced to writing within 72 hours after it was recorded. (§ 1118, subds. (a)-(d).)

12 The settlement agreement provided only that the "[p]arties," a description that did not include respondents Wyner Tiffany, waived the provisions of the mediation confidentiality agreement and that the "[p]arties acknowledge and agree that the terms and provisions of *this Agreement* are not confidential." (Italics added.)

by all participants to the mediation. Based on the signatures on the mediation confidentiality agreement, there were at least 19 participants in the mediation, in addition to the mediator. Neither the mediator, nor the majority of the persons who participated in the mediation, signed the settlement agreement. Third, although Wyner did sign the settlement agreement, he did not sign as a party but, as with the other attorneys of record in the underlying action, signed only approving the agreement "as to form," indicating he was not bound by its substantive provisions. Finally, respondent Tiffany did not sign the settlement agreement at all.

The Porters rely on *Olam v. Congress Mortg. Co.* (N.D. Cal. 1999) 68 F.Supp.2d 1110 (*Olam*) in arguing the failure of other participants to waive mediation confidentiality is not an impediment to the introduction of evidence of what occurred at the mediation when the parties themselves have expressly waived mediation confidentiality.

*Olam,* however, involved a situation in which *both* sides indisputably agreed to waive confidentiality (see *Foxgate, supra,* 26 Cal.4th at p. 16), the waivers of both parties otherwise met the requirements of section 1122, subdivision (a) and the proposed evidence contemplated disclosure only of the mediator's generalized perceptions of a party's capacity to enter into a settlement rather than specific communications or admissions made during mediation, none of which is the case here. (*Olam, supra,* 68 F.Supp.2d at pp. 1129-1130, 1133, 1136, 1139, fn. 42.)

**III. There Was No Express Waiver by Counsel's Withdrawal of Motion in Limine**

The Porters agree that Wyner Tiffany repeatedly argued against disclosure of matters protected by mediation confidentiality during the litigation. They claim, however, that Wyner Tiffany made a strategic decision to waive mediation confidentiality in open court at the outset of trial in order to use evidence and testimony pertaining to the mediation. Though Wyner Tiffany were present in the courtroom, the trial court did not ascertain if they agreed with their counsel's oral waiver of confidentiality or obtained their oral consent on the record, and no written agreement for waiver was subsequently prepared or signed by respondents. Counsel's mere withdrawal of the motion in limine at

the hearing thus failed to meet the requirements of section 1122, subdivision (a) that the participants "expressly agree in writing, or orally in accordance with Section 1118," to the disclosure of communications or writings subject to mediation confidentiality.

Further, our Supreme Court determined in *Simmons* that the doctrine of estoppel, judicial estoppel and implied waiver are not exceptions to mediation confidentiality. In that case, a settlement allegedly was reached during mediation with the plaintiffs on a defendant doctor's behalf. When the defendant was informed the case had settled, she declared she was revoking her consent and refused to sign the settlement agreement. (*Simmons, supra*, 44 Cal.4th at p. 575.) Plaintiffs then sought to enforce an alleged oral settlement. (*Id.* at p. 576.) During pretrial proceedings, in the course of arguing that no enforceable contract was formed during mediation, the defendant stipulated to, and submitted evidence of, events that had occurred during mediation. (*Id.* at pp. 574, 576.) However, at trial the defendant for the first time asserted that the mediation confidentiality statutes precluded the plaintiffs from proving the existence of an oral settlement agreement. (*Id.* at p. 577.)

A divided Court of Appeal panel held the defendant was estopped from claiming mediation confidentiality because she had presented evidence of occurrences at the mediation and failed to object to plaintiffs' use of such facts during pretrial motions. (*Simmons, supra,* 44 Cal.4th at p. 577.) The California Supreme Court reversed and held that the mediation confidentiality statutes must be strictly enforced. (*Id.* at p. 581.)

The Supreme Court noted the Court of Appeal majority had relied on the doctrine of estoppel ostensibly to " 'prevent a litigant from tardily relying on mediation confidentiality to shield from the court facts which she had stipulated to be true and had extensively litigated without raising such bar.' " (*Simmons, supra,* 44 Cal.4th at p. 582.) But the Supreme Court agreed with the dissenting appellate justice that " '[b]y focusing on estoppel, the majority in essence [was] attempting to create a new exception to the comprehensive scheme.' " (*Ibid.*) The court declared, "Except in cases of express waiver or where due process is implicated, we have held that mediation confidentiality is to be strictly enforced." (*Id.* at p. 582.) The court further held that estoppel does not

apply because it was not a case where the party submitted to the jurisdiction of the court and then argued it had no jurisdiction. (*Id.* at p. 584.) Finally, the court determined that mediation confidentiality cannot be impliedly waived through conduct. (*Id.* at p. 585.)

Counsel's withdrawal of the motion in limine and Wyner Tiffany's failure to object to the withdrawal in the present case at most could be construed as an implied waiver, not an express one. However, as *Simmons* held, an implied waiver is insufficient to waive mediation confidentiality. (*Simmons, supra,* 44 Cal.4th at pp. 582-585; *Rael v. Davis* (2008) 166 Cal.App.4th 1608, 1622.)

The Porters heavily rely on *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565 (*Stewart*). Unlike in the present case, the defendants in *Stewart* sought to enforce a contract containing a waiver of mediation confidentiality which they had authorized their counsel to sign on their behalf and which the plaintiff, the party against whom enforcement was sought, had himself personally signed. (*Id.* at pp. 1584-1585; compare *Rael v. Davis*, *supra*, 166 Cal.App.4th at p. 1621 [no express waiver when client neither signed agreement containing confidentiality waiver nor sought to enforce it].)

## IV. There Was No Estoppel by Belated Assertion of Mediation Confidentiality

The Porters contend the *Simmons* court expressly acknowledged the doctrine of estoppel *to contest jurisdiction* may estop a party from belatedly raising mediation confidentiality when the party has asked the court to act in excess of its jurisdiction and then argued the court had no power to act as it did. This principle is inapplicable here. Wyner Tiffany do not contest the court's assertion of jurisdiction over the subject matter. (See *Simmons, supra,* 44 Cal.4th at p. 584.) Wyner Tiffany merely assert that the Porters may not present evidence subject to mediation confidentiality to support their claims and that the trial court correctly granted a new trial on that basis. Wyner Tiffany thus do not claim the trial court acted in excess of its jurisdiction. As the Supreme Court has held, the imposition of a judicially crafted estoppel exception would not be appropriate under the circumstances in light of the important public policy underlying the confidentiality statutes. (*Id.* at p. 582; see also *In re Stier* (2007) 152 Cal.App.4th 63, 79-81.)

Moreover, other equitable considerations come into play when, as here, communications, admissions or conduct occur in preparation for or during mediation both outside of, and in the presence of, the mediator or opposing parties. It would be inequitable and unfair if Mrs. Porter were allowed to testify about her conversation with Wyner but neither Wyner nor other participants could testify regarding their communications. The Legislature surely could not have intended such a result, and we need not accept such a narrow construction of section 1119 given the clear and unambiguous language of the statute.[13]

## V. The Trial Court Properly Granted a New Trial

The Porters complain that the order granting a new trial was procedurally improper on several grounds. They assert that Wyner Tiffany never objected to the introduction of the protected evidence and thus the court never had any opportunity to commit error. They argue any alleged error was not prejudicial to Wyner Tiffany because they themselves were the proponents of such evidence. They contend Wyner Tiffany failed to show, and they could not show, ignorance of the alleged irregularity before the verdict was rendered. They repeat their claim that Wyner Tiffany expressly waived mediation confidentiality twice and assert that Wyner Tiffany's "mistaken" view of the law prior to the *Simmons* case is not a proper ground upon which to grant a new trial. We disagree.

The Porters' procedural arguments essentially are attempts to do an end run around the strong legislation and judicial policies favoring mediation and settlement and the Legislature's clearly expressed intent in sections 1126 and 1128.

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[13] In their supplemental brief, the Porters claim that this case falls within the "absurd result" scenario discussed by Justice Chin in his concurring opinion in *Cassel, supra*, 51 Cal.4th at pages 139-140. There, Justice Chin indicated that if all participants in a mediation waived confidentiality except the attorney, it might result in absurd consequences if the attorney could prevent disclosure of the communication and thus shield himself from a malpractice action. The analysis is not apt here, however, as many of the participants aside from the attorneys did not sign the agreement.

"The remedy for violation of the confidentiality of mediation is that stated in section 1128: 'Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for purposes of Section 657 of the Code of Civil Procedure.' "[14] (*Foxgate, supra,* 26 Cal.4th at p. 18; *Kieturakis, supra,* 138 Cal.App.4th at p. 62.) Section 1128 expressly declares "[a]ny reference" to a mediation during any other subsequent noncriminal proceeding is "grounds for vacating or modifying the decision . . . ." Section 1128 does not include any requirement that the "reference" be objected to for the statute to apply.

The Porters contend they were equally "the holder of the privilege" with Wyner Tiffany and, because neither side exercised a right to object to evidence pertaining to mediation, the evidence was properly submitted. The Porters would have us treat mediation confidentiality as equivalent to a "privilege" that can be waived under section 912, subdivision (a). That statute expressly provides, in the event of a claim of privilege under specified statutes (see footnote 9, *ante*), that the privilege is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone.

However, section 1115 et seq. is not included among the instances listed in section 912 in which an objection must first be raised for confidentiality to be preserved, and the plain terms of sections 1126 and 1128 include no such requirement. (See *Simmons,*

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[14] Section 1128 provides: "Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of Section 657 of the Code of Civil Procedure. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new and further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief."

Section 1126 expressly provides that "[a]nything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential . . . before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends."

*supra,* 44 Cal.4th at pp. 587-588; *Foxgate, supra,* 26 Cal.4th at pp. 17-18; *Kieturakis, supra,* 138 Cal.App.4th at pp. 81-82; *Eisendrath, supra,* 109 Cal.App.4th at pp. 362-363.) In enacting sections 1126 and 1128, the Legislature obviously intended to give teeth to its expressed policy of protecting mediation communications, even if an objecting party interjects a belated objection to such evidence.

Furthermore, Code of Civil Procedure section 647 provides that an order, ruling, action or decision is deemed excepted to if the party "at the time when the order, ruling, action or decision is sought or made, or *within a reasonable time thereafter,*" makes his position known "by objection or otherwise." (Italics added.) Thus a party is protected if he or she makes a timely attack on an order, ruling or action by motion. (See *Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 15 [legal challenge may be raised for first time in post trial motions].) In this case, Wyner Tiffany made known their exception to the admission of evidence subject to mediation confidentiality by a timely motion for new trial, thus making their position known within a "reasonable" time "by objection or otherwise." Rules applicable to invited error or estoppel do not apply when an appellate court is reviewing the propriety of an order granting a new trial. The trial court retains broad discretion in considering and granting motions for a new trial, and its order will not be disturbed absent " 'a manifest and unmistakable abuse of discretion.' " (*Malkasian, supra,* 61 Cal.2d at p. 747; *McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 983-984.)

We further disagree with the Porters' contention that the trial court abused its discretion in granting a new trial absent an affirmative showing of prejudicial error. There is an important distinction between an appeal from an order granting a new trial and an order denying a new trial. (*People v. Ault* (2004) 33 Cal.4th 1250, 1260, 1271.) When a trial court grants a motion for a new trial, article VI, section 13 of the state Constitution does not compel de novo review of the trial court's prejudice determination before that ruling is affirmed on appeal. The appellate court does not independently redetermine the issue of prejudice. (*People v. Ault, supra,* 33 Cal.4th at p. 1271.) Rather, the reviewing court "will defer to the trial court's judgment on the issue of prejudice

because that issue involves an assessment based on the entire record of the proceedings before the trial court, and it is thus more suitably made by the trial court." (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 640.) Here, the trial court assessed the effect of the evidence protected by mediation confidentiality on the proceedings and impliedly determined the admission of such evidence was prejudicial. We will not disturb that finding.

The Porters argue that even if the claimed waivers are found "invalid," the order granting a new trial was improper under section 1128 because respondents' "substantial rights" were not affected. The jury awarded a large verdict against Wyner Tiffany based in part on the Porters' testimony of their communications with respondents and other participants in preparation for and during the mediation. Admission of evidence protected by mediation confidentiality most certainly affected respondents' substantial rights.

The Porters also argue section 1128 presupposes that the party requesting relief opposed the introduction of evidence pertaining to a prior mediation. This is again merely a back door argument for an implied waiver, which, as we have explained, our Supreme Court has repeatedly indicated is not available to deny the requesting party relief. (*Simmons, supra,* 44 Cal.4th at p. 567.)

The trial court therefore properly granted respondents a new trial.

**Cross-Appeal**

Wyner Tiffany cross-appeal, asserting that, even if the order granting a new trial is affirmed, this court should direct the trial court to enter judgment in their favor as to various claims asserted by the Porters and by respondents in their cross-complaint. Wyner Tiffany argue that Mrs. Porter premised a specific claim upon her alleged oral agreement during mediation to waive the claim based on certain assurances. Accordingly, Wyner Tiffany urge, the Porters are precluded from disclosing even the existence of this purported agreement if evidence of occurrences during mediation is excluded. The Porters rejoin that, even if this court discounts the evidence pertaining to the mediation, substantial evidence wholly unconnected to the mediation supports the

jury's verdict and precludes a JNOV. We agree with the Porters as they cite evidence beyond Mrs. Porter's testimony regarding what occurred at the mediation.

However, evidence potentially subject to mediation confidentiality is so interwoven with otherwise admissible evidence as to require the particularized determination of admissibility that the trial courts, rather than a reviewing court, are more suited to address. Wyner Tiffany admit that the Porters' additional claims did not rely exclusively on evidence subject to the mediation confidentiality provisions. We note, however that a substantial portion of Wyner Tiffany's showing in support of their cross-appeal relies on evidence of discussions and communications during the mediation meeting itself and during negotiations over the form of the definitive settlement agreement, matters which are subject to mediation confidentiality.

In short, evidence offered by both sides in the lawsuit would be precluded by enforcement of mediation confidentiality.

Because the motion in limine was withdrawn at an early stage in this case, the parties did not present the trial court with proffers and objections to particularized evidence triggering invocation of mediation confidentiality, and the trial court never had an opportunity to rule on the admissibility of such evidence.

Unlike *Simmons,* in which the court found the mediation confidentiality statutes made inadmissible *all* evidence of an oral contract and no possibility the plaintiffs could prove the only claim they had asserted, we cannot find on this record that respondents are entitled to a JNOV on all of the Porters' claims at issue. (See *Simmons, supra,* 44 Cal.4th at p. 588.) Nor, on the record before us, is it established that respondents are entitled to judgment as a matter of law on their own asserted cross-complaint.

**Order Modifying Opinion**
**Filed August 18, 2011**

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT



JOHN PORTER et al.,

Plaintiffs and Appellants,

v.

STEVEN WYNER et al.,

Defendants and Respondents.

B211398

(Los Angeles County Super. Ct. No. BC347671)

**ORDER MODIFYING OPINION**

[No change in the judgment]

IT IS ORDERED that the opinion filed in the above-captioned matter on July 27, 2011, be modified as follows:

At page six, third paragraph, the first sentence which reads "Though not all the parties to the mediation signed the settlement agreement . . ." is deleted and replaced with: "Though not all the persons present at the mediation signed the settlement agreement, the Porters, and representatives of the District signed as parties."

This modification effects no change in the judgment.

BIGELOW, P. J. RUBIN, J. FLIER, J.

Gerald Sauer
Sauer & Wagner
1801 Century Park East
Suite 1150
Los Angeles, CA 90067

Case Number B211398
Division 8

JOHN PORTER et al.,
Plaintiffs and Appellants,
v.
STEVEN WYNER DBA WYNER & TIFFANY et al.,
Defendants, Cross-defendants and Appellants.

## PROOF OF SERVICE

I am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is 1801 Century Park East, Suite 1150, Los Angeles, California 90067.

On September 2, 2011, I served the foregoing document(s) described as: **PETITION FOR REVIEW** on the interested party(ies) in this action, enclosed in a sealed envelope, addressed as follows:

SEE SERVICE LIST

(X) I am readily familiar with the business practice for collection and processing of correspondence for mailing within the United States Postal Service. I know that the correspondence is deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices in the United States mailed at Los Angeles, California.

( ) By Overnite Express, I caused to be delivered such envelope via Overnite Express to the office(s) of the addressee(s) noted above.

( ) By email, I caused the above-referenced document(s) to be transmitted to the party(ies) listed above.

( ) By personal service, I delivered such envelope by hand to the offices of the addressee(s) noted above.

Executed this 2nd day of September, 2011, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

( ) (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Ashia Huffman

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