Supreme Court Case No. S178914 Second Appellate District No. B215215

In the Supreme Court of the State of California

MICHAEL CASSEL,

Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

WASSERMAN, COMDEN, CASSELMAN & PEARSON, L.L.P., et al.,

Real Parties in Interest.

REVIEW SOUGHT OF THE DECISION RENDERED BY THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION SEVEN

REPLY TO ANSWER TO PETITION FOR REVIEW BY WASSERMAN, COMDEN, CASSELMAN & PEARSON, L.L.P., DAVID B. CASSELMAN, AND STEVE K. WASSERMAN

HAIGHT BROWN & BONESTEEL LLP
Peter Q. Ezzell (Bar No. 53497),
Nancy E. Lucas (Bar No. 126854) and
Stephen M. Caine (Bar No. 119590)
6080 Center Drive, Suite 800
Los Angeles, California 90045-1574
Telephone: (310) 215-7100
Facsimile: (310) 215-7300
E-Mail: caines@hbblaw.com

Attorneys for Real Parties in Interest and Defendants WASSERMAN, COMDEN, CASSELMAN & PEARSON, L.L.P., DAVID B. CASSELMAN, AND STEVE K. WASSERMAN

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REPLY TO ANSWER TO PETITION FOR REVIEW BY REAL PARTIES IN INTEREST, WASSERMAN, CAMDEN, CASSELMAN & PEARSON, L.L.P., DAVID B. CASSELMAN, AND STEVE K. WASSERMAN

To the Honorable Ronald M. George, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

The real parties in interest, Wasserman, Comden, Casselman & Pearson, L.L.P., David B. Casselman, and Steve K. Wasserman, respectfully submit their Reply to Answer to Petition for Review.

LEGAL ARGUMENT

I.
The Slip Opinion Has Already Been Analyzed Negatively By Another Court, With That Court Declining To Follow the Majority Opinion Because It Is Out of Step With the Existing Body of California Law Pertaining to Mediation Confidentiality.

One business day before WCCP filed its Petition for Review, another court issued an opinion analyzing and *declining* to follow the majority opinion, favoring instead the reasoning in the dissenting opinion for the identical reasons asserted by WCCP as requiring review.

In *Benesch v. Green*, 2009 U.S. Dist. LEXIS 117641 (Dec. 17, 2009),[1] the United States District Court for the Northern District of California was required to apply California's mediation statutes under claims that are nearly identical to those raised in this case. In *Benesch*, a client sued her lawyer "for malpractice arising out of a mediation." (*Id.* at p. 1.) In that suit, the plaintiff sought to introduce evidence of private conversations between her lawyer and her to prove her claim that a settlement agreement reached and drafted at a mediation "did not accurately reflect her intent ...." (*Id.*) The deviation between the settlement agreement negotiated and drafted at the mediation, and her intentions in settling the case discussed with counsel in pre-mediation meetings, was blamed on attorney negligence. (*Id.* at pp. 1, 4.)

The District Court was asked to determine whether conversations between the client and her lawyer just before and during the mediation were admissible under California's mediation confidentiality statutes, along with telephone conversations plaintiff had during the mediation with another person, Connie Benesch (the intended beneficiary of the agreement).

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[1] A copy of the *Benesch* opinion, available now only electronically, is submitted with Reply in a separate appendix.

(*Benesch*, at pp. 1-2.) The District Court was required to analyze and weigh the controlling California appellate opinions interpreting the mediation confidentiality statutes, under the rule in federal diversity actions that the District Court must "approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum. In doing so, federal courts are bound by the pronouncements of the state's highest court on applicable state law." (*Id.* at pp. 5-6 (citation omitted).)

After analyzing the controlling California cases, and noting "Cassel is the latest word from the California appellate court on the issue of mediation confidentiality," the District Court declined to apply the Slip Opinion's majority holding. It found that *Cassel* is "in significant tension with the large majority of California opinions" regarding application of mediation confidentiality, and that its "dissent, rather than the majority, is more persuasive and true to the statutory language and the California Supreme Court's injunction not to create implied exceptions." (*Benesch*, p. 5.)

Most significantly, the District Court concluded that *Cassel* "appears to create an implied judicial exception to the mediation confidentiality statutes." (*Benesch*, p. 6, citing *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14) This court has repeatedly forbidden judicially created exceptions to the mediation confidentiality statutes. (See, *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 582; *Foxgate*, *supra*, 26 Cal.4th at 11; accord, *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 162.)

Further, the District Court in *Benesch* found persuasive the attorney defendant's argument that applying mediation confidentiality to some statements during or pertaining to mediation, but not others, would be inherently "inequitable and unfair," as well as in violation of the clear terms of the statutes. (*Benesch*, p. 6.) Allowing a plaintiff to "provide evidence of communications with Defendant when they were alone together during the mediation, but Defendant, by virtue of the mediation confidentiality statutes, could not defend herself with other relevant evidence such as

communications with opposing parties in the mediation and/or the mediator," was not a result that the mediation confidentiality statutes allow.

> While a client may desire a certain term in a comprehensive settlement and initially tell her attorney that she insists on it, it is not uncommon at a mediation – when, for example, opposing parties communicate a refusal to agree to that term or the mediator provides a persuasive reason why it cannot be part of the settlement – that the client accepts the need to compromise and agrees to drop the condition. Thus, it would be inequitable to prevent Defendant from presenting any such evidence of what was said or done in the course of, for the purpose of, or pursuant to the mediation. [*Benesch*, p. 6 (citation omitted).]

The foregoing conclusion by the District Court is identical to the argument submitted by WCCP in its Petition, and reaches the same conclusion that WCCP urges this court to reach. (See, Petition, pp. 23-24) Interpretation of the mediation confidentiality statutes in a way that allows them to be applied unequally would create an inequitable situation in any case litigating mediation communications. This is so despite there being no hint in their clear, comprehensive language of the statutes that such an application is allowed.

As discussed in *Benesch*, the mediation process relies on people changing their minds, and softening their preconceived expectations or preconditions to settlement, based upon the give-and-take that is the hallmark of any mediation. Allowing evidence of pre-mediation decisions to be introduced into evidence, but barring the introduction of communications during a mediation that result in parties softening their positions and coming to agreement, could easily discourage parties from ever changing their minds during a mediation. This aspect of the Slip Opinion could provide a powerful disincentive to parties either to enter into

mediation, or to change their minds once mediation begins. Either result will harm mediation, rather than encourage it. The stated goal of the mediation confidentiality statutes is to encourage mediation, rather than create disincentives to it. (*Foxgate*, *supra*, 26 Cal.4th at 14.) The exception to the mediation confidentiality statues created by the Slip Opinion would therefore stand the stated purpose of those statutes on its head.

Seldom is a Slip Opinion repudiated so quickly and directly. By adopting WCCP's arguments almost verbatim at points, the opinion in *Benesch* provides the strongest reason yet why review of the Slip Opinion must be granted. It is no longer merely the affected litigant, WCCP, pointing out error in the opinion – another court has independently adopted WCCP's arguments, and announced publicly that the Slip Opinion's majority is severely out of step with California law. If the District Court determined that the Slip Opinion could not be followed because it does not reflect California law accurately, so too will other courts. The Supreme Court must grant review to correct the errors in the Slip Opinion pointed out by WCCP, and now by the District Court in *Benesch*.

II.
The Attorney-Client Privilege Is a Separate Privilege, and, Where Applicable, a Separate Evidentiary Objection From Mediation Confidentiality.

The primary argument in the Answer is that because the attorney-client privilege is waived in a client's lawsuit against their attorney for legal malpractice, pursuant to *Evid. Code* § 958, then the mediation confidentiality statutes must also not apply in a legal malpractice action. (Answer, pp. 6-12.)

This lengthy argument provides nothing relevant. The attorney-client privilege is an entirely separate privilege, and an entirely separate objection. Waiver of it, effectuated in *Evid. Code* § 958, does not effect a waiver of any other applicable objection to evidence.

The scope of *Evid. Code* § 958 is provided in that statute: "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." (Emphasis added.)

"This article" refers to Division 8, ch. 4, art. 3 of the *Evidence Code*, comprised of *Evid. Code* §§ 950-962. "This article" pertains to the attorney-client privilege only. It does not purport to apply to other statutory privileges, including mediation confidentiality.

That distinction reflects the law that the attorney-client privilege is held by the client, and may normally be waived only the client. A different standard for waiving mediation confidentiality is expressed in that different statutory privilege.

Evid. Code § 1122 outlines the only methods by which mediation confidentiality may be waived. To do so, all conditions under two alternative methods must be met: (1) "[a]ll persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally ...," *or*, if the "communication, document, or writing" involved was prepared by, or communicated between, fewer than all of the participants to the mediation, (2) "those participants [must] expressly agree in writing, or orally ... 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." (*Evid. Code* § 1122 (emphasis added).)

That section makes mediation confidentiality a privilege held by all of the participants to mediation, including the mediator. All must consent to it being waived. See, *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 359 (mediation communications can be disclosed or admitted with the express consent of all participants, including the mediator and other nonparties, but there can be no implied waiver). Here, neither WCCP nor the underlying mediator has consented to waiver of mediation confidentiality.

There is no section in the mediation confidentiality statutes comparable to *Evid. Code* § 958, effecting a waiver of mediation confidentiality merely by filing a lawsuit against former counsel. Indeed, many of the controlling appellate opinions, such as *Wimsatt*, *supra*, 152

Cal.App.4th 137, could not exist if that was the case. Such a waiver cannot be created by "implication," based upon the filing of claims founded on alleged problems that occurred at a mediation. The mediation privilege cannot be waived by implication. (*Evid. Code* § 1122; *In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 81.)

Mr. Cassel's argument, if accepted, would add yet another layer of error onto the Slip Opinion. He asserts that the waiver of the attorney-client privilege effected in *Evid. Code* § 958 applies also to mediation confidentiality, even though that statute undeniably *does not* contain language allowing that, based on that faulty premise, he concludes that mediation confidentiality, effectuated in *Evid. Code* § 1119, does not apply to communications "for the purpose of" mediation, even though that statute undeniably *does* contain that language. Inventing and erasing statutory language should not be so easy.

III.
The Factual Premise of the Slip Opinion Is Erroneous, and That Error Was Pointed Out Accurately in the Dissenting Opinion.

In attempting to parse WCCP's recitation of the factual background, Mr. Cassel undertakes a telling concession. He asserts that, in considering the motion in limine that led to the subject orders, the trial court judge "understood all along ... that Cassel sought to introduce communications directly related to the mediation." (Answer, pp. 6-7.) WCCP agrees.

The trial court judge clearly understood that WCCP's motion in limine focused on whether certain communications between Mr. Cassel and WCCP immediately before and during the mediation "related to the mediation." That was the whole point of the motion. And upon that understanding, the trial court judge concluded – accurately – that private conversations between an attorney and client fell within mediation confidentiality, specifically because they were "for the purpose of, in the course of, or pursuant to, a mediation." (*Evidence Code* § 1119.)

The trial court's factual conclusions are clear. The private communications between Mr. Cassel and WCCP in the days before mediation, and during the mediation, were all "for purposes of" or "pursuant to" the mediation, as contemplated in *Evid. Code* § 1119. (RPApp. Exs. 9-10; see also, 2RT 37, 40-41, 110, 113-115; 3RT 12:24-25.)

On this point, Mr. Cassel's arguments that, in its Petition for Review, WCCP "misquotes" Presiding Justice Perluss's dissenting opinion is wrong, and provocatively so. The Slip Opinion is quoted accurately throughout the Petition for Review.

To support this inappropriate assertion, Mr. Cassel says that, in the dissenting opinion, Presiding Justice Perluss states that "mediation confidentiality ... pursuant to section 1119 presents a question of law subject to independent review by this court ... and is the only issue addressed by the majority in granting petition Michael Cassel's request for relief ...." (Answer, p. 7 (emphasis omitted).)

All true, so far. However, the serious factual error described in the Petition is then revealed in the dissent, gently, in Presiding Justice Perluss' discussion that

> Cassel does not argue in his petition that the trial court abused its discretion in *concluding, after carefully reviewing each of the statements at issue here, that they were materially related to the mediation* in the underlying, Von Dutch lawsuit, and that issue is not properly before us. [Slip Opn., dissent pp. 1-2 and fn. 3 (emphasis added.]

By pointing out that the trial court had, in fact, concluded that the statements were "materially related to the mediation," and then pointing out that no claim of error in those factual conclusions was raised by Mr. Cassel (which would be reviewed for abuse of discretion), the dissent directly, if

gently, questions why the majority opinion could rely upon the opposite factual conclusions.

Those factual conclusions by the trial court stand in stark contrast to the Slip Opinion's majority, which holds that "there is no readily identifiable link to the mediation in the communications, such as the content of a mediation brief." (Slip Opn. p. 10; Answer, p. 8)

In future lawsuits, no reasonably competent attorney will miss that reference, and fail to comprehend that, without abuse of discretion having been asserted or argued by Mr. Cassel, the majority opinion simply overlooked factual conclusions of the trial court, which found that "each of the statements at issue here," i.e., the private communications between Mr. Cassel and WCCP lawyers, "were materially related to the mediation ...."

That the factual premise for the Slip Opinion is so obviously incorrect is reason enough to grant review. However, the primary reason why review is necessary remains that the Slip Opinion uses that false factual premise as a basis to ignore the statutory language that mediation confidentiality applies not just to communications during a mediation, but also to communications "for the purpose of" or "pursuant to" a mediation. (See, *Evid. Code* § 1119.) As pointed out in *Benesch*, that aspect of the Slip Opinion is far out of step with California law.

IV.
Public Policy Considerations Have Presumptively Been Taken Into Account by the Legislature in Drafting the Mediation Confidentiality Statutes.

Finally, Mr. Cassel argues that public policy considerations should trump the plain language of the statutes. This reasoning has been rejected by this court before. All aspects of "public policy" were presumptively considered by the Legislature in drafting the mediation confidentiality statutes. (See, *Wimsatt*, *supra*, 152 Cal.App.4th at 150.) By choosing to frame mediation confidentiality using exceedingly broad language, the Legislature intended that the statutes should be applied broadly. Competing policy concerns were presumptively considered, and rejected, in

favor of the policy that mediation is fostered by applying confidentiality broadly. (*Id.*)

V.
Conclusion

Despite a lengthy argument, Mr. Cassel's Answer fails to address directly the issue that is at the core of this dispute: what is the language used in the mediation confidentiality statutes, and does a court have the discretion to decline to apply some of that language in a given situation? The answer must obviously be that these statutes are clear, and that courts may not overlook language in these statutes (or any others).

The errors in the Slip Opinion are seen easily by reference to the statutes and case law, but are made even more obvious now that they have been pointed out in *Benesch.* Review must be granted.

Respectfully submitted,

HAIGHT BROWN & BONESTEEL LLP,
Peter Q. Ezzell,
Nancy E. Lucas, and
Stephen M. Caine

Attorneys for Real Parties in Interest
WASSERMAN, COMDEN, CASSELMAN & PEARSON, L.L.P., DAVID B. CASSELMAN, AND STEVE K. WASSERMAN

CERTIFICATE OF COMPLIANCE WITH RULE 8.204(c)(1)

I, the undersigned Stephen M. Caine, declare that:

I am a partner in the law firm of Haight Brown & Bonesteel, which represents Real Parties in Interest, Wasserman, Comden, Casselman & Pearson, L.L.P., et al., in this case.

This certificate of Compliance is submitted in accordance with Rule 8.204 (c)(1) of the California *Rules of Court*.

This Reply to Answer to Petition for Review brief was produced with a computer. It is proportionately spaced in 13 point Times Roman typeface. The brief contains 2,629 words, including footnotes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 25, 2010 at Los Angeles, California.

_____

Stephen M. Caine

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.:
COUNTY OF LOS ANGELES)

Case Name: MICHAEL CASSEL v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES
Case No.: Second Civil Number B215215

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, California, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 6080 Center Drive, Suite 800, Los Angeles, CA 90045-1574; that on ***January 25, 2010***, I served the within ***Reply to Answer to Petition for Review*** in said action or proceeding by depositing a true copy thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk of the Supreme Court of the
State of California
350 McAllister Street
San Francisco, California 94102

((Original and Thirteen Copies Via Federal Express))

Clerk of the Court
Court of Appeal – State of California
Second Appellate District Division Seven
300 South Spring Street
North Tower Second Floor
Los Angeles, California 90013

The Honorable William A. MacLaughlin
Judge of the Superior Court – Dept. 89
111 North Hill Street
Los Angeles, California 90012-3014

Mr. Ronald W. Makarem
Makarem & Associates, APLC
11601 Wilshire Boulevard, Suite 2440
Los Angeles, California 90025-1760

Telephone: 310.312.0299
Facsimile: 310.312.0296
Attorneys for Plaintiff

Mr. Lyle R. Mink
Law offices of Lyle R. Mink
1801 Century Park East, Suite 2600
Los Angeles, California 90067

Telephone: 310.553.1010
Facsimile: 310.284.5743
Attorneys for Plaintiff

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. ***Executed on January 25, 2010***, at Los Angeles, California.

Theresa Welsch

(Original Signed)