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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| 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 Porter $211,000 in back wages and the Porters $51,000 for breach of an attorney fee agreement; and (2) rescinded a release the Porters gave Wyner Tiffany regarding tax advice.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.

## DISPOSITION

The order granting a new trial is affirmed. The cause is remanded to the trial court to rule on the JNOV based upon a review of the entire trial record. The parties are to bear their own costs on appeal.

BIGELOW, P. J.

I concur:

RUBIN, J.

FLIER, J.