Case No: S111585

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

GENOVEVA ROJAS, et al.,

Petitioners,

vs.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent,

JULIE COFFIN, Trustee of the 1979 Ehrlich Investment Trust, and RICHARD EHRLICH, et. al.

Real Parties in Interest,

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN
Case No. B158391

PETITIONER'S OPENING BRIEF ON THE MERITS

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PETITIONER'S OPENING BRIEF ON THE MERITS

ISSUES PRESENTED

Whether the "mediation privilege," as codified under Evidence Code §§ 1119 and 1120, is intended to afford absolute and unqualified privilege protection from discovery of all evidence prepared for the sole and limited purpose of mediation (with the exception of evidence expressly specified by these provisions); and if not,

Does the "absolute" verses "qualified" privilege, and "derivative" verses "non-derivative" analysis, related to limited protection afforded by the work product doctrine, provide the proper and appropriate analytic framework to delimit the protections afforded evidence prepared specifically for mediation.

INTRODUCTION

This case presents an issue involving the abridgement of an important public right, as well as an important legal issue of significant public interest, related to every action which involves the potential for mediation. Specifically, it involves the degree in which parties may freely develop the facts, evidence and theories related to potential liability and defenses for the specific purpose of mediation only, in an effort to resolve their cases, without concern that evidence developed and presented will be used at trial or elsewhere, should the matter not resolve at mediation.

In the seminal Supreme Court case of *Foxgate Homeowners Association v. Bramala California Inc*. (2001) 26 Cal.4th 1, 13-14, this court found that the Legislative intent of Sections 1119 and 1120 is clear and unambiguous on its face. Evidence Code §§ 1119 and 1120 afford *an absolute protection* of *all evidence prepared for the specifically intended and limited purpose of mediation.* Thus, an absolute protection should be warranted under the circumstances presented.

However, in the present case, in a split decision, Division 7 of the Second Appellate District held otherwise. **In doing so, the majority opinion of Division 7 has divined a distinction between "derivative" verses "non-derivative" materials or evidence nowhere found in the statutory scheme of the mediation privilege, as codified in Sections 1119 and 1120.**

Without an absolute and unqualified privilege in place at mediation, all parties to the mediation process will be extremely reluctant to develop, for mediation, any evidence that may be potentially adverse, but of critical assistance in resolving cases. Moreover, parties will be inclined to opt out of mediation proceedings, as an alternative means of dispute resolution, since meditation will become a far less effective tool, in the absence of an absolute mediation privilege. This is particularly the case in matters involving employment disputes as well as construction defect cases, where defect evaluations and lists are routinely developed by the litigants for purposes of resolving cases at mediation.

The very heart of a successful mediation forum is its facilitation of the opportunity for litigants to lay all of their cards on the table, without fear of repercussion. This entails use of facts, evidence, and theories developed by the parties, for the sole purpose of resolving the matter at mediation. Implicit in the mediation process is the understanding and expectation, based on the protections established by the mediation privilege, that nothing developed by the parties for the specifically intended use at mediation, can or will be used against them, should the matter not resolve.

The uncertainty created by an unqualified privilege for communications, testimony and evidence prepared for the specific

purpose of mediation of civil matters, would not only be devastating to the mediation process itself, it would also create serious question as to the efficacy of private as well as court ordered mediation as an alternative means of conflict resolution in the State of California.

Of genuine concern to litigants, their counsel, and those involved in the mediation process, throughout the State, is that mediation would simply become an improper discovery tool or mechanism for those not genuinely interested in mediating in good faith. This could be routinely achieved, as is the case here, by merely arguing that the materials brought to the mediation table should be characterized as "purely factual in nature," or alternatively, are of a "qualifiedly privileged" or "derivative" nature, which "in balance" should be subject to discovery, in light of their relevance or present availability.

The scope of the dangers created by such misuse would be massive in nature, as it would include those who may not have even participated in the mediation process, as well as wholly unknown individuals who were not participants in the litigation or mediation, as was the case here. Such would also include those who decide to take little or no action to properly develop facts, evidence or theories on their own, but are savvy enough to craft arguments regarding what materials others may have brought to mediation and may be subject to discovery. The cost of arguing what materials are and what materials are not subject to the mediation privilege would become prohibitively expensive and costly to those earnestly interested in engaging in the mediation process.

Thus, the very purpose of mediation, as a tool for potential avoidance of large expenditures of time and resources required of litigation, would be essentially become pointless, as parties coming to mediation

would do so virtually empty handed, fearing that anything brought to the mediation table could potentially become a weapon to be used against them, in the future, either by the adverse party, should the matter not resolve, or by unknown individuals, in some other matter, regardless of whether the matter resolves at mediation.

Adequate protections from the "evils" perceived (including potential misuse of mediation privilege to shield "otherwise" admissible evidence) already exist, including, but not limited to, evidence and issue preclusion sanctions, and stipulations regarding use of evidence presented for purposes of mediation. Moreover, the Legislature has already considered any potential dangers related to possible misuse of the privilege and has weighed and balanced such concerns with the interests of justice and economic benefits of early case resolution (as occurred with respect to the matter presented in the mediation in this instance), when it enacted the subject statute.

Justice Perluss' strong dissent, in the subject decision, cogently and perceptively recognizes the very dangers presented by the majority's attempt to read and interpret into the mediation privilege statute that which does not exist. This Court is urged to accept this petition, to overturn the published decision by Court of Appeal, and to restore the intended absolute and unqualified protections afforded by the mediation privilege, as such constitutes an important pubic right for dispute resolution through this State, a right which the Legislature enacted for the benefit of the public at large. Accordingly, this matter requires the immediate attention of this Court to preserve and protect this important public right and interest.

BACKGROUND FACTS/PROCEDURAL HISTORY

1. The Underlying Action and the Mediation.

Petitioners below are primarily the former tenants of an apartment complex located at 131, 143, and 171 So. Burlington Street (Apartment Complex) owned by real parties in interest Julie Coffin, Trustee of the 1979 Erhlich Investment Trust and Richard Ehrlich (collectively referred to herein as "Coffin"). [CAD at 2.][1], [2]

The Apartment Complex was built by KSF Holdings, First City Properties, Inc. ("Developers"), and various other contractor and subcontractor entities (collectively referred to herein as "Contractors") and designed by Fields & Silverman. Included amongst the subcontractor entities was Real Party In Interest below and Petitioner herein Deco Construction Corporation (referred to herein as "Deco"), who was involved in the framing aspects of the construction of the subject Apartment Complex. [CAD at 2.]

Coffin became the owner of the building in 1994, and in December 1996, Coffin commenced an action against the Contractors alleging numerous construction defects that had resulted in water leakage, in turn causing the presence of molds and other microbes on the property. The construction defects included problems with the plumbing, electrical, roofing, and ventilation systems. [CAD at 2.]

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[1] "CAD" refers to the pages of the majority opinion, in the Court of Appeal decision in this matter, filed on October 10, 2002. A true and correct copy of the Court of Appeal decision in this matter, inclusive of the majority and dissenting opinions, is attached hereto as Exhibit "A."

[2] Of the 148 plaintiffs, ten or less remain as tenants of the subject Apartment Complex.

In connection with the underlying action, the parties entered into a Case Management Order (CMO). The CMO provided that a special master would be appointed to oversee discovery; *discovery would be stayed*; specified documents would be deposited into and held at a document repository; Coffin would prepare a defect list; the Contractors would be permitted to conduct destructive testing; the matter would be submitted to mediation; and the parties' experts would meet to discuss the cost and scope of repair. Only if the matter did not resolve, which it did, would discovery reopen and a final defect list be required to contain the type, extent and location of defects, Coffin's contentions as to the cause of the defect, whether the defect was identified by visual inspection, invasive testing, extrapolation, or some other method, and a repair report setting forth in detail the necessary repairs and specific cost of each repair. [CAD at 2-3; Petition ¶ 4; Petition Exhibit D:26-27.][3]]

The CMO also provided in pertinent part as follows:

> ***"[A]ny document prepared for the purpose of, or in the course of, or pursuant to any mediation proceeding shall be deemed privileged pursuant to Evidence Code § 1119 and shall not be admissible as evidence at trial or for any purpose prior to trial.*** However, in the event mediation efforts prior to expert depositions fail and the parties proceed to the expert deposition stage of litigation, Plaintiff shall, on a date ten days before the first day of plaintiff's first expert to be deposed, produce a final, discoverable - privileged Final Defect Report and Cost of Repair ('Discoverable Final Defect List and Cost of Repair'). . . As the Discoverable Final Defect List and Cost of Repair are substitutes for voluminous written

[3] "Petition" refers to the writ petition taken by plaintiffs in the instant matter, bearing Second Appellate District Case No. 15891, the lettered Exhibits thereto are also referred hereto herein by letter designation and page.

> discovery, it is necessary that same be admissible in evidence."[4] [CAD at 2-3; Petition ¶ 4; Exhibit D:26-27.]

In April 1997, Coffin prepared a preliminary defect list, for purposes of mediation, which identified purported defects in the structure of the Apartment Complex. In April 1998, Coffin began air testing at the Apartment Complex. Sometime in late 1998, one of the buildings (171 So. Burlington Avenue) at the Apartment Complex was closed, and some of those tenants moved into the other two buildings. Fences were placed around the building, which remained closed until abatement efforts were completed. Those abatement efforts included demolition of drywall and ceilings in all of the buildings and the installation of replacement drywall. Antimicrobial agents were also applied, and plumbing was repaired. [CAD at 3.]

In April 1999, the underlying litigation settled. The settlement provided that "[t]he terms of this agreement shall remain confidential as between the parties, their counsel, their consultants and their insurance carriers and their representatives. All parties, their counsel, insurance company representatives and consultants shall not take any action to facilitate, propagate and otherwise participate in the solicitation or prosecution of any claims by any tenant, current or future, with regard to their occupancy of the property. In addition, throughout this resolution of the matter, consultants provided defect reports, repair reports, and photographs for informational purpose which are protected by the Case Management Order and Evidence Code §§ 1119 and 1152, and it is hereby agreed that such materials and information contained therein shall not be published or

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[4] In connection with the mediation, Coffin prepared an "investigation binder" containing photographs of the Apartment Complex and other evaluation analysis made which related to the condition of the premises. [CAD at 3.]

disclosed in any way without the prior consent of plaintiff or by court order." [CAD at 3.]

Because mediation was successfully concluded in *Coffin v. KSF Holdings*, no Discoverable Final Defect List and Cost of Repair needed to be or was prepared. Accordingly, the time for expert designation was never triggered and no expert discovery took place. The only reports which existed were those work product reports prepared by consultants, retained for purposes of advising counsel for the mediation, and the reports and contents were prepared specifically for and intended solely for use at the mediation, with the understanding that they would be protected under the mediation privileged for all purposes. [Answer to Petition Exhibits 12-14.]

2. The Instant Action and the Motions to Compel.

In August 1999, petitioners, commenced the instant action against Coffin and the Contractors of the Apartment Complex.[5] Petitioners contended that faulty plumbing, roofing, HVAC, sheet metal and stucco work caused free water to circulate in the building, permitting microbes to infest the building. As a result, petitioners claim to have suffered numerous health problems. Petitioners alleged that they did not become aware of the building defects until April 1999, and alleged that Coffin and the Contractors conspired to conceal the defects and microbe infestation from them. [CAD at 4.]

a. *First Motion to Compel, July 27, 2000.*

In November 1999, petitioners served a request for production of documents, in which petitioners sought production of, among other things,

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[5] The Second Combined Amended Complaint alleged 10 causes of action for negligent maintenance of premises, breach of the warranty of habitability (contract, tort, and statutory), concealment, breach of the covenant of quiet enjoyment, nuisance, strict liability, negligence, and intentional infliction of emotional distress. [CAD at 4.]

five self-described categories that included: (1) all discovery and responses exchanged between the parties to the underlying litigation; (2) "[a]ll actual physical evidence evidencing the condition of the buildings, including, without limitation, photographs, videotapes, test samples, test reports (such as spore and colony counts), and any physical evidence that was removed from the buildings and saved (drywall, plumbing, framing members, etc.)"; (3) writings describing the buildings, including written notes of observations made during building inspections, and witness interviews -- "[t]his category would also include notes describing what the witnesses did and saw while conducting inspections or repairs of the buildings;" (4) and (5) writings evidencing the opinions of expert consultants, both those communicated to the defendants and those not communicated to the defendants. [CAD at 4.]

In July 2000, petitioners brought a motion to compel production of documents, heard before Judge McCoy. Petitioners argued that purely evidentiary, or "non-derivative" material, was not protected as work product. They contended that such material included the identity and location of physical evidence, and the identity and location of witnesses with knowledge of the facts of the case. "Derivative" materials, which contained attorney interpretations or evaluations of the facts or law, were discoverable upon a showing of good cause, which existed in the instant case since there was no other means by which to obtain the requested discovery because Coffin had remediated the property. Petitioners sought all pleadings, discovery responses, photographs, samples, test results, correspondence, and documents identifying potential witnesses. Petitioners contended that because of the remediation of the property, there was no other way they could obtain the information. [CAD at 4-5.]

Judge McCoy issued a statement of decision in which he ordered documents produced for an in camera inspection. Coffin and Contractors

took the position that all documents had been prepared for the mediation and were therefore protected by the mediation privilege. An in camera inspection was conducted November 3, 2000, and the court ordered the transcript sealed.[6] After petitioners pointed out they could not effectively challenge the court's ruling without a privilege log, the court directed that one be prepared, Deco and Coffin submitted privilege logs. [CAD at 5.]

On January 24, 2001, the court ordered that the photographs, reports and other documents submitted by Coffin, Developers and Contractors at mediation were protected by the mediation privilege. In particular, the court stated that "the court's rulings only apply to the privileged nature of the compilations. The documents attached to the compilations were not submitted to the court separately, and the court ruled on the documents taken together for mediation purposes."[7] [CAD at 5.]

After ruling on matter the case was then transferred to Judge Anthony Mohr, due to a peremptory challenge of Judge McCoy, exercised by a new party to the litigation. [Exhibits B:200-202; N:401.]

b. *Second Motion to Compel, March 7, 2002.*

After reassignment of the matter to Judge Mohr, petitioners took no action to challenge the trial court's ruling on their first motion. Instead, they re-propounded virtually identical discovery requests. In response, objections were again presented to the discovery requests on the same grounds

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[6] Because the transcript is not relevant to the determination of the issues on appeal and contains discussions concerning privileged material, the Court of Appeal appropriately denied the motion. [CAD at 5.]

[7] The court took under submission the matter as to other defendants, it then conducted an in camera review on January 30, 2001, and ultimately issued a similar ruling on February 6, 2001. [CAD at 6.] On subsequent review by Judge Mohr, it was confirmed that Judge McCoy had reviewed the photographs individually, in addition to in a complied format for purposes of ruling hat all the materials presented were protected. [Petition Exhibit H at 9:14-22.]

previously raised and ruled on, as well as on the grounds that petitioners were barred from re-propounding the same discovery requests on Coffin and Contractors. [Petition Exhibits J-O; Exhibit 4 to Return in Opposition to Petition.]

Undaunted by this fact, petitioners pursued responses without objection. Petitioners again moved to compel the production of physical evidence, including photographs of the project, former tenants, and current tenants, including photographs provided in the underlying action as part of compilations. Petitioners also requested videotapes of the project and videotapes of former and current tenants, including videotapes of the "project that were utilized" "during the mediation." Lastly, petitioners sought "any and all raw data regarding air sampling for mold spores," data from "bulk sampling for mold spores," raw data from destructive testing, "any and all results" from destructive testing, and all recorded statements of former and current tenants. Petitioners contended Judge McCoy's ruling supported their argument that photographs and other raw material was not protected by the mediation privilege because Judge McCoy had not ruled on individual photographs or other evidentiary material. [CAD 6.]

Included amongst the grounds that Coffin and Contractors opposed the motion were as follows:

(a) The photographs and other evidence were prepared "for the purpose of mediation;"

(b) In the absence of mediation confidentiality, the subject materials would not have been prepared for or produced at mediation, including the photographs and other data developed in the mediation binder;

(c) The photographs and results of testing were not "raw" data as characterized by petitioners;[8] and,

(d) Coffin and Contractors relied on the CMO and Sections 1119 and 1120, in the underlying litigation, in which "any document prepared for the purpose of mediation" was protected.

Furthermore, the mediation privilege did not support any distinction between documents or material that were part of a compilation and those which were not. Coffin and Contractors also pointed out that Judge McCoy had concluded certain individual items were not producible because he had individually reviewed such items at the in camera proceedings. [CAD 6.]

Petitioners argued in response that the changed conditions of the premises due to remediation, and their inability therefor to replicate the raw data and images recorded in the photographs, constituted good cause for the production of the materials sought. They further maintained that mold spore analyses did not constitute expert opinion; that photographs do not contain attorney opinion, impression or analysis; and that the court's prior order mandated disclosure. [CAD 7.][9]

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[8] Petitioners' repeated challenges to the privilege assertion appear calculated to seek undiscoverable expert evidence, from non-designated expert consultants in a prior action, including: their testing, reports and statements which constitute analysis and opinions, under the pretext that such constitutes raw evidence which is not protected by the mediation privileged. Coffin and Developers have repeatedly stated there is no raw evidence amongst the materials prepared and presented at mediation, and that the evidence that was presented would not have been prepared and presented if the mediation privilege were not absolute. (Further elaboration on these points appears in the Answer to Petition at page 39, footnote 33 and Return in opposition to Petition at 7, footnote 4, 9 at ¶12; 20.) [See also Petition Exhibit D at 120-121; 180-185 and Petition Exhibit H at 11:11-20; and 13:18-26.

[9] This was the same argument presented and rejected by Judge McCoy on Petitioners' first motion to compel of July 27, 2000.

Coffin and Contractors disagreed and further noted that petitioners failed to represent that they did not have photographs or testing of their own, even if such were the case.[10] (Petition Exhibits B at 204:2-9 and H at 24:22-25:10; Return in Opposition to Petition at 16 and 22.]

At the hearing, Coffin and Contractors argued that the photographs were "advocacy" in the sense that were taken to show impressions, and have arrows pointing out significant features. They also argued that the photographs were not just a mere group of photographs; rather, they constituted a report of their experts, and because a photograph was "worth a thousand words" the photographs were more than just raw evidence. Coffin argued that the photographs were taken for the purposes of mediation and had only been taken because of the CMO. [CAD 7.]

While engaging in this discovery dispute, petitioners did not oppose the in camera review by the court, rather they invited it, until the trial court determined that the evidence was indeed protected. [Answer to Petition, Exhibit 22.]

After playing devil's advocate on the issues, Judge Mohr denied petitioners' motion, resulting in a writ petition by petitioners. [Reporter's Transcript of Proceedings, March 7, 2002, at 25:11-20 (Petition Exhibit H:25.)]

3. Petitioners' Writ Petition on the Motions to Compel

In a writ petition served on or about May 6, 2002, taken from the trial court's ruling on the documents prepared for mediation, petitioners argued that the mediation confidentiality provisions of Evidence Code Sections

[10] Briefing on the motion consisted of the motion, an opposition, a reply, a sur-reply, and a reply to the sur-reply. [CAD at 7.]

1115,[11] et seq. did not shield physical evidence, such as photographs and test data, from discovery because such evidence is purely evidentiary in nature ("non-derivative"). They contend such evidence is therefore "clearly otherwise admissible," pursuant to the provisions of Section 1120, and at the very least, any evidence prepared prior to the CMO, which commenced the mediation process, should be discoverable. Petitioners again argued that they have no other means by which to obtain any of this evidence, as most of it was destroyed or removed from the premises as a result of the remediation process. [CAD 8.]

Coffin, joined by Contractors, including Deco, answered the petition, maintaining, that on procedural grounds, the writ was not timely presented, in light of the fact that petitioners failed to challenge the court's ruling on the same discovery previously propounded, thereby waiving the issues presented. [CAD 8; Answer to Petition 56-57; Return in Opposition to Petition at 16-17 30-36.] .]

Furthermore, Coffin, joined by Contractors, substantively maintained the statutory language of Section 1119 is clear on its face, and there is no reason to read the doctrine of work-product protection into the statute in order to determine the scope of the mediation privilege, which they contend is absolute: Documents and other materials prepared for purposes of a mediation are protected from discovery. (See *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 13.) Because the materials in question were never admissible or subject to discovery outside of the mediation, the materials do not fall within the statutory exception of Section 1120. [CAD 9.]

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[11] All references herein, unless otherwise noted, are to the Evidence Code.

It was also pointed out, in the return to the writ petition, that petitioners never represented that they did not have evidence of their own, including photographs and testing materials. They merely represented that they did not have the Coffin materials presented at mediation. [Return in Opposition to Petition at 16 and 22.] Lastly, Coffin and Contractors viewed the issue as a factual question, pointing out that Judge McCoy conducted and determined, after no less than three fact-intensive inquiries, that the materials were prepared for purposes of mediation. Further, Judge Mohr also conducted his own inquiry and arrived at the same conclusions.

Accordingly, the findings of the trial court should not be overturned because the findings are supported by substantial evidence. [CAD 8.]

4. The Court Of Appeal Decision on the Writ Petition

Notwithstanding the points raised by Coffin and Contractors, in responses to the subject writ petition, in a split decision on the matter, the majority issued a peremptory writ of mandate issue in the first instance directing the trial court to vacate its order of March 7, 2002. [CAD 19.]

Consistent with the views expressed in its decision, the Court of Appeal ordered photographs and other materials it deemed to comprise "raw data" to be produced and for the trial court to conduct an in camera review of all materials falling within petitioners' document production, to determine which materials if any remained protected under an "absolute" verses "qualified" privilege, and "derivative" verses "non-derivative" analytic framework, so as to delimit the protections afforded the evidence prepared specifically for mediation. [CAD 18-19.]

In so ordering, the Court of Appeal referenced no prior legal authority, from any jurisdiction, which applied this scheme to the mediation privilege as part of any analytic framework so as to delimit the protections afforded the evidence prepared specifically for mediation. Justice Perluss'

strong dissenting opinion, takes issue with the majority's approach in the subject decision, recognizing the very dangers presented by the majority's attempt to read into the mediation privileged some notion that there are any factors outside Sections 1119 and 1120 which would diminish what is understood to be otherwise, as an absolute privilege. [CADDO 1-4.][12]

[12] "CADDO" refers to the dissenting opinion of the Court of Appeal Decision in this matter, dated October 30, 2002, attached as Exhibit "A" hereto.

LEGAL DISCUSSION

I.

THE LEGISLATIVE INTENT OF EVIDENCE CODE §§ 1119 AND 1120 IS TO MAKE THE MEDIATION PRIVILEGE ABSOLUTE EXCEPT AS EXPRESSLY PROVIDED

The majority opinion in this case appears to turn the legislative intendment of the mediation privilege statutes on their head, by stressing its belief that the absolute and unqualified mediation privilege should nonetheless be limited to prevent misuse of mediation as a pretext to shield certain evidence from subsequent disclosure, during litigation.

A. The Legislative History of the Mediation Privilege Statutes Demonstrates the Confidentiality of the Materials Presented.

As explained by in Justice Perluss, dissent, the California Law Revision Commission in 1985 recommended enactment of former Evidence Code Section 1152.5 to encourage use of mediation as an alternative to a judicial determination of a dispute as well as to protect "statements made and documents prepared in the course of a mediation" from "disclosure in latter judicial proceedings." (Recommendation Relating to Protection of Mediation Communications (Jan. 1985) 18 Cal. Law Revision Com. Rep. (1986) App. III, p. 243.)[13]

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[13] The Commission explained, "Successful mediation of disputes is one way to reduce court congestion and to avoid the cost of litigation. The Commission has considered whether legislation is needed to make mediation a more useful alternative to a court or jury trial. The Commission has concluded that legislation is needed to protect information disclosed in a mediation from later disclosure in a judicial proceeding. . . . [¶] The Commission recommends that a new section be added to the Evidence Code to protect oral and written information disclosed in the

The Legislature, through subsequent amendments to former Section 1152.5 and adoption of Section 1119, which replaced former Section 1152.5, has extended and reinforced the mediation privilege, recognizing that "confidentiality is essential to effective mediation . . . ." (*Foxgate Homeowners' Assn. v. Bramalea California, Inc*. (2001) 26 Cal.4th 1, 14.)

Thus, the background Legislative history expressly sets forth that the purpose and intent behind the mediation privilege is to preserve the confidential nature of that which is prepared and presented for mediation.

B. <u>This Court has Previously Determined that the Mediation Privilege Statutes are Unambiguous as to the Absolute Privilege for Evidence Prepared for Use at Mediation.</u>

The majority purports to acknowledge the precedence established by the Supreme Court in Foxgate, finding that there is nothing ambiguous in the provisions of Section 1119, or the Legislative intent, in its enactment of an unqualified privilege. Moreover, the majority acknowledges the unqualified nature of the privilege, stating as follows:

> "Fortunately, our Supreme Court has spoken on ***the legislative purpose behind the mediation privilege, which is to encourage mediation by providing for confidentiality of documents introduced therein.*** [Citation.] "[T]he purpose of confidentiality is to promote 'a candid and informal exchange regarding events in the past . . . . ***This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other***

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course of a mediation from later disclosure in a civil action or proceeding." (Recommendation Relating to Protection of Mediation Communications (Jan. 1985) 18 Cal. Law Revision Com. Rep., *supra*, App. III, p 245.)

> ***adjudicatory processes***.' [Citations]." [Citation.] Mediation is the preferred method for dealing with many disputes because it conserves resources and avoids subjecting the parties to "'unnecessarily costly, time-consuming, and complex'" court proceedings. The Supreme Court has stressed that "confidentiality is essential to effective mediation," (*ibid*) and therefore, "the statutory scheme . . . ***unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception***." [Citation.]' (Emphasis added.)

Section 1119, subdivision (b), expressly protects from disclosure *all* "writings," as defined by Section 250, "prepared for the purpose of, in the course of, or pursuant to, a mediation."

Absent an express statutory exception "as provided in this chapter," Section 1119 affords absolute confidentiality to writings prepared for a mediation, whether or not the document or other writing is actually used in the mediation itself and whether or not the document is "purely evidentiary" in nature. There is no room in this provision for judicially created limitations. (*Foxgate Homeowners' Assn. v. Bramalea California, Inc., supra*, 26 Cal.4th at p. 4.)

C. <u>This Court has Rejected Other Attempts By the Court of Appeal to Add Judicial Constructions to the Mediation Privilege Statutes in Light of the Clearly Specified Objectives of the Legislature.</u>

This court expressly rejected the attempt by Division 5 to add analogous judicial constructions to Section 1119 in the *Foxgate* decision, *supra*, stating as follows:

> ***We do not agree with the Court of Appeal that there is any need for judicial construction of section 1119 and section 1121 or that a judicially crafted exception to the confidentiality of mediation they mandate is necessary***

> ***either to carry out the purpose for which they are enacted or to avoid an absurd result***. The statutes are clear. Section 1119 prohibits any person, mediator and participants alike from revealing any written or oral communication made during mediation. . . .[¶] ***Moreover, a judicially crafted exception to the confidentiality mandated by section 1119 and section 1121 is not necessary either to carry out the legislative intent or to avoid an absurd result***. The legislative intent underlying the mediation confidentiality provisions of the is clear. The parties and all amici curiae recognize the purpose of confidentiality is to promote 'a candid and informal exchange regarding events in the past. . . This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.' [Citations.]" (Emphasis added.) (26 Cal.4th at pp.13-14.)

Where the analysis of the majority's opinion falters is in its unfounded sense of distrust of parties asserting the privilege and paternalistic concern for potential misuse of the privilege. In this regard, the majority erroneously remarks as follows:

> "Most lawsuits are *factual* disputes, rather than legal ones, which is the reason discovery is often such a difficult and protracted process full of gamesmanship. To give the parties one more avenue where they could hide evidence and obstruct the fact-finding process of litigation would be, in our view, disastrous and would not foster resolution of disputes, but hinder them. Parties could simply agree to mediate, introduce all their evidence, and then refuse to settle, and claim privilege. What then?" [CAD at 17.]

Nothing within this case would bear out the concerns expressed by the majority, as the underlying matter of *Coffin v. KSF Holdings* was successfully mediated in light of the fact that materials could be and were prepared to facilitate a early resolution, without fear of potential

repercussions, given Coffin and Contractors understanding that the materials that were prepared would not be discoverable. [CAD at 3, See also Petition Exhibit D at 120-121; 180-185 and Petition Exhibit H at 11:11-20; and 13:18-26.]

To be sure, as is stated by the majority, pursuant to Section 1120, evidence otherwise discoverable outside of a mediation does not gain protection from disclosure "*solely* by reason of its introduction or use in a mediation . . . ." (§ 1120, subd. (a), italics added.) Section 1120 is thus a statutory limitation on the "in the course of" prong of Section 1119; but, by its plain language, this section does not restrict the scope of the privilege when applied to communications or writings "prepared for the purpose of" a mediation.[14]

Indeed, Section 1120 contains the express exceptions to the absolute privilege provided for evidence prepared exclusively for purposes of mediation.

In this regard, there was no evidence presented here that any of the evidence was prepared to avoid production outside the scope of admissible evidence. In fact, discovery was stayed by the CMO, so there is objective and undisputed proof which establishes that the materials

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[14] As enacted, former Section 1152.5 protected statements or admissions "made in the course of the mediation" (former § 1152.5, subd. (a)(1); Stats. 1985, ch. 731, § 1, p. 2379) and documents "prepared for the purpose of, or in the course of, or pursuant to, the mediation." (Former § 1152.5, subd. (a)(2); Stats 1985, ch. 731, § 1, p. 2379.) When this provision was repealed in 1997 and replaced by Section 1119, the Legislature extended the protection for oral communications to include those "made for the purpose of or pursuant to a mediation, not just oral communications made in the course of the mediation." (Cal. Law Revision Com. com., reprinted at 29B pt. 3 West's Ann. Evid. Code (2002 supp.) foll. § 1119, p. 95.)

derived for purposes of mediation could not be construed as tactic to shield otherwise legitimate discovery from being revealed, through use at mediation. [CAD at 2-3; Petition ¶ 4; Exhibit D:26-27.] ***Thus, while any photographs taken prior to the CMO related to mediation, may have been ruled subject to production, as being outside the scope of the mediation privilege, those taken for the mediation could not .*** [See Petition Exhibit B at 171; Answer to Petition at page 39, footnote 33 and Return in opposition to Petition at 7, footnote 4, 9 at ¶12; 20; see also Petition Exhibit D at 120-121; 180-185 and Petition Exhibit H at 11:11-20; and 13:18-26.]

Contrary to the assertion set forth in the majority opinion, and as articulated in Justice Perluss' dissent, read together, Sections 1119 and 1120 preclude compelled discovery of any writing (including witness statements, photographs and test results) that was, in fact, prepared for use in a mediation. [CADDO 2.]

Even if such material could properly be described as "raw material" or "purely evidentiary," it remains confidential and protected from disclosure, not only because it was used during a mediation, but because it was "prepared for" the mediation, the touchstone for application of the privilege contained in Section 1119. [CADDO 2.] Physical objects that exist independently of the mediation (spore or mold samples, defective piping, for example, or a broken window pane), in contrast, are discoverable even if used at a mediation because, quite apart from the exception contained in Section 1120, they are not statements made or writings prepared for the purpose of mediation within the meaning of Section 1119. [CADDO 2-3.]

The majority's rejection of the plain meaning of Sections 1119 and 1120, which require that all materials introduced at the mediation be

protected as within the scope of the privilege where they were "prepared for the purpose of, in the course of, or pursuant to," the mediation, based on the concern that such an interpretation would "foster the evils it is designed to prevent: namely, using mediation as a shield for otherwise admissible evidence, is itself error. The Court of Appeal is without the power or authority to usurp the function of the Legislature in its enactment of an unambiguous statute. Nor may the Court of Appeal simply rewrite the statute to its own liking based on unsubstantiated concerns as to potential misuses of the statute. (See *Foxgate*, *supra*, 26 Cal.4th at pp.13-14.)

Indeed, in a previous ruling, Division Seven of the Second Appellate District acknowledged there are ***no exceptions*** to the confidentiality of mediation communications. (*Paul v. Friedman* (2002) 95 Cal.App.4th 853, 869, citing *Foxgate*, *supra*, 26 Cal.4th at 4.)

Adequate protections from the "evils" perceived by the majority in their opinion (including potential misuse of mediation privilege to shield "otherwise" admissible evidence) already exist, including, but not limited to, evidence and issue preclusion sanctions. [CADDO 2.] Furthermore, the Legislature has, no doubt, already considered the perceived dangers involved including potential misuses of the privilege, and it has balanced such with the interests of justice, including early case resolution (as occurred with respect to the matter presented in the mediation in this instance), when it in enacted the subject statute.

II.

THE WORK PRODUCT DOCTRINE, DOES NOT PROVIDE THE PROPER AND APPROPRIATE ANALYTIC FRAMEWORK TO DELIMIT THE PROTECTIONS AFFORDED EVIDENCE PREPARED SPECIFICALLY FOR MEDIATION

As set forth above, interjection of judicial constructions to the mediation privilege statutes, including ones gleaned from the work product doctrine statute, is not appropriate and deprive the public of a statutory right.

A. There is No Authority to Support a Judicial Construct of the Nature Purposed or Otherwise.

Divining a distinction between "derivative" and "non-derivative" materials nowhere found in the statutory scheme and acknowledging only a qualified protection from disclosure even for concededly privileged materials, the majority's position in the subject Court of Appeal decision effectively eradicates any significance from the mediation privilege in California.

Indeed, by its very attempt at restricting application and scope of the privilege here, the majority has essential wiped the mediation privilege off the books, and merely reclassified the protections afforded as identical those provided by the work product doctrine. [CADDO 1.] As explained above, this court expressly rejected the attempt by Division 5 to add analogous judicial constructions to Section 1119 in the *Foxgate* decision, *supra*.

The majority errs not only in limiting the scope of the mediation privilege to so-called "derivative" material, but also by recognizing a "qualified" protection for those items it concedes are privileged. The

majority would allow discovery of confidential material prepared for a mediation on a showing of "good cause," which requires "a determination of the need for the materials balanced against the benefit to the mediation privilege obtained by protecting those materials from disclosure." [CADDO at 3.][15]

[15] Coffen and Developers further contend that even if the work product doctrine analysis were applied to the subject evidence, there was no basis for compelling production of this evidence in light of petitioners' failure to meet their burdens of demonstrating that: (a) the evidence was not protected under the qualified privilege; (b) that there was not similarly available evidence which was in petitioners' possession custody and control; and (c) that petitioners had not waived any such claim to the discovery, by agreeing to the multiple in camera inspections, as well as not timely pursuing the issues presented. With respect to these points, Coffin and Developers argued that the photographs were "advocacy" in the sense that were taken to show impressions, and have arrows pointing out significant features. They also argued that the photographs and statements of the expert consultants constituted privileged reports, as they were more than just raw evidence. [CAD 7.] Petitioners' repeated challenges to the privilege assertion appear calculated to seek undiscoverable expert evidence, from non-designated expert consultants in a prior action, including: their testing, reports and statements which constitute analysis and opinions, under the pretext that such constitutes raw evidence which is not protected by the mediation privileged. Coffin and Developers have repeatedly stated there is no raw evidence amongst the materials prepared and presented at mediation. (Further elaboration on these points appears in the Answer to Petition at page 39, footnote 33 and Return in opposition to Petition at 7, footnote 4, 9 at ¶12; 20.) [See also Petition Exhibit D at 120-121; 180-185 and Petition Exhibit H at 11:11-20; and 13:18-26.] Coffin and Developers also brought to the court's attention that petitioners' failure to represent that they did not have photographs or testing of their own, even if such were the case. (Petition Exhibits B at 204:2-9 and H at 24:22-25:10; Return in Opposition to Petition at 16 and 22.] Coffin and Developers also raised their objections, as the same discovery was simply re- propounded and petitioners raised the same issues on grounds previously ruled on. Petitioners further agreed to the multiple in camera review proceedings. Accordingly, petitioners were barred raising any challenge to the trial court's ruling arguing any of the from re propounding the same discovery requests on Coffin and Developers. [Petition Exhibits J-O; Return in Opposition to

As this court explained previously, the Legislature itself balanced those competing interests and concluded that, except as specifically provided by statute, the confidentiality provisions for mediation proceedings are absolute. (*Foxgate Homeowners' Assn. v. Bramalea California, Inc*., *supra,* 26 Cal.4th at p. 4.) "To carry out the purpose of encouraging mediation by ensuring confidentiality, the statutory scheme, which includes Sections 703.5, 1119, and 1121, unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception." (*Id*. at p. 15.) [See CADDO at 3.]

Examination of Section 1122 further underscores the error in this aspect of the majority's holding.[16]

Under Section 1122, absent express agreement from all parties to the mediation, any writing that discloses anything done in the course of the

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Petition at 30-36, and Exhibit 4 thereto; Answer to Petition at 35, 56-57 and, Exhibit 22 thereto.]

[16] Section 1122 provides in full: "(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied: [¶] (1) All 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. [¶] (2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, 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. [¶] (b) For purposes of subdivision (a), if the neutral person who conducts a mediation expressly agrees to disclosure, that agreement also binds any other person described in subdivision (b) of Section 1115."

mediation is inadmissible in a subsequent proceeding and absolutely protected from discovery however great one party's need for those materials may be. Even if it does not reveal anything said or done during the mediation itself, under Section 1122 any writing protected by the mediation privilege is inadmissible and absolutely protected from disclosure unless all parties on whose behalf it was prepared agree, again regardless of another party's need for those materials. The majority's willingness to compel disclosure of mediation materials over the objection of the parties upon a sufficient showing of need is inconsistent with this narrowly drawn exception to the otherwise absolute protection created by Section 1119.

Finally, in this regard, even the Federal authority cited by petitioner below, and specifically, *Ramada Development Company v. Rauch* (5th Cir. 1981) 644 F.2d 1097, does not support the application of a work product doctrine analysis to the mediation privilege. There, defendant Rauch claimed that a report prepared by plaintiff's retained architect, *a year before the action had even been filed*, should have been disclosed. Applying Federal Rules of Evidence, Rule 408 (the Federal equivalent to Section 1119), the Fifth Circuit ruled that the report remained confidential because it was prepared for mediation. (*Id*. at p. 1100.) There, the court observed that Federal Rule 408, does not require that there be a pretrial understanding of or agreement of the parties to regarding the nature of the report. (*Id*. at p. 1107.) Our case is a even stronger one for application of the mediation privilege, as there is no question that the materials were developed for the mediation itself.

Thus, there is considerable authority for the understanding that the mediation privilege must remain intact, without judicial constructs, for the

benefit of the general public, even where the evidence may not have been prepared in the course and scope of the mediation itself.

B. Public Interest Militates in Favor of Protecting an Unabridged and Absolute Mediation Privilege, as was Enacted, without the "Protections" of Any Judicial Constructs.

As set forth above, this case presents an issue involving the abridgement of an important public right, as well as an important legal issue of significant public interest, related to every action which involves the potential for mediation. It involves the degree in which parties may freely develop the facts, evidence and theories related to potential liability and defenses for the specific purpose of mediation only, in an effort to resolve their cases, without concern that evidence developed and presented will be used at trial or elsewhere, should the matter not resolve at mediation.

Without an unqualified privilege in place at mediation, all parties to the mediation process will be extremely reluctant to develop any evidence that may be potentially adverse, but of critical assistance in resolving cases. Moreover, parties will be inclined to opt out of mediation proceedings, as a alternative means of dispute resolution since meditation will become far less effective tool, in the absence of an absolute mediation privilege.

The very heart of a successful mediation forum is its facilitation of the opportunity for litigants to lay all of their cards on the table, without fear of repercussion. This entails use of facts, evidence, and theories developed by the parties, for the sole purpose of resolving the matter at mediation. Implicit in the mediation process is the understanding, based on the protections established by the mediation privilege, that nothing

developed by the parties for the specifically intended use of mediation, can or will be used against them, should the matter not resolve.

The uncertainty created as to the extent of an unqualified privilege would not only be devastating to the mediation process itself, it would also create serious question as to the efficacy of private as well as court ordered mediation as an alternative means of conflict resolution in the State of California.

Of genuine concern to litigants, their counsel, and those involved in the mediation process, throughout the State, is that mediation would simply become an improper discovery tool or mechanism for those not genuinely interested in mediating in good faith. This could be routinely achieved, as is the case here, by merely arguing that the materials brought to the mediation table should be characterized as "purely factual in nature," or alternatively are of a "qualifiedly privileged" or "derivative" nature, which "in balance" should be subject to discovery in light of their relevance or present availability.

The scope of the dangers created by such misuse would be massive in nature, as it would include those who may not have even participated in the mediation process, as well as wholly unknown individuals who were not participants in the litigation or mediation, as was the case here. Such would also include those who decide to take little or no action to properly develop facts, evidence or theories on their own, but are savvy enough to craft arguments regarding what materials others may have brought to mediation and may be subject to discovery. The cost of arguing what materials are and what materials are not subject to the mediation privilege would become prohibitively expensive and costly to those earnestly interested in engaging in the mediation process. **None of this appears to**

have been considered or addressed by the majority in its analysis of the proposed judicial construct.

Thus, aside from the abridgement of a Legislative right, the very purpose of mediation, as a tool for avoidance of large expenditures of time and resources required of litigation, would be essentially become pointless, as parties coming to mediation would do so virtually empty handed, fearing that anything brought to the mediation table could potentially become a weapon to be used against them, in the future, either by the adverse party, should the matter not resolve, or by unknown individuals, in some other matter, regardless of whether the matter resolves at mediation.

III.

OUT OF STATE AUTHORITY FURTHER SUPPPORTS APPLICATION OF THE UNQUALIFIED PROTECTION AFFORDED BY MEDIATION PRIVILEGE AS ENACTED TO PROTECT THE PURPOSE AND POLICIES BEHIND THE MEDIATION PRIVILEGE

Several out of State decisions and other persuasive authority further support the policy and purpose for an absolute and unqualified mediation privilege, as well as the rationale for enforcing the legislative intent articulated by this Court in *Foxgate*.

In *R. R. Donnelly & Sons Co. v. North Texas Steel Co., Inc*. (Ind. Ct. App. 2001) 752 N.E.2d 112, the Third District Court of Appeal, in Indiana, overturned the trial court's erroneous decisions including its admission of: (a) a videotape prepared exclusively for mediation; (b) an undesignated expert's preliminary report compiled specifically for mediation; and (c) oral testimony of a retained consultant who had been not been designated as

expert testimony in advance of trial and whose testimony was offered solely for purposes of mediation.

The R. R. Donnelly & Sons case involved products liability claims arising from the collapse of storage racks at R. R. Donnelly & Sons ("RRD") in Warsaw, Indiana. Appellant, RRD purchased the storage racks, from Associated Material Handling Industries, Inc. ("Associated"). Associated purchased the storage racks from Frazier Industrial Company ("Frazier"). Frazier designed the storage racks and contracted with the North Texas Steel Company, Inc. ("NTS"), to manufacture the component parts of the storage racks. (*Id*. at 120.)

Frazier videotaped shelf beam connection tests for use during mediation. The video depicted a series of *destructive tests* in which welds similar to the ones used in the RRD rack system were subjected to various amounts of weight in order to demonstrate their sufficiency. At one point in the video, some of the welds on an end connector were destroyed in an effort to show that even if some of the welds in a connection were bad, the rack would still be able to hold its load. Therefore, the video supported NTS's theory that even if the welds were not welded to Frazier's specifications, they could have withstood their load and, thus, were not the proximate cause of the rack collapse. Frazier presented the videotape to all parties during mediation. NTS offered the tape into evidence over RRD's contemporaneous objection at trial and prior objection in a motion in limine. (*Id*. at 127.)

RRD claimed that the video should be excluded as a confidential settlement negotiation under Indiana Alternative Dispute Resolution Rule

2.12.[17] Conversely, NTS argued that it acquired the video outside of mediation and no restrictions were placed on its use. Accordingly, NTS contended that the ADR rules did not apply. (*Id*. at 127.)

The Indiana Court of Appeal in *R. R. Donnelly & Sons* found that the videotape was prepared specifically for mediation, and that to allow its use in any subsequent litigation would have a chilling effect on settlement discussions by subjecting opinions and research presented for the sole purpose of settlement negotiations to subsequent disclosure during any lawsuit that may ensue. Accordingly, the appellate court held that the trial court erred by admitting such evidence over RRD's objections. (*Id*. at 130.)

In analyzing the issues presented, the court observed that Indiana's ADR Confidentiality Rule at the time of this mediation incorporated the

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[17] At the time of the mediation in this case, the Indiana ADR Rules provided as follows:

> "Mediation shall be regarded as settlement negotiations. *Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in the course of mediation is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of the mediation process....* Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matter shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by the parties, and an objection to the obtaining of testimony or physical evidence from mediation may be made by any party or by the mediators." (*Id*. at 128.)

language of Federal Rule of Evidence 408. Indiana Rule of Evidence 408 was also determined to be applicable. (*Id.* at 128.) In light of the Federal Rules application, the *R. R. Donnelly & Sons* Court also found the Fifth Circuit Court of Appeal's decision in the *Ramada Development Co., supra, 644 F.2d 1097 particularly relevant to its analysis.* (*Id.*)

There, the Fifth Circuit Court of Appeal agreed with the district court relying on the policy reasons behind the enactment of Federal Rule of Evidence 408. (*Ramada, supra*, 644 F.2d at p. 1107.) Specifically, the *Ramada* court stated:

> "The present rule [408] fosters free discussion in connection with such negotiations and eliminates the need to determine whether the statement if not expressly qualified 'falls within or without the protected area of compromise;' *the question under the rule is 'whether the statements or conduct were intended to be part of the negotiations toward compromise.'* ... The rule does not indicate that there must be a pre-trial understanding or agreement between the parties regarding the nature of the report." (citations omitted, emphasis added) (*Id. at 1106-1107*).

The Court in *R. R. Donnelly & Sons* took its cue from *Ramada* where defendant Rauch attempted to argue that the report was admissible under the exception to Rule 408, which holds that the rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The Fifth Circuit in *Ramada* concluded that "***clearly such an exception does not cover the case where the document, or statement, would not have existed but for the negotiations, hence the negotiations are not being used as a device to thwart discovery by making existing documents unreachable***." (*Id.*; *R. R. Donnelly & Sons, supra* 752 N.E.2d at p. 129)

In arriving at its decision to preclude the videotape, *R. R. Donnelly & Sons* court recognized that **at first blush, the confidentiality rule may seem harsh and appear to be an impediment to future litigation should it arise. "*However, when analyzing the admissibility of evidence of compromise negotiations, we must keep in mind that no 'fruit of the poisonous tree' doctrine is intended*.** (Miller at § 408.101 (citing Graham Handbook § 408.1 at 280-81 (3d ed. 1991))." (*Id*. at 130.)

From this, the court in *R. R. Donnelly & Sons* observed that while the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations, the exception does not extend to a case where the materials presented, including a videotape which would not have existed but for the negotiations. (*Id*.)

Thus, the court in *R. R. Donnelly & Sons* found that whether the trial court erred in by admitting the videotape turned on whether the videotape was produced solely for mediation. **The court found that the evidence demonstrated that the videotape was produced solely for mediation, and concluded that the trial court therefore erred in admitting it at trial**. (*R. R. Donnelly & Sons*, *supra* 752 N.E.2d at 129, 130; citing also *Marchal v. Craig* (Ind. Ct. App. 1997) 681 N.E.2d 1160, 1163.) **Based on this reasoning, the court also found error in admission of an undesignated expert's preliminary report compiled specifically for mediation, as well as oral testimony of a retained consultant who had been not been designated as expert testimony in advance of trial and whose testimony was offered solely for purposes of mediation**.

The factual circumstances in this case are remarkably similar to *R. R. Donnelly & Sons*, as the subject matter of the mediation privilege involves

photographic depictions of, and reports concerning various areas and locations at the subject apartment complex. However, the instant case is even an even stronger one for application of the mediation privilege, as not only is the statute unequivocal (as explained in *Foxgate*), there is no dispute that the materials at issue were undisputedly prepared solely and specifically for the purpose of mediation, which resolved the matter.

IV.

CONCLUSION

Based on the forgoing, it is respectfully requested that this Court overturn the Court of Appeal decision, on each of the issues presented, reaffirm the public's statutory rights, as provided under the Evidence Code, to the absolute, unqualified, and unabridged protections afforded by the mediation privilege, as such constitutes an important pubic right for dispute resolution through this State, a right which the legislature enacted for the benefit of the public at large.

Respectfully Submitted,

DATED: March 17, 2003

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CERTIFICATE OF WORD COUNT

Counsel hereby certifies that the forgoing brief contains 9,054 words according to the computer word processing program.

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PROOF OF SERVICE

STATE OF CALIFORNIA)
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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 55 South Lake Avenue, Suite 220, Pasadena, California 91101.

On March 17, 2003, I served the foregoing document described as **PETITIONER'S OPENING BRIEF ON THE MERITS** on the parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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Executed on March 17, 2003, at Pasadena, California.

JANICE McCROSKEY

SERVICE LIST
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Case Number: BC 214521

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