Case No.: S111585

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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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

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

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REPLY BRIEF

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JULIE COFFIN, Trustee of the 1979
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Introduction

No new laws are needed. No new "bright-line" tests are required. As this Honorable Court has already articulated in *Foxgate Homeowners Association, Inc. v. Bramalea California, Inc.*, (2001) 26 Cal.4th 1, 25 P.3d 1117, 108 Cal.Rptr.2d. 642, and as other courts applying mediation confidentiality have recognized, the confidentiality rule in Evidence Code section 1119[1] sweeps broadly. Because the words "no writings" are

[1] In its entirety, Evidence Code section 1119 provides: "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. [¶] (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."

used in section 1119(b), Justice Perluss correctly analyzed the scope of the protection provided by section 1119 when he stated in his dissent that "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."[2]

[2] Appendix "B" to petition for review, p.2.

Thus, the proper test already exists and is set forth within the statute itself. As stated by Justice Perluss, "any writing (including witness statements, photographs and test results)" is protected from disclosure under section 1119 and section 1120[3] as long as the evidence "was, in fact, prepared for use in a mediation."[4] This test applies "[e]ven if such material can properly be described as 'raw material' or 'purely evidentiary'";[5] as long as the evidence was "prepared for" mediation, "it is confidential and protected from disclosure."[6]

This is the same "but for" test that the trial court used in this case. Both Judge McCoy and his successor, Judge Mohr, looked at "when" the mediation began, and "why" the expert reports, which included expert photographs and expert analysis, were prepared. Judge McCoy also had the actual writings — most of which were marked "mediation privileged" — before him when he made his rulings at an all day in camera review. And he relied on the case management order in *Coffin v. KSF Holdings* that directed real party Julie Coffin to have her retained consultants prepare documents in

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[3] Subdivision(a) of section 1120 provides: "Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation."

[4] Appendix "B" to petition for review, p.2.

[5] Appendix "B" to petition for review, p.2.

[6] Appendix "B" to petition for review, p.2.

anticipation of mediation and to share those documents with the adverse parties in mediation to educate the mediator and the parties in hopes that the case would resolve. The test that was applied worked; the case resolved.

Other courts have also applied this same analysis when interpreting similar laws. In *Ramada Development Company v. Rauch* (5th Cir. 1981) 644 F.2d 1097, the Fifth Circuit, interpreting Federal Rule of Evidence 408, which is analogous to California's mediation confidentiality statute, performed the "but for" analysis when reviewing an architect's report created in 1974, a year before actual litigation had even been filed. The court ruled that the report was still confidential because it "would not have existed but for the negotiations [that occurred during mediation]."[7]

In our case, by holding the in camera review and examining the writings at issue, the trial court had the benefit of knowing what the Court of Appeal could not: the writings from *Coffin v. KSF Holdings* corroborated that they were created expressly for mediation. The trial court also had the benefit of a clear, unambiguous standard in section 1119.

[7] *Ramada Development Company v. Rauch, supra*, 644 F.2d at p. 1107.

Even plaintiffs Genoveva Rojas et al endorse the "but for" rule in their responsive opening brief when, near the end of the brief, they argue that "[i]f a party demonstratesthat this type of 'derivative' material [expert reports, analysis, tests and evaluations which may have been commissioned solely for mediation purposes] would not have existed but for mediation (e.g., it was not prepared outside mediation), then mediation confidentialitydoes, and should, protect that material against disclosure."[8] This surprising admission by the plaintiffs themselves demonstrates, above all else, that the exception to section 1119 created by the Court of Appeal in this case is unnecessary to carry out the legislative intent behind the mediation confidentiality provisions.

1. <u>The Plaintiffs' Responding Brief is Replete with Inaccurate Facts</u>

Without any citations to the record below, the plaintiffs resort to hyperbole and emotion in an attempt to sway this Court.[9] A return to the facts and an emphasis on the law affords this Court with a more thorough and reliable analysis.

First, and most importantly, there was no "raw evidence" from *Coffin v. KSF*

[8] Plaintiffs' opening brief, p. 26.

[9] This is not to allege or imply intentional and multiple improprieties on the part of plaintiffs' counsel — indeed, counsel for real parties in interest do not believe that to be the case. Such a determination is better left to this Court. Plaintiffs' attorneys obviously drafted their opening brief in as good a light as could possibly be cast, for the benefit of their clients. In some instances, however, the line between fact and advocacy is difficult to discern.

Holdings at issue in this case — as the plaintiffs have represented to this Court. The writings in question were consultant reports, which contained photographs and analyses prepared by those consultants. Thus, the claim by the plaintiffs that they are being deprived of "raw evidence" in this case is a red herring.

Second, tens of thousands of documents have been produced to counsel for the plaintiffs and placed within a document depository for access by all litigants. It is only a small group of documents that Ms. Coffin and the other defendants claim are protected from disclosure by Evidence Code section 1119.

Third, all documents were turned over to the trial court by Ms. Coffin and the other defendants for the in camera review conducted by Judge McCoy, and the parties prepared privilege logs for those documents claimed to be privileged under section 1119 and other applicable grounds. These privilege logs were given to the counsel for the plaintiffs before the hearing, and Judge McCoy handwrote his rulings on the privilege log created by counsel for Ms. Coffin so that the exact basis for the rulings would be known to all parties, including the plaintiffs. Thus, it is simply wrong for the plaintiffs to suggest in any way that the real parties did not turn over all the writings to the Court or that Ms. Coffin did not provide an adequate privilege log.

Fourth, Ms. Coffin did not "compile" evidence and place it "into what the owners

then labeled a 'mediation' binder."[10] Instead, the writings at issue were specifically created for the mediation ordered by the court in *Coffin v. KSF Holdings*. Rather than being "sold" to other counsel, the documents were available to other participants in mediation for copying costs.

Fifth, Ms. Coffin and the other owners did not "pocket" millions of dollars from the settlement in *Coffin v. KSF Holdings* and then fail to use the money to aid the "true victims of the defects — the tenants."[11] Not only is such argument ad hominen completely false, but it is contradicted by later statements in the plaintiffs' brief that show that the apartment complex was repaired:

[10] Plaintiffs' opening brief, p. 3.

[11] Plaintiffs' opening brief, p. 1.

> 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 the 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.[12]

Although the plaintiffs make the wild charge that the money was "pocketed," they, in fact, never conducted any meaningful discovery about how Ms. Coffin actually spent the settlement money, i.e., attorneys' fees, expert fees, costs of closing a building for a year. This is in spite of the fact that the repair bills were in the document depository.

2. Ms. Coffin Does Not Claim That All Documents from *Coffin v. KSF Holdings* Are Protected from Disclosure under Evidence Code Section 1119 — Only Those "Prepared For" the Mediation in That Case

Contrary to the claims of the plaintiffs in their responsive opening brief, it has never been the position of Ms. Coffin that "all documents [in *Coffin v. KSF Holdings*] had been prepared for the mediation and were therefore protected by the mediation privilege." To begin with, as discussed above, most of the documents from *Coffin v. KSF Holdings* have been produced and placed within a document depository for access by all litigants, and

[12] Plaintiffs' opening brief, p. 6.

only a small group of documents were claimed to be confidential. It has been Ms. Coffin's position — both before the trial court and later before the Court of Appeal — that the documents at issue were prepared for mediation in compliance with the case management order in *Coffin v. KSF Holdings*, and that they are protected from disclosure under Evidence Code section 1119, as well as other grounds, e.g., attorney-client privilege, work-product doctrine. Both Judge McCoy and Judge Mohr determined that there was no doubt that the writings at issue were created "for the purpose of, in the course of, or pursuant to" the mediation in *Coffin v. KSF Holdings.*

In response to the plaintiffs' alarms that the Evidence Code provisions were not designed to permit litigants from shielding evidence, otherwise admissible, by merely introducing it in a mediation and then claiming the cloak of confidentiality, Ms. Coffin and the other real parties agree wholeheartedly. This is already the law, and is contained within the provisions of Evidence Code section 1120.

It cannot be overemphasized that the writings determined to be protected from disclosure were created only because the trial court in *Coffin v. KSF Holdings* ordered the parties to create them for the purpose of educating the mediator and other participants in resolving a complex case. In spite of plaintiffs' dire warning that had *Coffin v. KSF Holdings* not settled, the parties would have been deprived of all evidence at trial, such a notion is dispelled by the actual facts. In fact, the case management order in *Coffin v. KSF*

Holdings contained the following provision, ignored or overlooked by the plaintiffs' attorneys:

> [I]n 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, non-privileged Final Defect Report and Cost of Repair. ("Discoverable Final Defect List and Cost of Repair["]). The Discoverable Final Defect Report and Cost of Repair shall be deemed a written report by an expert witness. No prior versions or portions thereof are admissible for any purpose.[13]

Thus, "but for" the order of confidentiality in *Coffin v. KSF Holdings*, the expert reports would not have been created in the form as they existed and were used at mediation. No final, discoverable reports were ever created because the case settled as a result of mediation. Plaintiffs' concerns are unfounded.

And because the documents were prepared for the purposes of mediation, the documents do not, as the plaintiffs claim, consist of what the Court of Appeal majority called "raw evidence," i.e., test data, photographs, and witness statements. As Justice Perluss succinctly pointed out in his dissent, the documents at issue cannot be such "raw evidence" in light of the determination by the trial court that they were "prepared for" the purposes of mediation:

> Physical objects that exist independently of the mediation (spore or mold samples, for example, or a broken window pane), in contrast, are discoverable even if used at a mediation because, quite apart from the exception contained

[13] Exhibits to answer to petition for writ of mandate, 140:12-27.

> in section 1120, they are not statements made or writings prepared for the purpose of mediation within the meaning of section 1119.[14]

Thus, it is only because the documents were, in fact, prepared for the purposes of mediation that Ms. Coffin claimed that they were protected from disclosure under section 1119. Yet again, plaintiffs' concerns have no factual foundation.

3. The Absolute Confidentiality for Documents "Prepared For" Mediation Provided in Section 1119 Should Not Collapse Based on the Mere Claim of Need by the Plaintiffs

In its opinion, the Court of Appeal majority was concerned by arguments made by the plaintiffs that they had no access to the documents prepared in *Coffin v. KSF Holdings* and needed them to litigate their claims against Ms. Coffin and the other defendants. The court said:

[14] Appendix "B" to petition for review, p.2.

[W]e therefore reject Coffin's reading of sections 1119 and 1120 that all materials introduced at the mediation, or prepared for the mediation, including those of a purely evidentiary nature, are encompassed within the scope of the privilege because they were "prepared for the purpose of, in the course of, or pursuant to," the mediation. Such a reading would render section 1120 complete surplusage and foster the evils it is designed to prevent: namely, using mediation as a shield for otherwise admissible evidence. If we were to read sections 1119 in this fashion, in isolation, without reference to section 1120, parties such as the petitioners in the instant case would have no access to necessary and relevant factual materials with which to conduct their litigation.[15]

[15] Appendix A to petition for review at p. 14.

But these concerns are without basis. It was never the reading of Ms. Coffin that all materials introduced at the mediation are privileged. Ms. Coffin seeks nothing more than what the law guarantees: No writing "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."[16]

And while plaintiffs repeat the concerns expressed by the Court of Appeal, arguing that the opinion correctly "ensures application of the Legislature's express intent that mediation confidentiality not be abused to deny a litigant access to properly admissible and discoverable evidence,"[17] Evidence Code section 1120 already does that.

Here, as in *Foxgate Homeowners Association, Inc. v. Bramalea California, Inc.*, *supra*, the literal language of the statute is all that is required for application by the trial courts. It does not create unfair or unacceptable results. In spite of the representations by the plaintiffs to this Court that they established below that "the physical evidence . . . that was introduced and used in the mediation was otherwise admissible [under Evidence Code section 1120]"[18] and that "[t]here was good cause for their discovery,"[19] no such

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[16] Evid. Code, § 1119(b).

[17] Plaintiffs' opening brief, p. 4.

[18] Plaintiffs' opening brief, p. 24.

[19] Plaintiffs' opening brief, p. 24.

findings were ever made.[20]

[20] Logically, it is obvious that if the trial court had found that the documents were "otherwise admissible," Evidence Code section 1120 would apply and there would be no dispute before this Court.

Moreover, the plaintiffs' "due process" type argument has been addressed — and dismissed — by other courts. Recently, in *In re Anonymous* (5th Cir. 2002) 283 F.3d 627, the Fifth Circuit, when interpreting the meaning of a local rule providing, in part, that "[i]nformation disclosed in the mediation process shall be kept confidential and shall not be disclosed to the judges deciding the appeal or to any other person out the mediation program participants,"[21] addressed a due process argument similar to the one articulated by the plaintiffs here. In that case, an attorney disciplinary action arose when participants to a successful court-sponsored mediation in a Title VII action disclosed information in a collateral dispute over attorneys' fees. The court addressed many issues, including whether, and under what standard, the confidentiality of a mediation may be waived for future disclosures. After thorough analysis of arguments that the parties would be deprived of their due process rights because they would not be able to access certain information from the mediation, the court ruled that the local rule did not deprive participants of a forum for resolution of disputes in a collateral litigation. Rather, the court stated that the rule limits the availability and use of information gleaned during the mediation in subsequent proceedings.[22] The court added that "[c]ourts routinely have recognized the substantial interest of preserving confidentiality in mediation proceedings

[21] *In Re Anonymous, supra*, 283 F.3d at p. 632.

[22] *Id.*, at p. 634.

as justifying restrictions on the use of information obtained during the mediation. [Citation.][23]

In addition, the court in *In re Anonymous* noted that "mediation" is not a limited term, as plaintiffs and some amici curiae in this case suggest:

> Although Rule 33 does not specifically define the duration of "mediation" for purposes of maintaining confidentiality,it is plain that the "mediation" is not limited to the mediation conference, but continues until the mediated dispute has either been dismissed or is otherwise removed from the [Office of the Circuit Mediator for the Court]. This conception of the duration of mediation is a practical necessity of the process itself, in that the mediated dispute is rarely conclusively resolved during the mediation conference. Instead, the parties to the dispute often resume mediation, or refine aspects of the settlement agreement, subsequent to the mediation conference, and many times do so outside the presence of the mediator. These conversations and the information disclosed therein are entitled to the same degree of confidentiality as disclosures made during the mediation conference.[24]

Here, the trial court determined that mediation in *Coffin v. KSF Holdings* was an on-going process that began long before the case management order was signed. Consequently, the plaintiffs' request that this Court somehow permit them access to documents created before the case management order[25] is misguided. In fact, the factual

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[23] *Ibid.*

[24] *Id.*, at p. 635.

[25] Plaintiffs' opening brief, pp. 26-27.

determination that the plaintiffs ask this Court to make was addressed long ago by Judge McCoy after reviewing the writings in issue:

> The Court's September 18, 2000 Statement of Decision did not foreclose the possibility that documents produced before July 2, 1998 *may* be protected by the mediation privilege. That was one of the very purposes of the *in camera* review — to determine whether documents prepared before July 2, 1998 were subject to the mediation privilege. Rather, that Court stated that the defendants' blanket mediation privilege objection was overbroad because it may have encompassed documents subject to the discovery process prior to entry of the [Case Management Order] which were not prepared for mediation purposes. The Court's statement, however, did not foreclose the possibility that documents had been prepared for mediation prior to entry of the CMO and would be protected by the mediation privilege.[26]

Therefore, while the plaintiffs here may not have liked the decision of the trial court that, "but for" mediation, the documents would not have existed, that is not sufficient justification for the Court of Appeal to create a new standard. The language that was drafted by the Legislature and already in place provides clear guidance for all courts to determine whether documents are protected from disclosure because they were prepared for purposes of mediation only.

4. Contrary to the Plaintiffs' Claim, They Did Not Establish "Good Cause" Justifying the Creation of an Exception to the Absolute Protection Afforded by Section 1119

[26] Exhibits to answer to petition for writ of mandate, p. 900.

The plaintiffs claim that they established "good cause" below sufficient to destroy the confidentiality provided by section 1119.[27] That simply is not true.[28]

This observation is not made merely to correct the record but to prove a point. A judicially created exception to the Evidence Code provision that permits disclosure of confidential documents upon a later showing of "good cause"opens the door for manipulation of facts and the record. Because the Evidence Code itself does not provide for disclosure of the materials upon a showing of "good cause," such a disruptive exception should not be created in this case or in any other case. Otherwise, no attorney honestly advising a client will be able to assure that client that what is prepared for mediation will remain confidential because, without the clear provision of confidentiality as articulated in Evidence Code section 1119, that attorney will be unable to predict what may be articulated as sufficient "good cause" to sway a court sometime in the future.

5. Conclusion

[27] Plaintiffs' opening brief, p. 24.

[28] As with the claim that the documents were "otherwise admissible," this could not be the case because the Court of Appeal ordered the trial court to conduct yet another in camera hearing to evaluate the writings under the newly created standard.

Ensuring the confidentiality of documents prepared for and used in mediation as envisioned by the Legislature does not lie in creating new law not articulated by that body. Such law already exists and was applied properly at the trial court level. Evidence Code section 1119 sets forth all that is needed. And Evidence Code section 1120 addresses the concerns expressed by the Court of Appeal that evidence cannot be shielded from discovery merely because it is introduced at mediation.

Judge McCoy and, later, Judge Mohr determined that there was no doubt that the writings at issue were created "for the purpose of, in the course of, or pursuant to" the mediation in *Coffin v. KSF Holdings.* In making this determination, both Judge McCoy and Judge Mohr were aware of the exception articulated in section 1120 and necessarily found that the writings were not "otherwise admissible" or "subject to discovery."

While the plaintiffs portray confidential communications as only benefitting those with a nefarious purpose, to attempt to cloak confidential communication in such a dark shadow misrepresents the importance of the freedom to be able to discuss the strengths and weaknesses in a case with other litigants in a way that does not bind a party to one theory. No new rule or bright-line test needs to supplant that which already exists by way of the Legislature.

Dated: June ___, 2003 WATTEN, DISCOE, BASSETT & McMAINS

By: _____

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BRIEF ON REVIEW

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