

Case No. S147848

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

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**MICHELLE SIMMONS, etc., et al.,**

Plaintiffs and Respondents,

vs.

**LIDA GHADERI,**

Defendant and Appellant.

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After a Decision by the  
Court of Appeal of the State of California  
Second Appellate District, Division Three  
Case No. B180735  
(Los Angeles Super. Ct. No. BC 270780)

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**APPELLANT'S REPLY BRIEF**

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## INTRODUCTION

Dr. Ghaderi established in her opening brief that the court of appeal erred in invoking a judicially created exception based on estoppel to the mediation confidentiality statutes to hold that the parties entered into an oral settlement agreement at mediation. The lower court's ruling is contrary to the terms of the mediation confidentiality statutes which make inadmissible evidence generated at or for mediation (Evid. Code, § 1115, et seq.) and limit any exception to those set forth expressly in the statutes. (*Id.*, §§ 1118, 1122, 1124.) It also is contrary to three decisions of this Court which have disallowed judicially created exceptions similar to estoppel and interpreted narrowly a statutory exception to mediation confidentiality. (*Fair v. Bakhtiari* (2006) 40 Cal.4<sup>th</sup> 189; *Rojas v. Superior Court* (2004) 33 Cal.4<sup>th</sup> 407; *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4<sup>th</sup> 1.)

Respondents' opposition brief does not address *any* of the foregoing issues. Respondents do not discuss nor consider the language of the mediation confidentiality statutes in any detail. They neither mention nor address two of this Court's rulings regarding mediation confidentiality (*Fair* and *Rojas*), and only peripherally discuss the third (*Foxgate*). Nor do Respondents seek to support the court of appeal's reliance on estoppel as an exception to mediation confidentiality.

The majority of Respondents' brief is devoted to discussion of an issue of their own creation which is *not* before this Court: “[w]hether the insurance company or the doctor is in control of the mediation process after written consent to settle by the doctor has been given.” (Respondents' Brief (“RB”) 4, 21-34.) Unless otherwise ordered by the Court, the parties' briefs on the merits must be confined to “any issues that are raised or fairly included in the petition or answer.” (Cal. Rules of Court, rule 8.516(b)(1); see also *id.*, rules 8.516(a)(1), 8.520(b)(3).) Respondents did not file an answer. Their new issue was first presented in their opposition brief on the merits; it cannot be deemed “fairly included” in the issue presented by Dr. Ghaderi in her petition for review. Accordingly Dr. Ghaderi will not address any of Respondents' arguments in support of their newly-submitted issue because they are prohibited by the California Rules of Court.

Respondents address the mediation confidentiality statutes only to assert that they are inapplicable to this case for two reasons—neither of which is supported by the record or controlling authorities. First, Respondents argue that it is “uncontroverted” that the mediation was successful resulting in an enforceable settlement agreement and thus mediation confidentiality cannot bar disclosure of “the fact that a case settled” or “the terms of settlement.” (RB 2-4.) The issue on this appeal is *whether* there can be an enforceable oral settlement agreement when all the evidence upon which it is based is inadmissible under the mediation

confidentiality statutes. The scope and meaning of the mediation confidentiality statutes are central to the issue presented here.

Second, Respondents' argument that Dr. Ghaderi waived her right to assert that no enforceable settlement agreement exists due to her conduct before the trial court is foreclosed by *Eisendrath v. Superior Court* (2003) 109 Cal.App.4<sup>th</sup> 351, 360. *Eisendrath* rejected the argument that a party had impliedly waived confidentiality by submitting a declaration to the trial court in which he recounted the events and conversations that occurred at mediation. Respondents fail even to cite, no less discuss, *Eisendrath* as they were required to by law. (*Pierotti v. Torian* (2000) 81 Cal.App.4<sup>th</sup> 17, 31; *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 884-886.)

Respondents' arguments also are based on a misrepresentation of the record:

(1) Respondents erroneously assert that Dr. Ghaderi signed the consent form “[p]rior to commencement of the mediation.” (RB 1, italics added.) The record is clear that the consent form upon which the trial court largely relied to find an enforceable settlement agreement was signed by Dr. Ghaderi at the mediation at the insistence of the mediator. Respondents do not dispute that the other evidence on which the trial court relied to find an oral agreement emanated from the mediation.

(2) Respondents incorrectly state that both Dr. Ghaderi and her counsel admitted to the trial court the existence of an enforceable settlement agreement. (RB 5, 34-45.) The record is clear that, at all times, both Dr. Ghaderi and her counsel—while acknowledging the events that transpired at the mediation—maintained that these events did *not* create an enforceable settlement agreement. At trial, Dr. Ghaderi repeatedly objected to the admission of the evidence upon which the trial court relied to find an oral settlement agreement based on the mediation confidentiality statutes.

Contrary to Respondents' assertion, it was the trial court (not Dr. Ghaderi or her counsel) who suggested that a binding oral settlement agreement had been reached at the mediation and suggested that Respondents seek leave to amend the complaint to allege breach of an oral contract—which claim the trial court upheld. The trial court thus was the architect of the judgment. In their haste to settle this case, the trial court and then the court of appeal refused to enforce the confidentiality requirement of mediation proceedings guaranteed by statute and the decisions of this Court. The decision below should be reversed and Dr. Ghaderi should be granted a trial on the merits of the malpractice claim.

#### **RESPONDENTS MISREPRESENT THE LITIGATION HISTORY**

Respondents misrepresent a number of key facts to support their argument that the parties entered into an enforceable settlement agreement.

**I. DR. GHADERI SIGNED THE CONSENT FORM AT THE MEDIATION AT THE INSISTENCE OF THE MEDIATOR**

Respondents argue that “[p]rior to the commencement of mediation with the Appellant, GHADERI provided written consent authorizing her medical malpractice insurance carrier CAP-MPT to settle this case ... As a result of GHADERI providing consent for settlement, the mediation commenced ....” (RB 1-2, italics added.) This assertion is contradicted by the record. It is undisputed that the consent form was signed at the mediation at the insistence of the mediator.<sup>1</sup>

Martin Berman, Respondents’ counsel before the lower courts and this Court, stated in a declaration signed under oath:

“On July 9, 2003 all parties attended mediation before the Hon. Robert Altman. *At that time*, GHADERI consented in writing to allow her malpractice insurance carrier to settle the instant matter ...”

(1 Joint Appendix (“JA”) 14:10-12, italics added.) In a subsequent declaration, Mr. Berman stated in greater detail the circumstances surrounding Dr. Ghaderi’s completion of the consent form:

“On July 9, 2003 the parties attended mediation with the Hon. Robert T. Altman (Ret.). Initially, the issue of consent to settle the case had to be dealt with. At the outset of the mediation, GHADERI had not provided consent

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<sup>1</sup> Indeed, elsewhere in their brief, Respondents acknowledge that Dr. Ghaderi was presented with the consent form “[a]t the beginning of the mediation.” (RB 11.)

to her insurance carrier, [CAP-MPT], to allow CAP [sic] settle the matter on her behalf. Judge Altman after meeting with all counsel broke the matter into caucus and proceeded to discuss the issue of consent with GHADERI's attorneys .... Also present was Ms. Obi Amanqugi, a claims specialist from CAP. Shortly thereafter, these discussions also included GHADERI. Eventually, GHADERI consented [at the mediation] to allow CAP to settle this case.”

(1 JA 27:10-18.) Indeed, by Mr. Berman's own account, “*a good part of the mediation ... dealt with the consent issue from Dr. Ghaderi who eventually provided written consent to settle the case.*” (R.T. 1:23-27, italics added.)

In addition, Judge Altman stated in his declaration:

“When the attorneys and parties appeared at my office, I was advised by defense counsel that Dr. Ghaderi had not consented to a settlement. I told the attorneys that it was pointless to discuss the case without Dr. Ghaderi's consent. They agreed and Mr. Reback, cumis counsel for Dr. Ghaderi, then met separately with Dr. Ghaderi. ... After meeting with Dr. Ghaderi, Mr. Reback advised me that Dr. Ghaderi had given her consent. I then proceeded to settle the case ...”

(1 JA 33:22-34:2.) While California Business & Professions Code section 801, subsection g,<sup>2</sup> requires the written consent of an insured prior to the insurer entering into a settlement agreement, it does not require that

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<sup>2</sup> California Business & Professions Code section 801, subsection g, requires that “no insurer shall enter into a settlement [agreement] without the written consent of the insured.”

this consent be obtained *before* the commencement of any settlement negotiations as Judge Altman insisted.

**II. THE DAY FOLLOWING MEDIATION, THE PARTIES' COUNSEL DID NOT TELL THE TRIAL COURT THAT THEY HAD ENTERED INTO AN ENFORCEABLE SETTLEMENT AGREEMENT**

Respondents claim that the day after the mediation, on July 10, 2003, “the *parties advised the court* that a settlement had been reached the day before at mediation, causing the court to advance and to vacate the trial which had been set to commence on July 14, 2003.” (RB 5, italics added.) They further assert that “counsel for Ghaderi recited the terms of the agreement into the record in open court on July 10, 2003.” (RB 42.) These assertions are contradicted by the record.

Both counsel to CAP-MPT and to Respondents, while acknowledging the events that occurred at the mediation, expressed to the trial court their uncertainty as to whether these events had resulted in a settlement. At the July 10 hearing, in response to the trial court’s speculation that “maybe there is an enforceable settlement agreement,” Kent Brandmeyer, Dr. Ghaderi’s CAP-MPT counsel, stated:

“That would certainly be one interpretation. What I would like to do – this all happened yesterday at 6:00 p.m. I would like to have a chance to talk to the in-house corporate Counsel for the insurance company. ... [Dr. Ghaderi’s Cumis Counsel] is trying to talk to this doctor to get her to sign off. This thing is in progress and we are hoping to resolve it. And if we don’t

resolve it with her, maybe we can still take the position that it's enforceable based upon what occurred yesterday afternoon."

(R.T. 4:10-19.)<sup>3</sup>

At the same hearing, Mr. Berman, Respondents' counsel, told the trial court that he was "somewhat flummoxed" by the mediation (R.T. 2:3.) and did not "quite know[ ] exactly what it means." (R.T. 4:23-24.) He further stated that CAP-MPT and its counsel were "somewhat concerned that absent [Dr. Ghaderi's] signature on the settlement agreement that they may be treading into an area that is a little murky for them. I'm not smart enough, Your Honor, to tell you whether that's true or not." (R.T. 2:7-11.) Indeed, Mr. Berman stated that he could "see where they would legitimately want to explore this." (R.T. 5:4-5.)

### **III. DR. GHADERI AND HER COUNSEL AT ALL TIMES MAINTAINED THAT THERE WAS *NO* ENFORCEABLE SETTLEMENT AGREEMENT**

Respondents argue that Dr. Ghaderi and her counsel conceded that a settlement agreement was reached at the mediation and set forth the "essential terms of the settlement." (RB 43; see also *id.*, 34-45.) This assertion is also contradicted by the record.

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<sup>3</sup> A week later, on July 17, 2003, and after consulting with CAP-MPT, Mr. Brandmeyer told the trial court that CAP-MPT would not honor a settlement agreement unless it was signed by Dr. Ghaderi. (R.T. 14:15-20.)

Dr. Ghaderi and her counsel at all times maintained that there was no enforceable settlement agreement. On July 17, 2003, after conferring with in-house insurance counsel, Dr. Ghaderi's CAP-MPT counsel, Mr. Brandemeyer, informed the trial court that CAP-MPT would not honor any settlement agreement that was not signed by Dr. Ghaderi. (R.T. 14:15-20.) On July 29, 2003, Dr. Ghaderi personally informed the trial court of her lack of consent to the settlement agreement. (R.T. 18-25.) Dr. Ghaderi and her counsel continued to dispute the existence of a settlement agreement in their opposition to Respondents' motion to enforce settlement under Code of Civil Procedure section 664.6 (1 JA 36-58) and in their motion for summary adjudication on Respondents' breach of oral contract claim. (1 JA 100-123, 193-198.) Finally, at trial, they repeatedly objected to the admissibility of the evidence upon which the trial court relied to find an oral settlement agreement. (2 JA 245-263, 306-316; R.T. 57-60, 77-78, 99.)

Indeed, the evidence on which Respondents rely to support their argument shows simply that Dr. Ghaderi and her counsel were truthful in their recounting of the events that occurred at the mediation, not that they admitted to a binding settlement agreement or to "the terms of the settlement agreement." (RB 17-19, 42-45 citing to Dr. Ghaderi's declaration at 1 JA 147; Dr. Ghaderi's deposition testimony at 2 JA 239-

240; and Dr. Ghaderi's counsel Melanie Schornick's declaration at 1 JA 42-43.)

Finally, Respondents' reliance on the opinion of Obi Amanugi, the claims adjuster, as to whether a settlement agreement had been reached is unavailing. (RB 34-35.) Ms. Amanugi's opinion is not relevant to or determinative of the legal question whether the parties had entered into a binding settlement agreement. Further, Ms. Amanugi testified at trial that she made it known to the mediator and the Respondents on the day of the mediation that CAP-MPT deemed Dr. Ghaderi's revocation valid and that it did not believe a settlement agreement had been reached. (R.T. 83-84, 87-89.)

#### **IV. THE TRIAL COURT WAS THE ARCHITECT OF AN ORAL SETTLEMENT AGREEMENT PURPORTEDLY REACHED AT MEDIATION**

Contrary to Respondents' assertion, it was the trial court (not Dr. Ghaderi or her counsel) who argued that a binding settlement agreement had been reached at the mediation:

- At the July 10, 2003 hearing, the trial court speculated that "so maybe there is an enforceable settlement agreement."  
(R.T. 4:8-9.) On its own initiative, the trial court vacated the

