

IN THE COURT OF APPEALS OF THE STATE OF OREGON

GREGORY A. CHAIMOV,
Plaintiff-Respondent,

v.

STATE OF OREGON,
by and through the Oregon Department of Administrative Services,
Defendant-Appellant.

Marion County Circuit Court No. 18CV39159

Court of Appeals No. A169203

ORDER GRANTING STAY

Defendant appeals from the trial court's General Judgment that, as applicable here, requires defendant to disclose certain documents to plaintiff's attorney no later than Friday, October 26, 2018. Defendant moves for confirmation that the General Judgment is subject to the 14-day automatic stay provided for in ORS 19.360(1) or, in the alternative, to review the trial court's denial of defendant's request for a stay under ORS 19.350.

Whether Automatic Stay under ORS 19.360(1) is in Effect

It appears defendant moved the trial court to stay enforcement pending appeal, and that the trial court has orally denied that motion. It does not appear that the trial court has entered a written order ruling on the motion. Whether the trial court has entered a written order ruling on defendant's motion is important because, under ORS 19.360(1), unless the trial court orders otherwise, the General Judgment is automatically stayed for a period of 14 days from the date of entry of the written order.

It appears from the trial court register that the trial court has not yet entered a written order ruling on the motion for stay. However, the trial court record contains a print-out of an email from the trial judge's judicial assistant to the parties relaying the trial judge's statement that she expected the denial of the stay to "fall under the 'unless orders otherwise' language of ORS 19.360."

If the trial court enters a written order that the automatic stay is not in effect, then, the automatic stay is not in effect.

It follows that the automatic stay contemplated by ORS 19.360(1) is not in effect because the trial court has not entered a written order ruling on defendant's motion for stay and, if the trial court has and will enter such an order, it appears to be the trial judge's intent to disavow the automatic stay.

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Whether to Grant Discretionary Stay under ORS 19.350

Where the trial court enters a written order ruling on a motion for stay, ORS 19.360 confers authority on this court to review that decision. But, here, the trial court has not yet entered a written order; therefore, there is nothing for this court to review under ORS 19.360.

ORS 19.350(5) authorizes this court to act on a party's motion for discretionary stay "if the party establishes * * * that the trial court is unable or unwilling to act on the request within a reasonable time." The court determines it has authority to act under ORS 19.350(5) because the trial court has not yet entered a written order memorializing its ruling on defendant's motion for stay.¹

Under ORS 19.350(3), the court must consider whether the appeal is taken in good faith and not for the purpose of delay, whether there is support in fact and in law for the appeal, the likelihood that the appellant will prevail on appeal, and the harm that will result to the parties or others, including the public, depending on whether the court grants or denies a stay, and may consider "other factors as the * * * court considers important."

The court determines that defendant is taking this appeal in good faith and not for the purpose of improper delay.²

There also is support in fact and in law for the appeal. The Public Records Law, ORS 192.311 to 192.478, generally favors public disclosure of public records, but ORS 192.355(9) exempts from disclosure "[p]ublic records or information the disclosure of which is prohibited and restricted or otherwise made confidential or privileged under Oregon law." ORS 40.225(2) provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."

¹ There does not appear to be much difference between the court acting under ORS 19.350(5) instead of ORS 19.360(1) because the court's scope of review respecting factual issues under ORS 19.360 is *de novo*. ORS 19.360(2).

² The court is not oblivious to the political context of this case and that a stay may work to the advantage of one party or candidate (or that denying a stay may work to the advantage of another party or candidate) in the general election that concludes in early November 2018, well before a department of this court can render a decision on the merits of the appeal. But that is not the kind of delay to which ORS 19.350(3)(b) refers, at least not where the appeal otherwise is taken in good faith. The legal issue presented by the appeal is a legitimate one and worthy of an appellate court's attention and defendant in good faith is seeking an appellate court resolution of the issue.

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Since at least May 2018 the Governor and, thereafter, the various state agencies submitting legislative suggestions to the Governor, operated under the assertion that the legislative concepts and supporting materials are privileged and confidential. Once the materials are submitted to Legislative Counsel, Legislative Counsel must treat them as confidential. ORS 173.230. And while, generally, under ORS 180.220, the Department of Justice is responsible for providing legal services and representation to state administrative agencies, a state agency, like any client, can have more than one attorney for different legal matters. It is within the legislature's authority to provide that an entity other than the Department of Justice – here, Legislative Counsel – will provide one discrete type of legal service – drafting proposed legislation – to a state agency. The legislature may have done so in adopting ORS 173.130(2), which in material part, provides:

Upon the written request of a state agency, the Legislative Counsel may prepare or assist in the preparation of legislative measures that have been approved for preparation in writing by the Governor or the Governor's designated representative. * * * * In accordance with ORS 283.110, the Legislative Counsel may charge the agency * * * for the services performed.

And, if so, the communications between Legislative Counsel and the state agencies relating to preparation or assisting in the preparation of legislative measures may be subject to the attorney-client privilege.

Conversely, this court ultimately may determine that ORS 173.130(2) is not an exception to ORS 180.220, or that preparing or assisting in the preparation of legislative measures is not the practice of law.³ Or plaintiff may be correct that a state agency waives the privilege in any instance in which an authorized agency representative has disclosed to stakeholders the existence of the legislative concept or disclosed the materials used to transmit the legislative concept to the Governor to stakeholders.

At this point, the court need not decide whether defendant is correct or plaintiff is correct regarding resolution of the legal issues presented in the case. It is sufficient to determine that there is support in fact and in law for the appeal and that defendant has shown a reasonable possibility of prevailing on appeal.

Respecting the harm that will result to the parties or to the public depending on

³ Defendant observes that ORS 173.130(5) excepts bill drafting from the general prohibition that Legislative Counsel must not provide opinions or other "legal services" to agencies, implying that at least the Legislature has determined that bill drafting is a legal service, therefore arguably within the scope of the attorney-client privilege. It is less clear to the court that, generally speaking, drafting proposed legislation is a legal service within the practice of law.

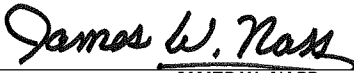
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whether a stay is granted or denied, defendant asserts that denying a stay will destroy the confidentiality that arises from the attorney-client privilege, and that compelled disclosure likely will render the appeal moot and may result in this court not deciding the appeal. Plaintiff protests that the Governor intends to disclose the materials on November 30, 2018, when Legislative Counsel files the draft bills with the Legislature. But if the materials truly are subject to the attorney-client relationship, that the client has stated the intent to waive the privilege and disclose the materials at a later time does not mean that the client is barred from asserting the privilege now.

Nor does it matter that if this court later decides that the materials are subject to the attorney-client relationship and the materials may not be used as evidence in a court, because the attorney-client privilege protects against disclosure of materials subject to the privilege for any purpose. One thing is certain, if the materials are disclosed for the purpose of public discourse, the genie cannot be put back in the bottle, even if this court subsequently determines the attorney-client privilege protects against disclosure of the materials.

After considering all of the factors under ORS 19.350(3), the court determines that the part of the trial court's judgment requiring disclosure of the materials in question should be stayed pending resolution of this appeal or further order of the court.


JAMES W. NASS
APPELLATE COMMISSIONER
10/26/2018 4:25 PM

c: John DiLorenzo, Jr.
Denise G Fjordbeck
Jona Jolyne Maukonen
Marion County Circuit Court

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