

***Phillips v. Honorable William O'Neil***

**Citation:** 407 P.3d 71 (Ariz. 2017).

**Date Filed:** December 20, 2017

**Author:** Justice Lopez

**Joined by:** Chief Justice Bales, Vice Chief Justice Pelander, and Justices Brutinel, Timmer, and Gould.

**Dissent:** Justice Bolick.

**Facts:** This action arose out of a State Bar disciplinary action against attorney Brent Phillips related to his mailing of allegedly deceptive advertisements to Arizona residents. Prior to the disciplinary proceedings, the Arizona Attorney General (“AG”) had sued Phillips under the Arizona Consumer Fraud Act for the same advertisements. Phillips agreed to a consent judgment with the AG.

The consent judgment admitted that Phillips violated state law and federal regulation, and required Phillips to pay restitution, civil fines, and attorneys’ fees. Reserving the state’s right to enforce the judgment itself in a future action, Phillips and the AG stipulated that the consent judgment would not be used as an admission or evidence of wrongdoing or liability in any future civil, criminal, or administrative action.

**Procedural history:** During the state disciplinary proceeding, Phillips, through his counsel, moved to exclude the State Bar’s use of the consent judgment for any purpose. The Presiding Disciplinary Judge (“PDJ”), Judge William O’Neil, denied Phillips’s request in part. O’Neil’s order permitted the State Bar to use the stipulated facts of the consent judgment for impeachment purposes—via prior inconsistent statement—in the event that Phillips’s testimony differed from the facts of the consent judgment. The order also stated that, in accordance with Arizona Rule of Evidence 613(b), extrinsic evidence of a prior inconsistent statement is admissible “if justice so requires.”

Asserting jurisdiction under article 6, section 5(3) of the Arizona Constitution, the Arizona Supreme Court granted review of the PDJ’s order on Phillips’s motion in limine.

**Issue:** In a state disciplinary proceeding, can the State Bar use the stipulated facts of a prior consent judgment to impeach a witness’s prior inconsistent statement, if that consent judgment included a stipulation precluding its use as evidence of liability in future actions?

**Holding:** No. Arizona Rule of Evidence 408 expressly precludes the use of a consent judgment to prove substantive facts to establish liability for a subsequent claim. Likewise, a consent judgment cannot be used for impeachment purposes under Rule 613.

**Disposition:** The PDJ’s order denying Phillips’s motion in limine is vacated.

**Rule:** Under Arizona Rule 408, a party cannot introduce facts from a prior consent judgment to prove substantive facts to establish liability for a disputed claim or to impeach a witness.

## Reasoning:

- **Principles of Statutory Construction:** The court addressed some preliminary questions of statutory construction regarding Rule 408. The rule provides that two types of evidence are not admissible “to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement . . . .”<sup>1</sup> Specifically, evidence of the following is inadmissible: 1) “offering—or accepting . . . —a valuable consideration in compromising or attempting to compromise the claim;”<sup>2</sup> and 2) “conduct or a statement made during compromise negotiations about the claim.”<sup>3</sup>

Under the “general terms” principle of statutory construction, the court found that the general terms “evidence” and “valuable consideration” encompass a wide range of provisions that parties can offer and accept in reaching a settlement.<sup>4</sup> Consent judgments, therefore, are included in this provision for purposes of inadmissibility.<sup>5</sup> Using United States Supreme Court Justice Scalia’s method of interpreting statutory titles and headings, the court also rejected the dissent’s argument that the rule’s title, “Compromise Offers and Negotiations,” limits its application only to evidence of offers and negotiations.<sup>6</sup> Consistent with the unambiguous language of the rule’s text, the case at bar involved an *offering* and *accepting* of *valuable consideration*.<sup>7</sup> Specifically, the state offered to mitigate Phillips’s liability in exchange for Phillips admitting that he violated the law and agreeing to pay for it.<sup>8</sup> This offer-acceptance-consideration is therefore inadmissible to prove the validity of the State Bar’s claim or to impeach Phillips by a prior inconsistent statement.<sup>9</sup>

- **Policy and Application of Rule 408 at the Federal Level.** Noting that Arizona modeled Rule 408 after the Federal Rule of Evidence (“FRE”) 408, the Court analyzed the purpose and application of FRE 408.<sup>10</sup> The policy behind FRE 408 is to encourage “the compromise and settlement of disputes” between parties.<sup>11</sup> That stipulated facts from a consent judgment could be used in future cases to establish liability would dissuade a party from settling altogether. With this policy in mind, federal courts have consistently barred admission of consent judgments to prove substantive facts to establish liability of a party.<sup>12</sup> The court noted that the rule does not preclude *all* use of consent judgments in future actions<sup>13</sup>. For example, federal courts have permitted

---

<sup>1</sup> ARIZ. R. EVID. 408.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Phillips v. O’Neil, 407 P.3d 71, 74 (Ariz. 2017).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *See id.* at 73.

<sup>8</sup> *Id.*

<sup>9</sup> *See id.* at 77.

<sup>10</sup> *See id.* at 74–75.

<sup>11</sup> *Id.* at 74 (quoting FED. R. EVID. 408 advisory committee’s note to 1972 proposed rules).

<sup>12</sup> *See, e.g.*, United States v. Gilbert, 668 F.2d 94, 97 (2d Cir. 1981); Buescher v. Baldwin Wallace Univ., 86 F. Supp. 3d 789, 796 (E.D. Ohio 2015); N.J. Tpk. Auth. v. PPG Indus., Inc., 16 F. Supp. 2d 460, 473 (D. N.J. 1998).

<sup>13</sup> Phillips, 407 P.3d at 75.

their use to establish motive or intent of a party.<sup>14</sup> However, the plain language of the Arizona rule, the uniform interpretation of its federal counterpart, and the underlying policy of promoting settlements necessitate a finding that Phillips’s consent judgment is inadmissible to establish substantive facts to prove liability or wrongdoing in a state disciplinary action.<sup>15</sup>

- **Transactional Analysis of the “Same Claim”:** The court rejected the State Bar’s argument that the consent judgment should be admissible because the disciplinary proceeding and the initial AG action did not involve the “same claim.”<sup>16</sup> The proper test to determine whether the same claim is at issue is the Restatement (Second) of Judgment’s transactional analysis, i.e., whether the disciplinary action and the AG action arose out of a “common nucleus of operative facts.”<sup>17</sup> Here, both claims arose out of Phillips’s mailing of allegedly deceptive advertisements.<sup>18</sup> The State Bar and the AG both brought actions to establish Phillip’s liability related to these mailings.<sup>19</sup> The fact that they sought different sanctions is irrelevant under the transactional analysis.<sup>20</sup>
- **“Justice” Does Not “So Require”:** The court disagreed that Rule 613(b)’s “justice so requires” language permits the introduction of substantive facts from the consent judgment.<sup>21</sup> Notwithstanding the fact that Rule 408 *expressly precludes* the use of the consent judgment to impeach Phillips, the court also appeared to view its use as a free pass for the State Bar: “There is nothing unjust about requiring the State Bar to prove its case—as it generally must do in attorney disciplinary proceedings—against Phillips without the stipulated facts from the Judgment.”<sup>22</sup>

**Dissent (Bolick):** Justice Bolick wrote that Rule 408’s title, “Compromise Offers and Negotiations,” encompasses simply those subjects and nothing more.<sup>23</sup> If it were intended to include consent decrees, it would have explicitly said so. He bemoaned the majority’s rule that Rule 408 “precludes the use of a consent judgment to prove substantive facts in any legal setting involving a claim with a ‘common nucleus’” as too categorical and far-reaching.<sup>24</sup> Rather than read unapparent rules into existing, codified evidentiary rules on an ad hoc basis, Justice Bolick wrote that the court should engage in the formal procedural rulemaking process permitted by article 6, section 5(5) of the Arizona Constitution.<sup>25</sup>

---

<sup>14</sup> See, e.g., *Johnson v. Hugo’s Skateway*, 974 F.2d 1408 (4th Cir. 1992).

<sup>15</sup> See *Phillips*, 407 P.3d at 77.

<sup>16</sup> See *id.* at 76.

<sup>17</sup> *Id.* (quoting *In re Gila River System and Source*, 127 P.3d 882 (Ariz. 2006)); see also RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (AM. LAW. INST. 1982).

<sup>18</sup> *Phillips*, 407 P.3d at 76.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See *id.*; see also ARIZ. R. EVID. 613(b).

<sup>22</sup> *Phillips*, 407 P.3d at 77.

<sup>23</sup> *Id.* (Bolick, J., dissenting).

<sup>24</sup> *Id.* at 78.

<sup>25</sup> See *id.*