

Florida Dispute Resolution Center  
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**Case and Comment**

*By Perry Itkin*

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**“WHAT! A MEDIATOR WAS SUED! WHY?!? I THOUGHT WE WERE IMMUNE!”**

[COMMENT: Immunity does not prevent a party from filing suit against a mediator – it provides a statutory defense. Even though the case that follows is a California case it does provide a “heads up” for mediators in Florida.]

In *Secress v. Ullman, et al.*, 2005 U.S. App. LEXIS 16490 [9<sup>th</sup> Cir. 2005] the pro se appellant appealed the U.S. District Court's order dismissing her civil rights action against two state court judges, a lawyer appointed to represent the minor child, and a private mediator. Appellant alleged her constitutional rights were violated during the underlying child custody proceedings. Apparently, appellant also alleged the existence of a conspiracy among the defendants. The complaint was dismissed against all defendants and the dismissal was affirmed on appeal. As to the dismissal against the mediator, the appellate court agreed with the trial court's dismissal based on quasi-judicial immunity and a California statutory “litigation privilege.”

[COMMENT: As a reminder, F.S. 44.107 provides statutory immunity from liability for mediators serving under F.S. 44.102 and mediator trainees fulfilling the mentorship requirements for certification by the Florida Supreme Court. It is “judicial immunity in the same manner and to the same extent as a judge.” Please, take the time to read F.S. 44.107. It applies to court-ordered and non-court ordered mediations and the immunity in each context differs. Nevertheless, please be careful out there!]

**The Aura of Mediation!**

In the case of *Connelly, et al. v. Old Bridge Village Co-op, Inc., et al.*, 30 Fla. L. Weekly D2390 (Fla. 2d DCA October 12, 2005), the plaintiffs in this declaratory judgment action appealed from the trial court's order awarding attorney's fees to the defendants under F.S. 57.105(1). F.S. 57.105(1) authorizes an award of attorney's fees when the plaintiffs or their counsel knew or should have known that

their claim against the defendant “was not supported by material facts,” or “would not be supported by the application of then-existing law to those material facts.” Instead of filing an answer, the defendants filed a motion to dismiss the complaint alleging that property line disputes were not properly brought in a declaratory relief action but should be brought in an ejectment action if the parties were fee simple owners.

The trial judge, instead of ruling on the defendants' motion to dismiss, ordered the parties to attend mediation. Mediation resulted in an impasse. Thereafter, the plaintiffs dismissed one set of defendants from the litigation hoping they would prevail against the remaining defendants under a different legal theory. The dismissed defendants filed a motion for attorney's fees pursuant to F.S. 57.105. The trial judge granted the motion for attorney's fees and entered a judgment for attorney's fees and costs against the plaintiffs and in favor of the dismissed defendants in the amount of \$6,875.00.

The appellate court viewed the unusual referral to mediation, prior to the trial judge's ruling on the defendant's motion to dismiss, as adding to the complexity of the case. [COMMENT: Here's where the aura of mediation comes to the plaintiff's rescue. But note, it was only one of several factors referenced by the appellate court.] The appellate court stated:

*If anything, the referral [to mediation] suggested that the declaratory judgment had some validity or at least was not so devoid of merit as to be obviously and apparently unsupported by the material facts necessary to establish the claim.*

### **TO AVOID THE DEATH PENALTY ALL YOU HAVE TO DO IS ASK!**

Okay, not exactly, but almost. Dismissal with prejudice in a civil case is sort of tantamount to the “death penalty.” In *Office Environments, Inc. v. Lake States Insurance Co.*, 833 N.E.2d 489 [Ind. Ct. App. 2005] the Indiana Court of Appeals upheld a dismissal with prejudice when a party refused to comply with a court order to mediate. [Note, this is an Indiana Court of Appeals case, not a Florida case.]

Office Environments, Inc., the insured, filed a claim against Lake States Insurance, the insurer alleging failure to pay a claim. The trial judge ordered the parties to participate in mediation 60 days before going to court in accordance with a local rule. After **three years**, and several attempts by the mutually agreed upon mediator to hold the mediation, the insured still refused to mediate. As a result, the case

was dismissed with prejudice as provided for in the Indiana court rules. The insured appealed arguing there were appropriate reasons for the delay in mediation. The Indiana Court of Appeals affirmed the trial judge's decision to dismiss the complaint and would reverse only if the insured had shown an abuse of discretion, which the insured failed to do. The appellate court emphasized that dismissal was especially appropriate because the insured could have been excused from mediation *if they asked the court for permission*.

The appellate court clearly identified the dismissal with prejudice as a proper remedy for failure of the insured to comply with the trial court's *order* to mediate and not for the insured's failure to comply with the court mediation rules.

[COMMENT: Speaking of Florida, remember *Florida Rules of Civil Procedure*, Rule 1.700(b), Motion to Dispense with Mediation and Arbitration, which provides:

A party may move, within 15 days after the order of referral, to dispense with mediation or arbitration if:

- 1) the issue to be considered has been previously mediated or arbitrated between the same parties pursuant to Florida law;
- 2) the issue presents a question of law only;
- 3) the order violates rule 1.710(b) or rule 1.800; or
- 4) other good cause is shown.]

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