# Case and Comment

by Perry S. Itkin

### Warning: Macaroni and Cheese Can Be Dangerous!

COMMENT: One of the nice features of Florida's *Mediation Confidentiality and Privilege Act*, F.S. 44.401-44.406, is the definitions section. For the first time "mediation communication" is defined [F.S. 44.403(1)], in part, as "nonverbal conduct intended to make an assertion." How does that work in practice?

While there are no Florida cases interpreting this definition, a case of first impression in Indiana, *Bridges v. Metromedia Steakhouse Company, L.P.*, 807 N.E.2d 162 [Ind. Ct. App. 2004] is illustrative.

The Plaintiff was preparing a plate of food at a buffet in a Ponderosa restaurant. As she scooped macaroni and cheese onto her plate, steam from the steam table burned her hand. Bridges sought medical treatment the following day, and she was diagnosed as having sustained second-degree burns. During the weeks that followed, her burns began to blister and ooze and she continued treatment with her family physician until discharge from his care. At that time, he noted that her injuries had healed, but that she had scarring.

Plaintiff sued Metromedia alleging that its negligence caused her injuries. The parties participated in a court-ordered mediation session, but they were unable to reach a settlement. At trial, Plaintiff testified that she had raised scars and redness on her hand for four and one-half years following the burn injury in October 1998 and that she had recently undergone laser treatments to eliminate the scars. The Defendant called an impeachment witness to testify that when she saw Plaintiff's hand during mediation in June 2002, she did not see any scarring or redness. The Plaintiff immediately objected to the testimony on the basis that Metromedia had not previously disclosed this person as a potential witness. The trial court overruled that objection. Then, when the witness took the stand, the Plaintiff recognized her as the insurance adjuster who had participated in the court-ordered mediation and objected to her testimony on the basis that "everything that goes on during mediation is confidential in trial." The trial court ultimately overruled that objection and allowed the testimony.

The jury reduced its award to the Plaintiff based on her comparative fault [40%]. Plaintiff appealed contending that the trial court abused its discretion when it permitted the adjuster to testify regarding what she observed during the parties' court-ordered mediation. Specifically, she maintained that the adjuster should not have been permitted to testify regarding the appearance of Plaintiff's hand, because that testimony was based solely upon Plaintiff's "nonverbal conduct" during mediation, which is confidential and inadmissible under Indiana Rule for Alternative Dispute Resolution ("ADR") 2.11 and Indiana Rule of Evidence 408.

Black's Law Dictionary defines "statement" in relevant part as "nonverbal conduct intended as an assertion," and it defines "conduct" as "[p]ersonal behavior, whether by action or inaction; the manner in which a person behaves." See BLACK'S LAW DICTIONARY 292, 1416 (7th ed. 1999).

During trial, the adjuster's entire testimony on direct examination was as follows:

> Q: Good morning, Ms. [adjuster].
>
> A: Good morning.
>
> Q: Can you tell the jury what condition Ms. Bridges' right hand was in on or about June 27th of 2002?
>
> A: Yes. I was asked to look at her hand and I didn't see anything; I saw nothing.
>
> Q: Did you see any redness?
>
> A: No.
>
> Q: Did you see any blisters?
>
> A: I did not.
>
> Q: Did you see any scarring?
>
> A: No.
>
> Q: Were her hands puffy?
>
> A: No.
>
> Q: I have no further questions. Thank you.

There was no evidence in the record showing who asked the adjuster to look at the Plaintiff's hand or whether she was asked to do so before or during the mediation. The record merely indicates that adjuster observed Plaintiff's hand from across a conference room table during mediation.

On appeal, the Plaintiff stated that she "display[ed]" her hand to [the adjuster] and "point[ed] to the scars," but did not cite to anything in the record in support of those assertions. At one point, during cross-examination, the adjuster stated that the Plaintiff "put her hand out[,]" but the adjuster was interrupted and did not finish her sentence. The appellate court noted that it therefore did not know whether the Plaintiff "put her hand out" for the purpose of showing it to the adjuster or whether it was merely an inadvertent shift in Plaintiff's body position. [COMMENT: This would address the Plaintiff's intention to make an assertion.]

The adjuster's testimony consisted entirely of her personal observation of the Plaintiff's hand and could not be construed as either "nonverbal conduct intended as an assertion" or "personal behavior." See BLACK'S LAW DICTIONARY 292, 1416 (7th ed. 1999). The Indiana appellate court concluded that the adjuster's testimony did not constitute either conduct or a statement made in the course of mediation and that the trial court did not abuse its discretion when it permitted her testimony.

### "We Made a Mistake." "No, You Made a Mistake." So, What is a "Mutual Mistake?"

COMMENT: In *The Resolution Report*, Volume 18, Number 1 (June 2003) we discussed the case of *DR Lakes, Inc. v. Brandsmart U.S.A. of W. Palm Beach*, 819 So.2d 971 [Fla. 4th DCA 2002] in which the Fourth District Court of Appeal held that a recognized exception to mediation confidentiality and privilege is where the issue is whether there had been a mutual mistake in a settlement agreement. The appellate court noted that "it may be difficult for the seller to prove that this mistake was mutual, given the position of the buyer, seller should still have the opportunity to put on all of its evidence." *Id.* at 974-75.

This was the case where the seller, appellee DR Lakes, Inc., moved to enforce a mediated settlement agreement. Central to the motion was the seller's claim that there was a clerical error in the purchase price that failed to recognize the parties' mediation agreement that the buyer, appellant BrandsMart U.S.A., would not be entitled to a $600,000.00 reduction in the purchase price.

On remand, the circuit court presided over a non-jury trial, where each side presented conflicting evidence of what occurred during mediation. Guess who prevailed? Well, difficult does not equate to impossible and the trial judge ruled in favor of the seller [that's why the buyer is now the appellant!]. Here's an excerpt from the judge's ruling:

> *Though the evidence was disputed, the Court finds that DR Lakes showed by clear and convincing evidence that the parties agreed that it would receive credit for its $600,000.00 contribution to the construction of Executive Center Drive in return for its assumption of the Phase I construction obligation. That agreement was implicit in the incorporation of section 2.1 of the Purchase Agreement into the Stipulation, which noted that the purchase price gave BrandsMart a $600,000 credit towards the road construction, read in juxtaposition with the new requirement that DR Lakes construct or pay for construction of the road.* ***To the extent the Stipulation was not explicit on that point, it represented a scrivener's error in memorialization of the parties' agreement****. [Emphasis added.]*

COMMENT: This highlights a critical aspect of our role in assisting the parties in the preparation of their mediated settlement agreements – be specific! Florida's *Rules for Certified and Court-Appointed Mediators*, **Rule 10.420(c), Closure** provides:

> The mediator shall cause the terms of any agreement reached to be memorialized appropriately and discuss with the parties and counsel the process for formalization and implementation of the agreement.

The buyer appealed and in an opinion, following remand, *Brandsmart U.S.A. of W. Palm Beach v. DR Lakes, Inc.*, 901 So. 2d 1004 [Fla. 4th DCA 2005], the appellate court framed the definition of "mutual mistake" as follows:

> *A mistake is mutual when the parties agree to one thing and then, due to either a scrivener's error or inadvertence, express something different in the written instrument . . . Due to the strong presumption that a written agreement accurately expresses the parties' intent, the party seeking reformation based on a mutual mistake must prove its case by clear and convincing evidence . . .*
>
> *The parties' conflicting stories at trial do not preclude a finding that a mutual mistake was established by clear and convincing evidence. In litigation, "the issue of mutual mistake arises only when alleged by one party and denied by the other. Agreement on the matter would eliminate it as an issue to be tried."* [COMMENT: Imagine that!]

The appellant/buyer argued that the trial court's findings of fact were not supported by competent substantial evidence. The appellate court determined that the seller's witnesses testified to a version of the mediation agreement that supported the trial court's ruling and that the weight to be given to the testimony turned on the credibility of the witnesses, a matter exclusively within the province of the trial court and affirmed the trial judge.

COMMENT: This case and its predecessor are good examples of the exception to confidentiality in Florida's *Mediation Confidentiality and Privilege Act*, F.S. 44.405(a)(5):

> (4) (a) Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication:
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> > 5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or **reforming** a settlement agreement reached during a mediation; . . . [Emphasis added.]

### "You Can't Make Me Sign the Mediation Agreement – I Wasn't There!" "You Are Right, But What I Can Do Is . . ."

In *Holler v. De Hoyos*, 898 So. 2d 1216 [Fla. 5th DCA 2005], the Appellant filed a motion in the appellate court requesting that the court compel appellees to comply with a mediated settlement agreement, or in the alternative, to impose sanctions against appellees based upon one of the appellees' failure to attend appellate mediation or to sign the mediated settlement agreement. By now you may be wondering, how can there be an agreement if one party wasn't present and how can a court order a party, who did not attend a court ordered mediation, to sign the mediation agreement negotiated in their absence? Read on!

The Fifth District Court of Appeal entered an order referring the case to appellate mediation. The order provided that "failure of an attorney or party to appear for a duly scheduled mediation conference or otherwise comply with appellate mediation program procedures, without good cause, may result in the imposition of sanctions by this court . . ."

Pursuant to the order, the parties jointly selected a mediator and a mediation conference was scheduled. However, one of the appellees failed to attend the mediation. No motion to be excused from the mediation was filed. The mediation conference went forward resulting in a written settlement agreement. However, the appellee who failed to attend refused to sign the mediated settlement agreement.

Subsequent to the mediation, appellant filed a motion with the appellate court seeking to compel appellees to comply with the mediated settlement agreement, or in the alternative, to impose sanctions on De Hoyos. The Fifth District reviewed the response to the motion filed by the appellee who did not appear and determined that the response provided no good cause for her failure to attend mediation.

The court decided as follows:

> *Holler has cited no legal authority, and this court is not aware of any, which would authorize the court to compel Elin De Hoyos to comply with a mediated settlement agreement which was negotiated in her absence. However, this court does have the authority to impose sanctions against Elin De Hoyos for her failure to attend the mediation and, on this record, the granting of sanctions against Elin De Hoyos is appropriate. See Harrelson v. Hensley, 891 So. 2d 635 (Fla. 5th DCA 2005).*

The court ordered Elin De Hoyos to pay the following amounts as sanctions within 30 days from the date of its opinion:

> *1. To the mediator, all fees charged by the mediator in connection with this appellate mediation;*
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> *2. To opposing counsel, Holler's reasonable attorney's fees and costs incurred in preparing for and attending the appellate mediation and filing the motion for sanctions; and,*
>
> *3. To the clerk of this court, five hundred dollars ($500.00) as a sanction for willful failure to comply with this court's mediation order.*

The court, in positive foreshadowing, also ruled that:

> *If the parties cannot agree on the reasonable amount of costs and attorney's fees, the trial judge in this matter is hereby appointed as a commissioner to conduct an evidentiary hearing and to determine the reasonable amount of those fees and costs. Any dispute over the reasonable amount of attorney's fees and costs shall not delay Elin De Hoyos' obligation to timely pay the items set forth in paragraphs 1 and 3 above. The failure to make these payments may result in further sanctions by this court, including the striking of Elin De Hoyos' answer brief and the assessment of additional attorney's fees.*

COMMENT: Clearly, the Fifth District Court of Appeal was not happy with this appellee's failure to follow the mediation order. This is the latest in a series of appellate opinions from the Fifth District awarding sanctions. Other opinions were discussed in *The Resolution Report Online*, Volume 20, Number 2 (May 2005).

## "Is Everything We Say in Mediation Confidential?"

COMMENT: You know the answer and it is _____. Here's a Federal Court case from the Southern District of Florida providing an interesting outcome on *another* exception to confidentiality.

In *Quintana v. Jenne*, 2005 U.S. App. LEXIS 12742 [11th Cir. 2005], the question on appeal was whether the district court properly awarded attorney's fees to a prevailing defendant, even though the plaintiff, Paul Quintana, who alleged [1] racial discrimination and [2] retaliation in employment, established a prima facie case on one of his two claims for relief. The appellate court held that because the presentation of a prima facie case in response to a motion for summary judgment means that a claim necessarily cannot then be considered frivolous, the district court abused its discretion by awarding fees for the defense against the claim that was not frivolous. Although the court affirmed the decision of the district court for the defense against the frivolous claim, it reversed the decision to award attorney's fees for the defense against the other claim and vacated the order that awarded $73,890 in attorney's fees. The case was then remanded so that the district court could calculate the amount of attorney's fees attributable to the defense against the frivolous claim.

Generally, although attorney's fees are typically awarded to successful Title VII plaintiffs as a matter of course, prevailing defendants may receive attorney's fees only when the plaintiff's case is 'frivolous, unreasonable, or without foundation." Factors that are "important in determining whether a claim is frivolous" include (1) whether the plaintiff established a prima facie case; (2) whether the defendant offered to settle [COMMENT: This is a mediation clue!]; and (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits." These factors are general guidelines only, not hard and fast rules, and determinations regarding frivolity are made on a case-by-case basis.

As to factor number 2, the appellate court said:

> *[W]e have no way of knowing whether a settlement offer, if made, was of a sufficient amount to support a determination that Quintana's claim was not frivolous. Jenne does not deny making an offer of settlement, but maintains that any settlement offer should not be considered because it would have been made only as an attempt to comply with court-ordered mediation.* ***We are unaware of any authority that would preclude us from considering a settlement offer made during mediation, but the amount of the offer is a necessary factor in evaluating whether a settlement offer militates against a determination of frivolity.*** *In the absence of evidence of an offer of a substantial amount in settlement, this factor does not support either party.* [Emphasis added.]

In applying all three of the factors set out above, the court concludes that Quintana's *retaliation* claim was frivolous. The first and third factors supported a determination of frivolity, and the second factor offered no support for either party. The district court did not abuse its discretion when it awarded attorney's fees to Jenne for Quintana's retaliation claim.

The court affirmed the decision to award Jenne attorney's fees for the defense against the claim of retaliation, which was frivolous, but reversed the decision to award fees for the defense against the claim of discrimination, which was not frivolous. The case was remanded so that the district court could determine the amount of attorney's fees owed Jenne for services reasonably and exclusively incurred in the defense against Quintana's retaliation claim.

COMMENT: This was a Federal Court case and in the court's order to mediation there was a provision providing that "all proceedings of the mediation shall be confidential and privileged." Do you think the result would be, or should it be, the same in a state court-ordered mediation conference in Florida? Would the result be, or should it be, the same solely because the mediation conference is conducted by a Florida Supreme Court certified mediator? Remember, Florida's *Mediation Confidentiality and Privilege Act* provides:

> 44.402 Scope
>
> (1) Except as otherwise provided, ss. 44.401 - 44.406 apply to any mediation:
>
> (a) Required by statute, court rule, agency rule or order, oral or written case-specific court order, or court administrative order;
>
> (b) Conducted under ss. 44.401-44.406 by express agreement of the mediation parties; or
>
> (c) Facilitated by a mediator certified by the Supreme Court, unless the mediation parties expressly agree not to be bound by ss. 44.401 - 44.406.

What do you think?

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