

Significant Case Law For Attorneys and Mediators

Neil Leff and Physicians Financial Consultants Corporation v. Steven Ecker, M.D., 33 Fla. L. Weekly D 29 (Fla. 3rd DCA Opinion filed December 19, 2007): The Defendants, Leff and Physicians Financial Consultants Corporation appealed an order denying their renewed motion to enforce a settlement agreement. The Third District reversed the trial court's order and remanded for entry of an order enforcing the settlement agreement.

The Third District explained: "In this case the record amply establishes that plaintiff (Dr. Ecker) went into the mediation conference without a clear picture of what the policy limits were for the incidents in question. In fact, this was plaintiff's first question at mediation. Notwithstanding this limited knowledge, plaintiff chose to go ahead with the mediation and entered into an agreement at the end thereof. Despite his admitted suspicions about the policy limits, plaintiff made the decision to enter into the agreement.

The doctrine of mutual mistake was not created to relieve litigants of agreements entered into improvidently. The all-out efforts plaintiff later engaged in to go behind the policy and ascertain, without question, what policies applied and what policy limits were, could have been performed before the mediation. The situation in this appeal would have been avoided."

Kalliope Vitakis v. David L. Valchine, 33 Fla. L. Weekly D1775 (Fla. 4th DCA Opinion filed July 16, 2008): This appeal arose from the divorce proceedings of Kalliope Vitakis and David L. Valchine. The final judgment of dissolution of marriage incorporated the terms of the parties' mediated marital settlement agreement. The former wife appealed the final judgment, arguing that there had been mediator misconduct and that she had entered into the agreement as a consequence of duress and coercion. The Fourth District remanded the case to the trial court so that it could make factual

findings regarding the wife's claims of misconduct. See *Vitakis-Valchine v. Valchine*, 793 So.2d 1094 (Fla. 4th DCA 2001). On remand, the trial court found no mediator misconduct and no duress or coercion and upheld the settlement agreement; the Fourth District affirmed that ruling. See *Valchine v. Valchine*, 923 So.2d 511 (Fla. 4th DCA 2006).

The parties' settlement agreement included a provision that required the wife to "provide" the couple's frozen embryos to the husband so that he could dispose of them. The agreement also contained a provision providing that the agreement could not be modified except by written agreement. After the Fourth District's 2006 opinion upholding the settlement agreement, the husband filed a motion seeking to enforce the provision of the agreement requiring the wife to turn over to him the couple's frozen embryos. The wife insisted that the settlement agreement should not control because, during the pendency of appeals, the husband had a "change of heart" and indicated he would turn the embryos over to her; the wife acknowledged, though, that there was no writing signed by the parties, modifying the terms of the settlement agreement. The trial court granted the husband's motion, finding the issue was controlled by the terms of the settlement agreement. The Fourth District found no error with the trial court's ruling and affirmed the order appealed.

GOODBYE AND GOOD LUCK

Sharon Press served with distinction as the Director of the Florida Dispute Resolution Center (DRC) in Tallahassee for almost twenty years. Sharon and her dedicated staff were instrumental in contributing to Florida's reputation as a national and international leader in the fields of Mediation and Alternative Dispute Resolution (ADR). Recently, Sharon left the DRC for an exciting new opportunity as an associate professor of law and Director of the Hamline University School of Law Dispute Resolution Institute in Minnesota. I have had the privilege of knowing and working with Sharon during the past twenty years and wish her

and her family happiness and success with their new adventure-and mild winters.

MY NEW WEBSITE IS UP AND RUNNING

The “new” website is now more than two years old. You can find it at these addresses: www.BABMediate.com and www.BruceBlitman.com. The website contains past issues of mediation newsletters, as well as information about current mediation caselaw, ADR articles I’ve written and announcements about upcoming mediation seminars and presentations. Many thanks to Webmaster Gio Gutierrez for his invaluable expertise in designing this site. Please visit this site and let me know what you think. I hope you like it.

RECOMMENDED READING

“Study of Final-Offer Arbitration” By Justin Kelly: This article appears in the November 2008/January 2009 edition of *Dispute Resolution Journal*. A study by two University of Arkansas professors demonstrates that when the parties’ proposals are made known to the adversary during the course of final-offer arbitration, the parties end up spending less money to resolve their dispute. In final-offer arbitration, each party proposes to the arbitrator what the award should be and the arbitrator selects the most reasonable of the two proposals. This is the process employed by Major League Baseball to resolve salary disputes between players and owners. Amy Farmer and Cary Deck, the authors of this study, conclude that the more transparent the final-offer arbitration process, the more reasonable the parties’ proposals will be. The authors found higher settlement rates (60%) where the parties knew in advance that their proposals would be made known to each other. The study, “Strategic Bidding and Investments in Final-Offer Arbitration: Theory and Experimental Evidence” is scheduled to be published in an upcoming issue of the *Journal of Economic Behavior and Organization*.

“Doing the Best Mediation You Can” By John Lande: This article appears in the Spring and Summer 2008 edition of *Dispute Resolution Magazine*. Dr. Lande is associate professor and director of the LL.M. Program in Dispute Resolution at the University of Missouri School of Law. He served as a member of the ABA Section of Dispute Resolution’s Task Force on Improving

Mediation Quality and took the lead in designing and analyzing the Task Force’s research. The Task Force was created in 2006 to investigate factors that promote high-quality mediation practice. The Task Force findings focus on the following four aspects of mediation that the research subjects said are particularly important: (1) preparation for mediation by mediators and mediation participants; (2) case-by-case customization of the mediation process; (3) careful consideration of any “analytical” assistance that mediators might provide; and (4) mediators’ persistence and patience. This article should be of interest to mediators, attorneys, consumers of mediation services and all other participants in the mediation process. The Task Force’s Final Report is available at www.abanet.org/dch/committee.cfm?com=DR020600.

DISPUTE RESOLUTION IN THE NEWS - PART I

An article in the Business Section of the May 7, 2009 edition of *The Miami Herald* reported that Wal-Mart agreed to pay nearly \$2 million and improve safety at its 92 New York stores as part of a deal with prosecutors that avoids criminal charges in the trampling death of a temporary worker caused by a customer stampede in November, 2008. The company agreed to implement an improved crowd-management plan for post-Thanksgiving Day sales, set up a \$400,000 victims’ compensation and remuneration fund, and give \$1.5 million to Nassau County (New York) social services programs and non-profit groups. The agreement included no admission of guilt by Wal-Mart. Any victims who accept payment from the Wal-Mart compensation fund will be required to waive their right to a separate civil suit against Wal-Mart.

DISPUTE RESOLUTION IN THE NEWS- PART II

An article in the Business Section of the February 20, 2009 edition of *The Miami Herald* reported that the trustee of a \$580 million trust fund created to compensate Florida smokers and their survivors for smoking-related illnesses reached a settlement over claims made against the fund by the federal government. The Miami trustee for the Engle Trust Fund filed court papers stating the fund agreed to pay \$18 million to the Justice Department to settle

claims for reimbursement of Medicare and Veterans Administration benefits received by beneficiaries of the fund. The article reported that the settlement required approval of a Miami-Dade Circuit Court judge. If the court approved the settlement, it must decide how the \$18 million will be paid..

DISPUTE RESOLUTION IN THE NEWS - PART III

An article appearing in the Sports section of the March 4, 2009 edition of The Miami Herald reported that quarterback Kurt Warner offered the NFC champion Arizona Cardinals a “hometown discount” in pursuit of a new contract. Warner’s agent reported that the two-year contract proposal to the Cardinals was much less than what the San Francisco 49ers were offering. Warner, who has spent the past four seasons with Arizona, also instructed his agent to tell the Cardinals he would be willing to give up \$1 million in each year of the deal if the club agreed to a new contract with receiver Anquan Boldin.

MEDIATION AND NEGOTIATION SEMINARS AVAILABLE FOR CONTINUING EDUCATION CREDITS

For years, I have written and spoken extensively about mediation and negotiation-related topics, including: “Florida’s Mediation Case Law”; “Ingredients For A Successful Mediation Process”; “The Alternative Dispute Resolution Continuum”; “What Is Your Negotiating Style?”; and “Effective Negotiating Tips And Tactics”. If you want to put on a seminar for your law firm, clients and/or staff, please contact me for details.

NOTABLE QUOTATIONS

“A people that values its privileges above its principles soon loses both.”
-Dwight D. Eisenhower

“Success is a lousy teacher.”
-Bill Gates

“I always turn to the Sports section first, to read of man’s triumphs, before turning to the front page to read of man’s failures.”
-Earl Warren

“Patience is something you admire in the driver behind you and scorn in the one ahead.”
-Financial Expert Mac McCleary

“I may not have gone where I intended to go, but I think I have ended up where I intended to be.”
-Douglas Adams

“Christmas is a time when kids tell Santa what they want and adults pay for it. Deficits are when adults tell the government what they want and their kids pay for it.”
-Former Colorado Gov. Dick Lamm

“Always write angry letters to your enemies. Never mail them.”
-Author James Fallows

“Whenever you find yourself on the side of the majority it’s time to pause and reflect.”
-Mark Twain

“Progress always involves risks. You can’t steal second base and keep your foot on first.”
-Frederick B. Wilcox

“Clear your mind of can’t.”
-Samuel Johnson

“If you can imagine it, you can achieve it. If you can dream it, you can become it.”
-William Arthur Ward

“Obstacles are those frightful things you see when you take your eyes off the goal.”
-Hannah More

“Peace cannot be achieved by force. It can only be achieved by understanding.”
-Albert Einstein

“If you want the rainbow, you gotta put up with the rain.”
-Dolly Parton

“Nothing is a waste of time if you use the experience wisely.”
-Auguste Rodin

“One hundred percent of the shots you don’t take don’t go in.”
-Wayne Gretzky

“Change your thoughts and
you change your world.”
-Norman Vincent Peale

MESSAGES OF THANKS TO OUR TROOPS

To remember our troops in Iraq and around the world who risk their safety every day on our behalf, messages of appreciation and support can be sent via www.OperationDearAbby.net.

20 YEARS AS A SUPREME COURT CERTIFIED COUNTY AND CIRCUIT CIVIL MEDIATOR - AND COUNTING!

In February, 2009, I celebrated my twentieth anniversary as a Florida Supreme Court certified County and Circuit Civil mediator. How quickly the years have passed! It doesn't seem possible that I completed the training course so many years ago. I greatly appreciate your patronage and generous support through the years. It is always an honor and privilege to be of service to you and your clients. I am looking forward to (at least) another 20 years as a certified County, Family and Circuit Civil Mediator.

U.S. OFFERS GUIDE TO HELP KIDS SUCCEED

An article in the Action Line column of the December 5, 2008 edition of The Miami Herald reported that The U.S. Department of Education produces a downloadable series of pamphlets, Helping Your Child, to guide parents as their children begin school. The publications provide parents with the tools and information to help their children succeed in school and life. They feature practical lessons and activities to help school-aged and preschool children master reading, cope with homework and develop the skills and values necessary to achieve and grow. The series, also in Spanish, addresses academic subjects such as science, history and mathematics. Others in the series tackle test-taking, learning to write well and learning how to use the library. This is available at www.ed.gov/parents/academic/help/hyc.html.

“KICK FOR NICK” PROJECT

On May 26, 2008, Memorial Day, I watched a beautiful and moving story on ESPN's “Outside

the Lines” program about Private First Class Nick Madaras, who was tragically killed while serving in Iraq. The story by Tom Rinaldi described a program called “Kick For Nick,” which was established by Nick's father, Bill Madaras, and friends and neighbors, to honor Nick's memory and promote Nick's dream of improving relations between American soldiers and Iraqi children through the sport of soccer. Shortly before his death, Nick asked his father to send him some soccer balls so that he could play with the game with Iraqi youngsters. Nick was going to give these balls to the children so they could enjoy playing soccer with the troops and develop friendships with them. Sadly, Nick was killed before the soccer balls were delivered. The “Kick For Nick” Foundation was established to carry out Nick's vision for friendship and peace. Soccer balls are collected, they are each inscribed with Nick's name on them and they are shipped to American soldiers in Iraq. These soldiers personally deliver the soccer balls to Iraqi children and tell them about Nick's dream. To learn more about this wonderful project, please visit the website at www.kickfornick.com and www.kickfornick.org. The site contains video about the program, as well as photographs of American soldiers and Iraqi children playing soccer and testimonial letters from American soldiers describing the positive affect this project has had on everyone. On Memorial Day, 2009, ESPN updated its story about this project and reported that more than 21,000 soccer balls inscribed with Nick's name have been shipped to Iraq and delivered to Iraqi children.

OTHER WORTHY CAUSES THE COOPERATIVE FEEDING PROGRAM:

This 20-year-old agency, which dishes out more than a million meals a year, also provides free haircuts and other services to the needy, such as food stamp information and legal advice, with the help of volunteers. The agency also has an emergency food pantry that periodically supplies families with enough groceries to get them by for a few days. The program has seen a 25% increase in the demand for free food over the last year, but funding has been flat for the same period. Checks can be mailed to: The Cooperative Feeding Program, 1 NW 33

Terrace, Fort Lauderdale, Florida 33311. For more information, call (954) 792-2EAT (2328) or visit feedingbroward.org. Thank you.

THE GIFT OF LIFE: For information on how to become an organ donor, please visit www.organdonor.gov. Thank you.

**UNIVERSITY OF MIAMI-NOVA
SOUTHEASTERN UNIVERSITY CENTER
FOR AUTISM & RELATED DISABILITIES
(UM-NSU CARD):**

Is dedicated to optimizing the potential of people with autism, dual sensory impairment and related disabilities. In 1993, the legislature passed a statute that appropriated startup funds to establish the Center for Autism and Related Disabilities (CARD) at sites throughout Florida, including the University of South Florida, the University of Miami, Florida State University, University of Florida at Gainesville and Jacksonville, and the University of Central Florida. Individuals of any age with autism, pervasive developmental disorder, dual sensory impairment or sensory impairment with other disabling conditions, their family members, friends and professionals are eligible to receive CARD's free service. For contributions or information, please contact UM-NSU CARD's main office at: 5655 Ponce de Leon Boulevard, Coral Gables, Florida 33125-0725 Telephone: (305) 284-6563, 1-800-9-AUTISM, Fax: (305) 284-6555 www.umcard.org. Thanks.

MAKE-A-WISH FOUNDATION: Since 1980, the Make-A-Wish Foundation has granted more than 144,000 wishes for children with life-threatening medical conditions. It is the largest wish-granting charity in the world, with 74 chapters across the United States and its territories and 28 international affiliates on five continents. For more information, please visit the Make-A-Wish web site at: www.wish.org or call (866) 880-1382 (toll-free). You can also support the Make-A-Wish Foundation by returning a generous tax-deductible contribution to the Gift Processing Center at: P.O. Box 97104, Washington, DC 20090-7104. Thank you.

PEDIATRIC BRAIN TUMOR FOUNDATION: The Pediatric Brain Tumor Foundation is dedicated to supporting the search for the cause and cure of

childhood brain tumors. For more information, please contact the Foundation at: **Pediatric Brain Tumor Foundation, 302 Ridgefield Ct, Asheville, North Carolina 28806, (800) 253-6530, www.curethekids.org**. Thank you.

NATIONAL CANCER FOUNDATION FOR CANCER RESEARCH: Founded in 1973 to support cancer research and public education relating to the prevention, early diagnosis, better treatments and ultimately, a cure for cancer. For more information, please visit www.NFCR.org or call 1-800-321-CURE. Thank you.

EASTER SEALS DISABILITY SERVICES: Easter Seals mission is to provide exceptional services to ensure that all people with disabilities or special needs and their families have equal opportunities to live, learn, work and play in their communities. For more information, please visit www.easterseals.com or call 1-800-221-6827. Thank you.

PACE CENTER FOR GIRLS, INC.: Provides girls and young women an opportunity for a better future through education, counseling, training and advocacy. PACE values all girls and young women, believing each one deserves an opportunity to find her voice, achieve her potential and celebrate life defined by responsibility, dignity, serenity and grace. Since its inception, PACE Center for Girls, Inc. has played a critical role in promoting gender responsive programming, influencing juvenile justice policy and changing the lives of over 12,000 at-risk girls. PACE is a not for profit, 501(c)(3) minority provider that has 22 locations in Florida (19 direct care centers and 3 outreach locations), with its headquarters in Jacksonville. For more information, please visit the website at www.pacecenter.org or call Aggie Pappas, MSW, Executive Director of the PACE Center for Girls Broward at (954) 561-6939. Thank you.

AMERICAN LUNG ASSOCIATION: It's mission is to prevent lung disease and promote lung health. To learn more, please call 1-800-LUNG-USA (1-800-586-4872) or visit www.lungusa.org. Thank you.

EASE FOUNDATION, INC.: The mission of this 501(c)(3) non-profit foundation is "To aid those

qualified residents who are in need of temporary emergency assistance with food and financial help. Our objective is to assist them back into a self-sustaining, productive life.” EASE helps approximately one hundred families each month that come into the office for groceries. EASE only handles non-perishable items, paper products and canned goods for its pantry. The shelves are in need of food. If your business, church or organization would like to have food drive, please contact Linda Owen at (954) 797-1077 or e-mail Linda at Linda_owen@davie-fl.gov. Thank you.

MILES FORMONDAYS: The Miles For Mondays program was developed to encourage donors to give platelets on Mondays. Platelets are needed to treat patients who are in danger of bleeding and do not produce enough platelets themselves to protect against fatal internal bleeding. The program has now been expanded to include Saturday platelet donors as well. Just donate platelets two eligible Mondays or two eligible Saturdays in a row and earn American Airlines AAdvantage Miles. To schedule an appointment, please call the Community Blood Centers of South Florida at (800) 869-9628, ext. 5608 or visit online at www.cbcsf.org. Thank you.

DO YOU HAVE A FAVORITE CHARITY?

I am always interested in informing our readers about worthy causes. If there is some cause you want me to share with our readers in future issues of this newsletter, please send me an e-mail or a brochure which describes the charitable organization and its mission. I will be pleased to help you share this information.

MAY I ASK A FAVOR?

IF YOU HAVE A QUESTION OR SUBJECT you'd like me to address in this newsletter, please send me an e-mail with your suggestion. Thanks.

PLEASE FORWARD: If you'd like to share this newsletter with your partners, associates, clients, friends and colleagues, feel free to forward this issue including the copyright notice.

ADDRESS CHANGES: If you want to continue to receive my newsletter, please make sure I have your current e-mail address.

QUESTIONS? COMMENTS? IDEAS? OPINIONS?

I'm always happy to hear from you.

It's summer time in South Florida. At last, the droughts of spring have given way to the almost daily rains of summer. It's so nice to see lush greenery again. As baseball season approaches its annual mid-season All-Star Game, the Marlins are still in contention. After two months of playoffs, the NBA playoffs are finally over, and professional and college football will (thankfully) soon be here. I hope you are all busy, but will have time to relax with your friends and family this summer. Let's hope for a quiet and uneventful summer. Best wishes for a safe and enjoyable summer. Relax and enjoy the slower pace of this wonderful season. Many thanks for your loyal patronage for so many years. As always, Best wishes for much Good Health, Happiness, Success, and Peace (and Good Mediation, too) in 2009 and beyond.

BRUCE A. BLITMAN, ESQ.

Certified County, Family, Circuit Civil and Federal Mediator

Qualified Arbitrator and Windstorm Insurance Network (WIN) Umpire

9050 Pines Boulevard Suite 450

Pembroke Pines, Florida 33024

Phone: (954) 437-3446

Fax: (954) 433-7816

E-Mail: BABmediate@aol.com

Full Bio: www.tfapm.org/bio_listing.shtml

website: www.BABMediate.com

and www.BruceBlitman.com

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