

## ***Mediation Agreement – the Difference between “both” and “either”***

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I realize that it references outdated technology, but I am beginning to feel like a broken record. (“Corrupted MP3 file” just doesn’t have the same impact.) At the recent Personal Injury Practice Section seminar and in several Jacksonville Bar Bulletin articles, I have discussed the need to finish the task of mediation. If your goal is to resolve the matter, be sure you spend the necessary time memorializing your resolution before ending the mediation conference. Take the extra fifteen minutes to give your settlement lasting power. Your growling stomach, busy office, and/or cost counter can wait.

This sounds sensible and simple, yet our profession seems to have a hard time implementing this principle. The latest (reported) foible was discussed in Bibi v. Royal Hidden Cove at the Polo Club Homeowners Ass’n, Inc., 974 So. 2d 619 (Fla. 4<sup>th</sup> DCA 2008). The property owner (Bibi) brought suit against the homeowner’s association (Royal) for its failure to approve the building plans for his proposed residence. Such approval had to come from Royal and from the homeowners association for the entire development, a nonparty. Early in the litigation, Bibi and Royal entered into a mediation, through which they reached a settlement that set up deadlines and protocols for resolving the matter. The parties subsequently drafted a settlement document that would have allowed Bibi to continue his lawsuit if his plans were not approved by a date certain. Royal timely approved this plans, but the nonparty association did not. Bibi reinstated his suit, for which Royal got a summary judgment based on the settlement.

The appellate court affirmed, due to the poor wording of the executed settlement agreement. In particular, paragraph 7 of the document read, “If *both* the defendant Association and the Master Association do not provide approvals as specified herein by August 19, 2005, either party may void this settlement agreement and proceed with the lawsuit.” The trial and appellate court recognized that Bibi likely intended the provision to read “If *either*...”, as approval of only one association provided him with no benefit. Yet, because Royal did approve the plans, it could not be said that “both” failed to approve them, thus barring Bibi’s continued litigation.

Granted, I am discussing this case somewhat analogously, as the document in question was not a “mediation settlement agreement”. Yet, the lessons that we should learn from Bibi are readily applicable to mediations and the successful conclusions thereof.

This case teaches us some of the differences between “both” and “either”. First, the difference was at least twelve months of legal wrangling. Second, the difference was a large financial drain for Bibi for his own legal expenses and the taxable costs obtained through the successful defense of his claim. Finally, and most importantly, the difference was probably a split-second of careful attention.

Take the extra time at the conclusion of your mediation to accurately confirm the essential terms of your settlement, and you won’t have to worry about such differences in your case.

I’ll stop my record player now...hopefully.

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