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Medical Mediation-A Judicially Supervised Social Hour

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Abstract

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KEYWORDS: medical, mediation, social hour

Medical Mediation—A Judicially Supervised Social Hour

EDWARD N. WINITZ*

In 1975, the Florida Legislature recognized that the delivery of quality health care to the citizens of Florida was threatened. Faced with what was termed a "crisis," the Legislature passed the Medical Malpractice Reform Act of 1975.¹ The preamble² to this comprehensive legislation is evidence of the intent of the Legislature to address what were perceived to be the causes of the crisis and make it clear that the provisions of the medical mediation statute are not designed as a "toll-gate" approach to the problem, wherein the claimant is required to stop at the mediation panel and pay his toll before proceeding further. Rather, the provisions of the Act are, in the words of the preamble, fundamental reforms of tort law or liability insurance system.

Because a formal medical malpractice trial is a cumbersome, time consuming, expensive, painful and traumatic experience for both plain-

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1. Medical Malpractice Reform Act, Ch.75-9, 1975 Fla. Sess. Law Serv. 1 (West)(hereinafter referred to as the Act).

2. WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and WHEREAS it is not uncommon to find physicians in high-risk categories paying premiums in excess of \$20,000 annually; and WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance, and WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire or practice defensive medicine at increased cost to the citizens of Florida; and WHEREAS the problem has reached crisis proportion in Florida

tiff and defendant, alternatives have been sought for resolving medical malpractice disputes. One such alternative is the use of a medical liability mediation panel. The goal of mediation is to permit early settlement of meritorious claims and discourage frivolous litigation.³ The following advantages have been said to be present where medical mediation panels are used:

1. The unsophisticated jury is replaced by knowledgeable fact finders who, because of their expertise, are more capable of distinguishing a meritorious claim from a frivolous, nuisance claim.
2. Long delays between the initiation and final disposition of lawsuits may be avoided, thus providing the opportunity for rapid resolution of cases.
3. The enormous expense of actions-at-law is reduced because the technical, formal time-consuming procedure characteristic of a trial are replaced by an informal and simple process.
4. Unjustified, embarrassing lawsuits can be avoided if the panel is successful in identifying nuisance claims.⁴

By providing an impetus toward settlement and earlier resolution of disputes, the mediation procedure provides immediate benefits to the parties and to the judicial system. The claimant benefits when the case is settled rather than tried, because he receives compensation at a time when he may be out of work and in need of funds for medical expenses. The defendant benefits in that a rapid resolution of controversies subjects him to minimal embarrassment and potential damage to his reputation by an unwarranted claim.⁵ The judicial system benefits in that, if the number of malpractice suits that reach the trial stage is reduced, then the backlog is reduced and personnel and facility costs are avoided.

3. In Dade County, the clerk's statistics indicate that, in 1975 when the statute became effective, there were 74 requests for mediation filed and only 43 of those were subsequently filed in the circuit court. In 1976 there were 262 cases filed for mediation. One hundred sixteen cases subsequently were filed in the circuit court. Seventy-four of the cases were dismissed, either by settlement or by the statutory dismissal by the clerk. Of the 262 medical malpractice cases filed in 1976, 45 of the 100 cases tried were filed in the circuit court for litigation. The statistics affirmatively show a reduction in the filing of circuit court law suits, which reduced the need and expenses for the preparation of jury trials. Interview with Barbara Roberson, Medical Mediation Clerk, Dade County, Florida, May 18, 1977.

4. Hooks, *The Florida Medical Malpractice Act of 1975*, 4 FLA. ST. U. L. REV. 77, 78 (1976).

5. HEW, *Appendix, Report of the Secretary's Commission on Medical Malpractice* (DHEW Pub. No. (05) 73-89, 1973).

The 1975 Florida Legislature saw mediation of medical malpractice disputes as a partial resolution of the crisis it faced with the delivery of quality health care to the citizens of the state. As a provision of the Medical Malpractice Reform Act, the Legislature enacted Section 768.44, Florida Statutes (1977),⁶ which provided that, before a person

6. §768.44, FLA. STAT. (1977) (amending §768.133 (1975)) states:

768.44 Medical liability mediation panels; membership hearings

(1)(a) Any person or his representative claiming damages by reason of injury, death, or monetary loss on account of alleged malpractice by any medical or osteopathic physician, podiatrist, hospital, or health maintenance organization against whom he believes there is a reasonable basis for a claim shall submit such claim to an appropriate medical liability mediation panel before that claim may be filed in any court of this state.

(b) Claims shall be made on forms provided by the circuit court and shall be filed initially with the clerk of that court, with copies mailed to the person against whom the claim is made and to the administrative board licensing such professional. Service of process shall be effected as provided by law. Constructive service of process may be effected as provided by law.

(c) All parties named as defendants in the claim shall file an answer to such claim within 20 days of the date of service. No other pleadings shall be allowed. If no answer is filed within such time limit, the jurisdiction of the mediation panel over the subject matter shall terminate, and the parties may proceed in accordance with law.

(2) The chief judge of each judicial circuit shall prepare a list of persons available to serve on medical liability mediation panels whose purpose shall be to hear, and facilitate the disposition of, all medical malpractice actions arising within the jurisdiction of the circuit. The number of persons on the list shall be determined by the chief judge, but they shall be in sufficient numbers to efficiently carry out the intent of this section. Each hearing, as hereinafter provided for, shall be before a three-member panel, hereinafter referred to as the "panel," "mediation panel," or "hearing panel," composed as follows: a judicial referee, who shall be the presiding member of the hearing panel; a licensed physician; and an attorney. The judicial referee shall be a circuit judge. Such appointments of judicial referees shall be made by a "blind" system. The other panel members shall be selected in accordance with the following procedures . . .

(3) The clerk shall, with the advice and cooperation of the parties and their counsel, fix a date, time, and place for a hearing on the claim before the hearing panel. The hearing shall be held within 120 days of the date the claim was filed with the clerk unless, for good cause shown upon order of the judicial referee, such time is extended. Such extension shall not exceed 6 months from the date the claim is filed. If no hearing on the merits is held within 10 months of the date the claim is filed, the jurisdiction of the mediation panel on the subject matter shall terminate, and the parties may proceed in accordance with law.

(4) The filing of the claim shall toll any applicable statute of limitations, and such statute of limitations shall remain tolled until the hearing panel issues

or his representative may file a damage suit for alleged malpractice against a health care provider, he must first submit his claim to a mediation panel. The panel, pursuant to the statute, shall decide the issue of liability, *i.e.*, whether the defendant was actionably negligent in his care and treatment of the patient.

Requiring a party to comply with certain jurisdictional prerequisites is not new in this jurisdiction and, therefore, the Florida Courts have already determined that it is not a denial of procedural due process for a statute to impose jurisdictional prerequisites to suit as well as prerequisites to the granting of relief.⁷ The appellate courts in this jurisdiction

its written decision or the jurisdiction of the panel is otherwise terminated. In any event, a party shall have 60 days from the date the decision of the hearing panel is mailed to the parties or the date on which the jurisdiction of the panel is otherwise terminated in which to file a complaint in circuit court.

(5) All parties shall be allowed to utilize any discovery procedure provided by the Florida Rules of Civil Procedure. Any motion for relief arising out of the use of such discovery procedure shall be decided by the judicial referee. The judicial referee may in his discretion make reasonable limitations on the extent of discovery.

(6) The claim shall be submitted to the hearing panel under such procedural rules as may be established by the Supreme Court, however, strict adherence to the rules of procedure and evidence applicable in civil cases shall not be required. Witnesses may be called; all testimony shall be under oath; testimony may be taken either orally before the panel or by deposition; copies of records, x-rays, and other documents may be produced and considered by the panel; and the right to subpoena witnesses and evidence shall obtain as in all other proceedings in the circuit court. The right of cross-examination shall obtain as to all witnesses who testify in person. Both parties shall be entitled, individually and through counsel, to make opening and closing statements. No transcript or record of the proceedings shall be required, but any party may have the proceedings transcribed or recorded. The judge presiding at the hearing shall not preside at any trial arising out of the claim or hear any application in the case not connected with the hearing itself. No other hearing panel member shall participate in a trial arising out of the claim, either as counsel or witness.

(7) Within 30 days after the completion of any hearing, the hearing panel shall file a written decision with the clerk of the court who shall thereupon mail copies to all parties concerned and their counsel. The panel shall decide the issue of liability and shall state its conclusion in substantially the following language:

(a) "We find the defendant was actionably negligent in his care or treatment of the patient and we, therefore, find for the plaintiff"; or

(b) "We find the defendant was not actionably negligent in his care or treatment of the patient and we, therefore, find for the defendant." The decision shall be signed by all members of the hearing panel; however, any member of the panel may file a written concurring or dissenting opinion

7. See text accompanying notes 9 through 15 *infra*.

have consistently affirmed orders dismissing complaints for failure to comply with a condition precedent to obtaining relief.⁸

In one such case, *Millstream Corp. v. Dade County*,⁹ the corporation sought to have certain county tax assessments declared void and to enjoin the collection of ad valorem taxes on its property, pending a determination by the circuit court as to whether the corporation's property should have been classified as agricultural lands. The Third District Court of Appeal affirmed the trial court's order of dismissal of the corporation's (taxpayer) suit, for failure to comply with certain statutes¹⁰ requiring a taxpayer, as a prerequisite to suit, to pay those taxes which are admittedly owing. The court held that appellant (Millstream) was not denied due process since it had both the opportunity and the means to comply with the statute and there was no doubt that the state could properly and validly impose such requirements.¹¹

Similarly, compliance with Section 770.01, Florida Statutes,¹² is a condition precedent to the maintenance of a libel or slander action. Failure to comply with the provisions of the aforementioned statute was held, in *Ross v. Gore*,¹³ to justify entry of final judgment for defendant, since compliance was a condition precedent to plaintiff's ability to maintain his action. Similar results are found in *Gannett Florida Corp. v.*

8. *Id.*

9. 340 So. 2d 1276 (Fla. 3rd DCA 1977).

10. §§191.171(3) and (4) FLA. STAT. (1977).

11. The appellant in this action had such an opportunity, and it was only through its failure even to tender payment of those taxes which were admittedly owing that it was deprived of a hearing. There is little doubt that the state may validly impose such a requirement. Were it not so, it would be an easy matter to avoid paying legitimate taxes simply by challenging one facet of an otherwise valid assessment.

340 So. 2d at 1278.

12. §770.01 FLA. STAT. (1977) states: "Before any civil action is brought for publication or broadcast, in a newspaper, periodical or other medium, of a libel or slander, the plaintiff shall at least five days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast, and the statements therein, which he alleges to be false and defamatory."

13. In *Ross v. Gore*, 48 So.2d 412 (Fla. 1950), Julian Ross (Appellant) filed a libel suit against Gore and others based on an allegedly defamatory editorial which appeared in a newspaper published by defendant. The Florida Supreme Court affirmed the final judgment for defendants holding, *inter alia*, that a statute which requires certain prerequisites does not violate the due process and equal protection clauses of the Constitution.

*Montesano*¹⁴ and in *Orlando Sport Stadium, Inc. v. Sentinel Star Company*.¹⁵

Indeed, the above libel statutory provisions are phrased in terms nearly identical to those of Section 768.44(1)(a), Florida Statutes, dealing with jurisdiction prerequisites to filing a circuit court action in a medical malpractice case.¹⁶

The fact that a medical malpractice plaintiff and defendant are treated differently is not the result of some invidious and unconstitutional discrimination. On the contrary, the State of Florida prescribed a reasonable and appropriate condition to the bringing of a lawsuit, of a specified kind or class, and this distinction is not only real but the condition imposed has a reasonable relation to a legitimate object.

Currently on appeal to the Florida Supreme Court is *Herrera v. Doctors' Hospital and Elbert L. Fisher, M.D.*¹⁷ This case had been certified by the Third District Court of Appeal as being a case passing upon a question of great public interest, to-wit:

whether a medical malpractice complaint filed in the Circuit Court may be dismissed, with prejudice, by a trial judge when the plaintiff has filed a medical mediation claim pursuant to Section 768.44, Florida Statutes then failed to submit evidence in support of the claim before the mediation panel but has accepted the statutory conclusion of the panel as to liability, to-wit: "We find the defendants were not actionably negligent in their care and/or treatment of the patient and we, therefore, find for the defendants."¹⁸

On December 29, 1975, the Herreras (claimants) filed a request for medical mediation within the scope of Section 768.44, Florida Statutes. They alleged the customary allegations against the defendants regarding negligence which resulted in injuries and damages to them on or about

14. 308 So.2d 599 (Fla. 1st DCA 1975), *cert. denied*, 317 So.2d 78 (Fla. 1975).

15. 316 So.2d 609 (Fla. 4th DCA 1975).

16. See *Rocky Riccobono v. Cordis Corp.*, 341 So.2d 805 (Fla. 3rd DCA 1977); *Mt. Sinai Hospital of Greater Miami, Inc. v. Wolfson*, 327 So.2d 883 (Fla. 3rd DCA 1976).

17. 360 So.2d 1092 (Fla. 3rd DCA 1978), *appeal docketed*, Nos. 53,646 and 53,699, ___ So.2d ___ (Fla.).

18. Certified question of the Third District Court of Appeal, February 28, 1978. The Florida Supreme Court accepted jurisdiction pursuant to FLA. R. APP. P. 9.030(a) (2) (A) (ii) which states that certiorari jurisdiction of the Supreme Court may be sought to review decisions of the district courts of appeal that pass upon a question certified to be of great public interest.

September 8, 1967.

Pursuant to the mediation statute, a mediation panel was chosen and the hearing was scheduled to last three days beginning September 27, 1976.

At that hearing, the claimants chose not to present any evidence, testimony, expert or otherwise, nor any documentary evidence to establish any basis for a medical malpractice claim. The record on appeal indicates claimants' deliberate circumvention and subversion of the Act:

[Claimants' Attorney]: It is a horrible, hideous trauma, and he says I am trying to subvert it. He is absolutely right . . . It's a law that should be subverted.¹⁹

The Judicial Referee, finding that no evidence had been presented, stated:

[B]ut in the eyes of the law, there has been no evidence presented . . . there can be no ruling on the merits.²⁰

The medical mediation hearing concluded with the entry of the following order:

We find the Defendants were not actionably negligent in their care and/or treatment of the patient and we, therefore, find for the Defendants, *because the claimants chose not to present any evidence before this Mediation Panel.*²¹

On October 1, 1976, the Herreras commenced a malpractice action in the circuit court of the Eleventh Judicial Circuit in and for Dade County, Florida. The defendants filed their respective motions to dismiss the complaint asserting, *inter alia*, that plaintiffs did not present any testimony or other documentary evidence to support their claim of malpractice at the medical mediation hearing and, therefore, they avoided and subverted the purposes and intention of the Medical Mediation Statute. As a result, the plaintiffs deprived the defendants of a

19. 360 So.2d 1092, Record at 37.

20. *Id.*, Record at 71.

21. *Id.*, Record at 7 (emphasis added). It should be noted that the additional language of the order itself was not a question presented on appeal when the Herreras appealed the trial court's order dismissing their complaint with prejudice.

valuable legal right, without due process of law which was extended to them pursuant to the statute.²² The hospital also moved to dismiss the complaint for failure to comply with the applicable Florida statute of limitations, however, this issue was not decided because of the court's order.

The trial court, after having heard argument from all parties, dismissed the Herrerras' complaint with prejudice and held that they failed to comply with the requirements of the statute; that such failure was

a deliberate attempt to circumvent and evade the provisions of the statute; that the procedure followed by the plaintiffs in this case attempted to make a mockery and a sham of the procedure enacted by the Legislature and upheld by the Supreme Court of Florida; [and that compliance with the mediation procedure is] a jurisdictional prerequisite to the bringing of a medical malpractice suit in the Court of Florida.²³

Based upon the foregoing facts, the Herreras filed an appeal with the Third District Court of Appeal arguing the following point of law; Whether the trial court properly dismissed with prejudice the subject cause of action for failure of appellants (Herreras) to comply with the Medical Mediation Act. On this point, the court reversed and remanded with instructions to permit the Herreras to reinstitute the suit on the condition that the conclusion of the mediation panel be admissible in evidence at trial and that counsel be prohibited from informing the jury about the stricken portion of the panel's decision. Judge Pearson, dissenting, held that where a trial judge found that there had not been a good faith compliance with the statute, he had the jurisdiction to dismiss the complaint. Further, Judge Pearson wrote that he would affirm the trial judge's order upon the holding of the mediation panel judge.²⁴

22. See note 6 *supra*.

23. See note 18 *supra*, Record at 83-85.

24. It appears abundantly clear to this Court from an examination of the Act itself, and its intent and purpose, that the Florida Legislature intended that the Medical Mediation panels provided for would conduct a hearing on the merits of the case before it. It appears to be eminently clear that the Legislature in its approach to the public health crisis in Florida, by this Act, seeks to remove from the Court system of this State those medical malpractice cases which are patently frivolous, or clearly meritorious, and those which are subject to settlement after the parties have been brought together with a disinterested mediator and to act as preliminary screening panels to determine the issues of liability and damages. A compliance with this mediation procedure is and should be a jurisdictional prerequisite to the bringing of a medical malpractice suit in the Courts of Florida. The procedure followed by the plaintiffs in this case attempt to make a mockery

The defendants argued that under the Medical Mediation Statute, a claimant must present evidence in support of his claim at the mediation hearing as a condition precedent to this right to sue. The Third District Court, placing great emphasis on the precatory language used in the statutory provision as it relates to the presentation of evidence before a panel, held that a claimant had satisfied the jurisdictional requirement when he submitted his claim for mediation whether or not he presented any evidence. To affirm this decision will occasion a repeat of the crisis which existed in 1975, thus subverting the very intent and purpose of the Act.²⁵

The issue presented by the *Herrerias*' case, therefore, was whether the *Herrerias* complied with the jurisdictional prerequisites of Section 768.44, Florida Statutes. Does the mere filing of a claim for medical mediation constitute a submission of the claim to a mediation or is it the presentation of evidence to the mediation panel which constitutes submission of the claim to mediation within the meaning of Section 768.44(1)(a)? In other words, does the mere filing of the claim form and payment of filing fee, concomitant with a voluntary intentional and informed decision to refuse to present any evidence at the hearing, comply with the requirement that the claimant "shall submit such claim" to a mediation panel. By the words of the statute itself, there is a distinction between submitting a claim and the mere filing of a claim form. Subsection (1)(b) of the Act provides that "claims shall be" made on forms provided by the circuit court and shall be "filed" with the clerk. Subsection (1) (c) provides that defendant shall "file" an answer. Subsection (4) indicates that the "filing" of the claim shall toll the applicable statute of limitation. Subsection (3) further provides that the clerk "shall" set a time and place for "a hearing on the claim before the hearing panel." "The hearing shall be held" within a specified time after the "date the claim is filed." Within 60 days of the date of the decision of the hearing panel, the claimant may "file" a complaint in

and a sham of the procedure enacted by the Legislature and upheld by the Supreme Court of Florida and appears to be a deliberate attempt to circumvent and evade the provisions of the Act. To permit and condone the procedure followed by the claimant before the medical mediation panel would make an absurdity of the Act.

316 So.2d 609.

25. The author agrees with the Third District Court of Appeal that the conclusion reached by the mediation panel went beyond the limits prescribed by the statute when the panel included a reason (beginning with the word "because") for its decision as a part of its conclusion, thus transgressing the limitations of §768.44(7) FLA. STAT. (1977).

court. Subsection (6) requires that “[t]he claim shall be submitted to the hearing panel under such procedural rules as may be established by the Supreme Court.”²⁶

The plaintiffs and the Third District Court of Appeal took the position that, where the statute requires them to submit a claim, this only means that the claim has to be filed with the clerk. The majority of the Third District Court would hold that the terms “submit” and “file” have identical meanings. Such a determination is erroneous for two reasons. First and most important is that these terms are words of common usage and, when used in a statute, should be construed in their plain and ordinary sense.²⁷ To file a claim, as required by the statute, means to deliver and deposit the required document with the clerk of court. On the other hand, to submit the claim, once the claim was filed, as required by Section 768.44(1)(a) and 768.44(6), Florida Statutes, means to present evidence to the panel allowing it to take the claim under advisement for purposes of reaching an informed and intelligent decision required by subsection (7).²⁸ Second, since the legislature used two different terms (submit and file), case law holds that it must be presumed that different meanings are to be ascribed to them.²⁹ Thus, the legislative intent expressed by the choice of differing terms in various parts of this statute was that “submit” was to have a different meaning than the word “file.” That is to say, more is involved in submitting a claim to mediation than simply filing the claim. As stated in *Sharer v. Hotel Corp. of America*,³⁰ “[i]t should never be presumed that the Legislature intended to enact purposeless and therefore useless, legislation. [The court] must avoid statutory construction which would impair, nullify or defeat the object of the statute.”³¹

26. See note 6 *supra*.

27. *American Bankers Life Assurance Co. v. Williams*, 212 So.2d 777 (Fla. 1st DCA 1968).

28. BLACK'S LAW DICTIONARY, revised, 4th ed. at 1594 (1968) defines “submit” as follows:

To commit to the discretion of another . . . To propound; to present for determination; as an advocate *submits* a proposition for the approval of the court . . .

That is to say, a cause is not “submitted” by the mere filing of a form, but rather is “submitted” only when probative evidence in support of the moving party's case has been introduced.

29. See *Florida State Racing Commission v. Bourquardez*, 42 So.2d 87 (Fla. 1949).

30. 144 So.2d 813 (Fla. 1962).

31. *Id.* at 817. See also *Van Pelt v. Hilliard*, 78 So. 693 (Fla. 1918); *City of Indian Harbour Beach v. City of Melbourne*, 265 So.2d 422 (Fla. 4th DCA 1972).

The Florida Supreme Court has enunciated its interpretation of the legislative intent embodied within the mediation panel provisions insofar as the main issue in *Herrera* is concerned, by stating in *Carter v. Sparkman*³² that: “[T]he statutes involved here deal with matters related directly to public health and obviously have for their purpose an effort to have the parties mediate claims for malpractice thereby reducing the cost of medical malpractice insurance and ultimately medical expenses.”³³

Similar language reaching to legislative intent and public policy is contained within Justice England’s concurring opinion where he writes “[i]t troubles me that persons who seek to bring malpractice lawsuits might be put to the expense of two full trials on their claim”³⁴

To require the claimant to come forward with probative evidence in support of his claim fosters the clear legislative intent, and such interpretation of the statutory phrase “submit such claim” prevents this Act from becoming meaningless. Since claimants in *Herrera* did not submit such claim, but simply filed the claim within the meaning of subsection (1) (b) of the statute, they failed to meet the jurisdictional prerequisite and, accordingly, the circuit court was unable to try the claim since jurisdiction to do so was lacking. Hence, it is this writer’s belief that the trial court was correct in dismissing the cause.

32. *Carter v. Sparkman*, 335 So.2d 802 (Fla. 1976), *cert. denied*, ___ U.S. ___, 97 S. Ct. 740 (1977) upheld the constitutionality of the medical mediation statute. In so doing, the court stated;

Although courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guarantee of access, there may be reasonable restrictions prescribed by law. Typical examples are the fixing of a time within which suit must be brought, payment of reasonable cost deposits, pursuit of certain administrative relief such as zoning matters or workmen’s compensation claims, or the requirement that newspapers be given the right of retraction before an action for libel may be filed.

Cases are legend which hold that the police power of the state is available in the area of public health and welfare, and we must, therefore, consider matters pursued under the law sub judice as being separate and distinct from those generally flowing from the marketplace. At the time of enactment of the legislation in question sub judice, there was an imminent danger that a drastic curtailment in the availability of health care services would occur in this state. The Legislature’s recognition of the crisis in the area of medical care and the need for legislation for the benefit of public health in this state is evidenced by the Preamble

Id. at 805.

33. *Id.* at 806.

34. *Id.* at 807.

The Third District Court of Appeal failed to consider, when rendering its opinion, that it was an uncontroverted fact and admission that the Herreras deliberately circumvented the Medical Mediation Act. Dismissal of their complaint was justified since it is clearly provided for by rule and case law. Such deliberate tactics fall within the spirit of Rule 1.420(6) Florida Rules of Civil Procedure, which provides, in part, that:

Any party may move for dismissal of an action or of any claim against him for failure of any adverse party to comply with these rules or any order of court. . . . unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, . . . operates as an adjudication on the merits.³⁵

Even apart from the aforementioned Rules, the courts have the inherent power to impose the sanction of dismissal with prejudice for failure to comply with their orders. In *Surrency v. Winn and Lovett Grocery Co.*,³⁶ The Florida Supreme Court stated:

When a plaintiff invokes the jurisdiction of a Court and seeks to avail himself of it he does so with the understanding that he must abide by all lawful statutes, rules and order applicable to him, and the Court has inherent power to impose the sanction of dismissal, for its coercive effect. (Citations omitted)³⁷

The question which then arises, and which was advanced by the Herreras on appeal, is what quantum of proof is required to be presented by a claimant at the mediation hearing. This argument had nothing to do with the order of dismissal in the trial court since the issue before that court was whether uncontroverted subversion of the law and total failure to mediate justified dismissal of the circuit court complaint. The claimants ignored the statute by refusing to present any evidence and by refusing to submit the merits of their claim to mediation. The claimants failed to present any evidence and the court felt that some was required—that a good faith effort had to be made to comply with the law.

What then is the burden of proof in any medical malpractice case, despite the forum where it is litigated? Section 768.45, Florida Statutes states:

35. FLA. R. CIV. P. 1.420(b).

36. 34 So.2d 564 (Fla. 1948).

37. *Id.* at 565.

[T]he claimant shall have the same burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the accepted standard of care for that health care provider. The accepted standard of care for a given health care provider shall be that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances.³⁸

This statutory enactment simply codified the Florida common law on this subject. The cases in Florida are legend in number which hold that the plaintiff may not recover against a defendant in a malpractice action in the absence of proof of the following elements: Standard of care, breach of standard of care or duty, proximate cause and damages or injuries. In *Hunt v. Gerber*,³⁹ the court stated that in the absence of a showing of what the standard of care is, and coupled with the absence of showing that the hospital's actions were a departure from the accepted standards of care, and that such departure was the proximate cause of the injury sustained by the plaintiff, it would not submit the case to a jury, for to do so would be granting a jury a license to speculate as to what caused the injury in the particular case.⁴⁰ Actions of medical malpractice cannot be grounded on speculation.⁴¹

Because case law requires that the standard of care and breaches of it, as well as proximate causation, be established by the plaintiff, Florida case law has also required that such must be proven by expert testimony. The leading Florida case on the subject is *O'Grady v. Wickman*.⁴² In *O'Grady*, the court held that expert testimony is required to ascertain the skills and means that are recognized as necessary and customarily followed in the particular community.⁴³ There is, of course, one exception to the rule requiring expert testimony, and that is where the duty and its breach are so obvious as to be apparent to persons of common experience.⁴⁴

38. §768.45 FLA. STAT. (1977).

39. 166 So.2d 720 (Fla. 3rd DCA 1964).

40. *Id.* at 722.

41. See *Blackwell v. Southern Florida Sanitarium and Hospital Corp.*, 174 So.2d 45 (Fla. 3rd DCA 1965); *Barber v. North Shore Hospital, Inc.*, 145 So.2d 760 (Fla. 3rd DCA 1962); *Memorial Hosp., South Broward Hosp. District v. Doring*, 106 So.2d 565 (Fla. 2nd DCA 1958), for similar statements of the law.

42. 213 So.2d 321 (Fla. 4th DCA 1968).

43. *Id.* at 324.

44. The discovery of the presence of a foreign body, such as a sponge, clamp, forceps, surgical needle, or other paraphernalia, commonly used in diagnosing and

There was a simple, direct method of dealing with the crisis in health care services existing not only in this state but throughout the United States, to-wit: express legislative and fundamental reforms. The trial court, in dismissing the Herreras' complaint, construed the statute in accordance with the legislative intent. More particularly, it examined the language of the statute, the subject sought to be regulated, the purpose to be accomplished, and the means adopted for accomplishing the purpose.⁴⁵ The district court failed to recognize the intended purpose of the legislation enacted to deal with the malpractice crisis. Adoption of its opinion and of the Herreras' "deliberate attempt to circumvent and evade the provisions of the Act" will reduce the medical mediation hearing to little more than a judicially supervised social hour and will destroy any useful purpose intended for mediation panels. If the claimant fails to present testimony then the intent and purpose of the Act, *i.e.*, to screen out nonmeritorious claims and encourage settlement of meritorious claims, will never be accomplished because a hearing on the merits will not be held. Hence, the method for evaluating the claim is rendered useless and the mediation process will only result in an enormous waste of extremely valuable judicial time and labor.⁴⁶

treating a patient, is prima facie evidence of negligence. Amputation of the wrong extremity or removal of the wrong tooth or organ are other cases falling within this exception.

45. See, *e.g.*, *Deltona Corp. v. Florida Pub. Serv. Comm.*, 220 So.2d 905 (Fla. 1969).

46. The Florida Supreme Court, in an opinion filed December 21, 1978, affirmed the decision of the Third District Court of Appeal and held that it is not a jurisdictional prerequisite to the bringing of a medical malpractice lawsuit that the plaintiff present evidence at the mediation hearing but only that the plaintiff submits the claim to mediation. 1 Fla. L. W. 17 (January 1, 1979).