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**Apr 07 2023**

**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
CIRCUIT COURT

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L. Casey Manning, Circuit Court Judge

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Case No. 2019-CP-40-06996  
Appellant Case No. 2022-001755

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Champion Window Company of Columbia, SC.....Respondent,

vs.

Keith B. Evans and Brenda C. Evans.....Appellant.

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**INITIAL BRIEF OF APPELLANT**

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## STATEMENT OF ISSUES ON APPEAL

- I. Plaintiff violated the SCADR Rules by failing to mediate this case prior to trial. This Court should vacate the judgment, order mediation and/or impose sanctions against Plaintiff. The Circuit Court also erred by allowing the case to proceed to trial without proof of ADR being filed and no motion to be exempt from the mediation requirement being made or ruled on.

## **STATEMENT OF THE CASE**

Respondent commenced this action with the filing of a Summons and Compliant December 16, 2019, asserting a breach of contract cause of action with liquidated damages, attorney's fees and costs, as well as pre-judgment interest. Appellants filed a hand-written answer January 16, 2020 asserting defenses that Respondent had caused substantial damage to their home from water intrusion caused during installation and that some of the work is not completed. A Notice of ADR was filed July 8, 2020.

A hearing was held August 25, 2020 before Judge L. Casey Manning where he granted Appellants a 30 day continuance to obtain an attorney in an order filed August 28, 2020. After a lengthy delay due in part to the Covid shut down, the case was set on a bench trial roster for an October 4, 2022 trial date for default and merits hearing. Attorney for Respondent filed a Notice of Hearing September 23, 2022, but Appellants testified at trial that she did not receive it until the Wednesday prior to the trial date. (Trial Tr., p. 47, ll 6-7). No proof of ADR was filed and no mediation or arbitration was conducted as required by Rule 3, SCADR Rules. No motion to be exempt from the ADR requirement was filed by Respondent. A trial was held October 4, 2022 where the pro se Appellants were grossly unprepared to present their defenses. The Court rendered a verdict for Respondent for everything Counsel for Respondent requested including actual damages, attorney's fees/costs, and pre-judgment interest. Appellants filed a timely notice of appeal.

## **STATEMENT OF FACTS**

This case involves a contract between a homeowner, Appellants, and a contractor, Respondent, to replace windows and other work to be performed by Respondent at Appellants' home. The contract was for \$55,354 with half to be paid up front and half to be paid at completion.

Appellants paid the first half, but withheld the second half when they discovered water intrusion damage that lead to water damage and mold damage and continued water intrusion. Appellants also claimed that damage to the roof on the center front of the house was not yet repaired. Despite being issued an ADR Notice on July 8, 2020, no proof of ADR was ever filed and no motion to be exempt form ADR was ever filed or ruled on prior to the October 4, 2022 trial.

### **STANDARD OF REVIEW**

“ ‘Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below.’ ” Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). “It is well-established that ‘the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.’ ” Id. (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). “Therefore, the courts are bound to give effect to the expressed intent of the legislature.” Id. “It is only when applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it that we look beyond the statute's plain language.” Id. at 536, 725 S.E.2d at 695–96 (citing Cabiness v. Town of James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011)).

[404 S.C. 63] Further, “statutes in derogation of the common law are to be strictly construed.” Id. at 536, 725 S.E.2d at 696 (citing Epstein v. Coastal Timber Co., 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011)). “Under this rule, a statute restricting the common law will ‘not be extended beyond the clear intent of the legislature.’ ” Id. (quoting Crosby v. Glasscock Trucking Co., 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)). “ Statutes subject to this rule include those which ‘limit a claimant's right to bring suit.’ ” Id. (quoting 82 C.J.S. Statutes § 535). Ross v. Waccamaw Cmty. Hosp., 404 S.C. 56, 744 S.E.2d 547 (S.C. 2013).

## ARGUMENT

**I. Respondent and the Court did not comply with the mandatory mediation requirement prior to trying the case. As a result, the trial decision should be vacated, alternative dispute resolution must be compelled prior to trial or sanctions be imposed against Respondent.**

Rule 3 of the SCADR Rules reads as follows:

**(a) Mediation.** All civil actions filed in the circuit court, all cases in which a Notice of Intent to File Suit is filed pursuant to the provisions of S.C. Code 15-79-125(A), and all contested issues in domestic relations actions filed in family court, except for cases set forth in Rule 3(b) or (c), are subject to court-ordered mediation under these rules. Except for exempt cases, in all civil actions filed in the circuit court and all contested issues in domestic relations actions filed in family court, the parties may agree, in lieu of mediation, to conduct an arbitration or early neutral evaluation under these rules. The parties may select their own neutral and may mediate, arbitrate or submit to early neutral evaluation at any time.

**(b) Exceptions.** ADR is not required for:

- (1) special proceedings, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
- (2) requests for temporary relief;
- (3) appeals;
- (4) post-conviction relief (PCR) matters;
- (5) contempt of court proceedings;
- (6) forfeiture proceedings brought by governmental entities;
- (7) mortgage foreclosures;
- (8) family court cases initiated by the South Carolina Department of Social Services; and
- (9) cases that have been previously subjected to an ADR conference, unless otherwise required by this rule or by statute.

**(c) Motion to Exempt from ADR.** A party may file a motion to exempt a case from ADR for case specific reasons. For good cause, the Chief Judge for Administrative Purposes of

the circuit may grant the motion. For example, it may be appropriate to completely exempt a case from the requirement of ADR where a party is unable to participate due to incarceration or physical condition.

**(d) Motion to Refer Case to Mediation.** In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

This action is subject to the mandatory requirement to mediate under Rule 3(a), SCADR Rules and is not subject to any exceptions under Rule 3(b). There is no exception for case where the defendant is pro se. As of the date of the trial, despite having been served a Notice of ADR on July 8, 2020, Respondent had not filed the required proof of ADR and the Plaintiff had not yet mediated, arbitrated or moved to be exempt from the mandatory requirement to mediate under Rule 3(c).

Rule 10 of the SCADR Rules relating to Sanctions reads as follows:

**(a) Proof of ADR.** If by the time required by these rules, no Proof of ADR has been filed with the Office of the Clerk of Court and the case has not been exempted or deferred from ADR by court order, the court may issue a Rule to Show Cause why sanctions should not be imposed, including the dismissal of an action without prejudice or the striking of a pleading. The court may also manage such cases through status conferences and/or scheduling orders.

**(b) Sanctions.** If any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may, on its own motion or motion by any party, impose upon that party, person or entity, any lawful sanctions, including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCF.

Rule 10(a) of the SCADR Rules allow the court to issue a Rule to Show Cause for sanctions and can dismiss an action or strike a pleading. Rule 10(b) allows the court to make its own motion, or by motion of any party, to impose sanctions including the payment of fees.

Nowhere in Rule 3, Rule 10 or any other SCADR Rule is the court granted authority to try a case when the mandatory ADR requirement has not been met. In addition, there is nothing in

the SCADR Rules that permit a Plaintiff to go to trial before mediating if the defendant and the court don't remind him it is required. Perhaps due to the delay in the case getting to trial due to the Covid shut down, the ADR coordinator, the court, and Respondent overlooked the requirement. This, however, does not relieve the parties of the ADR requirement. In fact, due to the Covid shut down, the cases that were getting resolved were getting resolved in mediation. Zoom mediations became ubiquitous and virtually all types of parties were able to participate in mediation safely.

Rule 6(a) SCADR Rules reads as follows:

**Duty to Inform:** In cases subject to ADR under these rules, all attorneys should fairly and objectively inform their clients about mediation and arbitration.

Respondent had counsel throughout this case, Carols W. Gibbons, Jr., who is also a certified circuit court mediator. While Respondent's counsel had a duty to, and likely did, inform his client of the mandatory ADR requirement, Appellants did not have an attorney that is required to inform them about the ADR requirement. This put Respondent in a superior position to abide by the mandatory ADR requirement. In addition, Respondent is the Plaintiff in this action and this is Respondent's action to ensure mediation is conducted prior to trial. It is Respondent's duty to ensure that the case meets the ADR requirements before trial or be subject to sanctions. Again, Appellants contend that the SCADR Rules allow the Court of Appeals to issue sanctions for failing to mediate and should do so.

The Supreme Court has held that a failure to timely complete mediation is not grounds for dismissal, but that mediation should be ordered if not timely completed. Ross v. Waccamaw Cnty. Hosp., 404 S.C. 56, 744 S.E.2d 547 (S.C. 2013). *Ross* involved the 120 day requirement to mediate a medical malpractice case under §15-79-125. The Court went on to reason that to hold otherwise would motivate Defense attorney's to intentionally delay mediating so they can move for dismissal

after the deadline had passed. Similarly, if the court allows this trial result to stand, Plaintiff's attorneys facing an unsophisticated, pro se defendant who does not have an attorney informing him of the mandatory ADR requirement and the likelihood of resolving their case in a mediation may intentionally withhold this information from the Defendant to avoid mediating the case knowing they will have their opponent greatly outmatched at trial.

The court in *Ross* notes that the intent of the legislature is expressed in Rule 1 of the SCADR Rules: These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply. *Id.* The court in *Ross* goes on to reason that not requiring the mediation does not meet this goal. *Id.* This same rationale applies in this case. The Court should require the mediation to abide by the legislative intent instead of rewarding Plaintiff's who are up against an unsophisticated, pro se defendant and fail to meet a mandatory prerequisite of bringing a case prior to trial.

To allow a trial result to stand without the parties engaging in ADR deprives the parties of a substantial right and rewards a Plaintiff who disregarded a mandatory requirement before trying a case. Rule 10 of the SCADR Rules allow the court to issue sanctions including striking a pleading or dismissing the case without prejudice. Appellants contend that the Court of Appeals can impose these sanctions as well as the Circuit Court. In addition, under Rule 3(d), the court may move to refer a case to mediation and order it so. Appellants contend that the Court of Appeals also has this authority and in lieu of sanctions, should vacate the trial verdict and order the case to mediation prior to trial.

### **CONCLUSION**

Mediation is a requirement for this type of case prior to trial. It is the Plaintiff's responsibility to ensure mediation is conducted or move to be exempt from the requirement or face

sanctions under Rule 10 of the SCADR Rules. Plaintiff did neither in this case and the trial court failed to compel mediation and as a result, this court vacate the trial judgment, refer the case for mediation pursuant to Rule 3(d), and/or impose sanctions against Plaintiff in the form of dismissal of this action, attorney's fees, costs, or any other sanctions allowed by SCRCRCP Rule 37(b) as the court deems just and proper.

Respectfully submitted,

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