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**Jun 26 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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**FINAL REPLY BRIEF OF APPELLANT**

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T. Jeff Goodwyn, Jr. (SC Bar #:73789)  
Goodwyn Law Firm, LLC  
2309 Devine Street  
Columbia, SC 29205  
[JGoodwyn@Goodwynlaw.com](mailto:JGoodwyn@Goodwynlaw.com)  
(803) 251-4517  
(803) 251-4527 (fax)  
Attorney for Appellant

Columbia, South Carolina  
June 26, 2023

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## ARGUMENT

**I. This court can reverse and remand for mediation as in *Ross* under the same rationale that a failure to mediate is a non-jurisdictional procedural defect.**

Respondent asserts that this court cannot vacate the trial verdict and remand to compel mediation because the Circuit Court had jurisdiction to hear the case citing Ross v. Waccamaw Cnty. Hosp., 404 S.C. 56, 744 S.E.2d 547 (S.C. 2013). The court in *Ross* held that failing to comply with the 120-day statutory time period to mediate in S.C. Code §15-79-125 is a non-jurisdictional procedural defect. *Id.*

Appellant would respond by arguing that a non-jurisdictional procedural defect can and should be corrected by this court just as it was in *Ross*. This is not a question of jurisdiction, but correcting a procedural defect, specifically a violation of the court ordered requirement to mediate the case. Rule 3(a) SCADR.

If a plaintiff can go to trial without mediating, then the court order to mediate the case has been violated with no consequences. To allow this decision to stand is to effectively do away with the court ordered requirement to mediate.

Respondent also argues that Appellant is equally at fault for failing to mediate the case as *pro se* litigants are held to the same standard as attorneys citing State v. Burton, 356 S.C. 259, 589 S.E.2d 6 (2003). The Rules of ADR, however, specifically contemplate that litigants are not aware of the requirement to participate in mediation or arbitration and require attorneys to inform their clients. Rule 6(a) SCADR. In a case such as this where only one party is represented, the burden to attempt to schedule mediation should be on the represented party as the unrepresented party had no attorney informing them of the requirement to mediate. This is especially true with a plaintiff who is represented as a plaintiff's attorney knows the case must be mediated prior to trial when

he/she brings it. Regardless of who has the burden of initiating a mediation prior to trial, the fact remains that the case was not mediated in violation of the court order and if this court does not vacate the verdict and remand for mediation, the court ordered mediation requirement in Rule 3(a) SCADR is effectively eliminated.

For the above reasons and the reasons outlined in Appellants Final Brief, this court should 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 SCRCF Rule 37(b) as the court deems just and proper.

Respectfully submitted,

**GOODWYN LAW FIRM, LLC**



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T. Jeff Goodwyn, Jr. (73789)  
2309 Devine Street  
Columbia, SC 29205  
(803) 251-4517  
(803) 251-4527 facsimile  
[jgoodwyn@goodwynlaw.com](mailto:jgoodwyn@goodwynlaw.com)  
*Attorneys for Plaintiff*

Columbia, South Carolina  
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