THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson
C/A No.: 2012-CP-26-1859
Appellate No.: 2013-001478

Thomas Rickerson ..... Appellant

vs.

John Karl, M.D. and Virginia Bell, CS, FNP ..... Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

On May 15, 2012, Appellant filed a Notice of Intent to File Suit ("Notice") pursuant to S.C. Code section 15-79-125. [Notice of Intent]. Appellant alleged an antibiotic John Karl, M.D. and Virginia Bell, CS, FNP (collectively, "Respondents") prescribed to him interacted with his other medication allegedly resulting in hospitalization. Id. Appellant failed to name a mediator in this notice. Id. The last defendant was served on June 19, 2012. Counsel for Appellants filed a Notice of Appearance on July 5, 2012. [Notice of Appearance]. Between July 2012 and September 2012, Respondents subpoenaed medical records in accordance with their duties and obligations under section 15-79-125 related to this case. Respondents never communicated to Appellant's counsel that they would not mediate unless and until all medical records had been subpoenaed. However, Appellant did not take any steps to communicate or schedule mandatory pre-suit mediation as required by section 15-79-125.

Accordingly, on December 20, 2013, after the expiration of the 120-day time frame established by the statute and South Carolina Alternative Dispute Resolution ("SCADR") Rules for participating in pre-suit mediation, Respondents filed a Motion to Dismiss the Notice. [Motion to Dismiss]. On January 4, 2013, Appellant filed a purported Amended Notice of Intent to File Suit ("Amended Notice"). [Amended Notice] On February 7, 2013, without engaging in the statutorily mandated pre-suit mediation, Appellant filed a Summons and Complaint related to the incident that is the subject of the Notice and Amended Notice.[1] [Summons and Complaint].

On April 22, 2013, a hearing on the Motion to Dismiss was held, and Judge

[1] Respondents filed a Motion to Dismiss this Summons and Complaint, Judge Hyman heard the Motion, but no ruling has yet been rendered.

Culbertson ultimately granted Respondents' Motion to Dismiss the Notice. [Hearing Transcript pp.1-19; Order Granting Motion to Dismiss]. Appellant filed a Motion for Reconsideration, memoranda were submitted by all parties, and without oral argument, Judge Culbertson denied the Motion for Reconsideration on June 27, 2013. [Motion for Reconsideration; Appellant's Memorandum in Support of the Motion for Reconsideration, Respondent's Memorandum in Opposition to Reconsideration; Order Denying Motion for Reconsideration]. That same day, Appellant filed a Notice of Appeal. [Notice of Appeal]. This appeal follows.

STATEMENT OF THE FACTS

This is an alleged medical malpractice action. Appellant filed a Notice on May 15, 2012, alleging that an antibiotic "defendants" prescribed interacted with his other medications. [Notice of Intent]. No mandatory pre-suit mediation was held within the 120-day time frame as prescribed by statute. On December 13, 2013, the Horry County Clerk of Court sent the parties a Notice of ADR informing the parties they were to engage in pre-suit mediation and appointed Christopher H. Pearce as the mediator. [Notice of ADR]. However, because pre-suit mediation had not occurred within the 120-day time frame as required by S.C. Code Ann. § 15-79-125, Respondents filed and served a Motion to Dismiss the Notice on December 20, 2013. [Respondents' Motion to Dismiss]. That same day, Appellant's counsel wrote a letter to Mr. Pearce attempting to schedule mediation on January 22, 2012, over 6 months after having served his Notice and only after the Court's appointment of a mediator. [Diggs' letter to Christopher Pearce dated December 20, 2012].

On January 2, 2013, Mr. Pearce wrote the parties regarding the mediation.

[Pearce letter to Parties dated January 2, 2013]. The letter informed the parties that if mediation was not ripe, Mr. Pearce could not extend the deadline and that an order from the Chief Administrative Judge would need to be obtained to defer the mediation. Id. On January 4, 2013, Appellant's counsel wrote to Mr. Pearce providing him a copy of the Amended Notice and informing him of Respondents' pending Motion to Dismiss the Notice on the grounds that the mediation had not occurred within the time limits set forth in section 15-79-125. [Diggs' letter to Christopher Pearce dated January 4, 2013]. In the letter, Appellant's counsel informed Mr. Pearce it was his belief Respondents' counsel "never intended to mediate this case" and asked that Mr. Pearce issue an impasse in the case so that he could proceed with the civil action before the running of the statute of limitations in July 2014. Id. On January 8, 2013, Mr. Pearce wrote the parties and informed them that he was unable to mediate the case on January 22, 2013, as previously indicated. [Christopher Pearce letter dated January 8, 2013]. On January 10, 2013, Respondents' counsel, Marian Scalise, wrote to Mr. Pearce explaining the posture of the Motion to Dismiss—mainly that section 15-79-125 requires mediation to occur within 120 days of the filing of the Notice of Intent to File Suit, which had not occurred here. [Marian Scalise letter dated January 10, 2013]. Ms. Scalise further informed Mr. Pearce that Appellant's counsel never proposed dates for pre-suit mediation within the applicable statutory time frame nor did he seek relief from the Court in order to extend the deadline; accordingly, the Notice should be dismissed and that "no authority exists statutorily for the holding of the pre-suit mediation in January 2013." Id.

Also, on January 10, 2013, Appellant's counsel wrote to Mr. Pearce asking for the re-scheduling of the mediation conference regarding the Amended Notice. [Diggs' Letter

to Pearce dated January 10, 2013]. On January 31, 2013, Mr. Pearce again wrote to the parties. [Pearce letter to parties dated January 31, 2013]. Mr. Pearce determined it would be inappropriate to issue a mediation results report at that time. Id. Importantly, Mr. Pearce did not declare an impasse existed. Id.

A hearing on the motion to dismiss was held on April 22, 2013. [Hearing Transcript]. At the hearing, Respondents argued that because mediation had not occurred pursuant to the parameters of section 15-79-125 the case should be dismissed pursuant to Rule 10, SCADR and Rule 37(B), SCRCP. [Hearing Transcript p.3, line 7-p.4, line 4]. Appellant's counsel's arguments regarding the failure to abide by the time limits within section 15-79-125 revolved around Respondents' actions and that the entire process was driven by the parties, not the statute or the courts. Appellant's counsel stated,

> Nobody ever said anything to me about the time limits in this particular situation. The view that I took from the time limits that are set in the statute is that unless the parties are enforcing those and made an issue of those time limits . . . it would be acceptable to the parties to mediate the case when the parties became ready to do that.
>
> . . .
>
> Now the way I read that, Your Honor, is if one of the parties wants to enforce the time limit for the mediation they can do that . . .

[Hearing Transcript p.4, line 20-p.5, line 6]. The trial judge was not persuaded by this, or Appellant's other arguments, and orally dismissed the case from the bench. [Hearing Transcript, p.18, lines 14-16]. The formal order was signed on April 24, 2013, and filed May 2, 2013. [Order of Dismissal]. Appellant moved to reconsider, which was denied. [Motion to Reconsider; Memorandum in Support of the Motion for Reconsideration; Memorandum in Opposition to Reconsideration; Order Denying Motion to Reconsider]. This appeal follows.

STANDARD OF REVIEW

"Statutory interpretation is a question of law." Lambries v. Saluda Cnty. Council, 398 S.C. 501, 502, 728 S.E.2d 488, 489 (Ct. App. 2012). "It is well-established that the 'cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.'" 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. Further, "statutes in derogation of the common law are to be strictly construed." Id. Thus, a rule restricting the common law will not be extended beyond the clear intent of the legislature. Id. Statutes subject to this rule include those which limit a claimants' right to bring suit. Id. S.C. Code Ann. § 15-79-125 is one such statute which is in derogation of the common law. See Ross v. Waccamaw Comm. Hosp., 404 S.C. 56, 63, 744 S.E.2d 547, 550 (2013) (recognizing S.C Code Ann. § 15-79-125 is a statute in derogation of the common law and must be strictly construed).

ARGUMENT

I. The trial court properly dismissed Appellant's Notice of Intent to File Suit.

Appellant complains that dismissal with prejudice is excessive, too severe, and an abuse of discretion. This Court should reject this claim. S.C. Code Ann. § 15-79-125 governs the initiation of medical malpractice actions. Specifically, section 15-79-125(A) imposes a requirement on a plaintiff to file a Notice of Intent to File Suit. Additionally, section 15-79-125(C) provides that the Circuit Court Alternative Dispute Resolution Rules shall govern the pre-suit mediation process. Rule 4, SCADR, states in pertinent part,

> In medical malpractice cases subject to pre-suit mediation as required by S.C. Code § 15-79-125(C), the Notice of Intent to File

> Suit . . . **shall contain language directed to the defendant(s) that the dispute is subject to pre-suit mediation within 120 days and must contain a place for the names of the primary and secondary mediators . . . . The plaintiff shall serve the defendants with the Notice of Intent to File Suit containing the mediator appointment.**

Rule 4, SCADR (emphasis added). Following the filing of the Notice, Section 15-79-125(C) states,

> Within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon n finding of good cause.

See also Rule 5(f), SCADR ("Pre-suit medical malpractice mediations required by S.C. Code Ann. Section 15-79-125 **shall** be held no later than 120 days after all defendants are served with the Notice of Intent to File Suit . . .") (emphasis added).

Pursuant to Rule 10, SCADR, sanctions are appropriate for any party violating provisions of the SCADR Rules. Rule 10, SCADR, lists appropriate, non-excessive sanctions and directs parties to additional appropriate sanctions listed in Rule 37(b)(2), SCRCP. Rule 37(b)(2)(C) authorizes sanctions in the form of "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed or **dismissing the action or proceeding or any part thereof**, or rendering a judgment of default against the disobedient party." (emphasis added). In addition to violating S.C. Code Ann. § 15-79-125, Appellant violated Rules 4 and 5, SCADR, subjecting him to the sanctions in Rule 10, SCADR, and Rule 37, SCRCP.

The dismissal with prejudice was not too severe. Appellant cites several cases attempting to demonstrate the severity of the dismissal, but each case is easily distinguishable from the case at bar. Appellant cites Orlando v. Boyd, 320 S.C. 509, 512,

466 S.E.2d 353, 355 (1996) and its progeny, in support of his contention that the sanction of dismissal is too severe. Appellant conveniently neglects to specify that these cases considered whether the failure to list an expert witness on discovery responses warranted the sanction of dismissal—not whether a dismissal with prejudice in and of itself is too severe. Respondents submit the failure to include witnesses on a discovery response is not as severe as Appellant (1) failing to abide by statute and SCADR rules to provide notice to Respondents and (2) failing to ensure he properly initiated his own claim.

Appellant also argues the Supreme Court has only affirmed dismissal of actions for failure to prosecute "in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only upon a finding of unreasonable neglect." These cases, too, are distinguishable from the case at bar. First, Small v. Mungo, 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970), involved a situation wherein the plaintiff's case was number eleven on the docket, yet it was called for trial on a Tuesday morning at 10 a.m. after the other preceding cases were disposed of. Id. Upon inquiry from the court, the plaintiff stated he could not arrive to court until after 2:00 p.m. that same day. Id. The circuit court, upon motion from the defendant, dismissed the matter with prejudice. Id. On appeal, the Supreme Court found that dismissal of the action was appropriate because an inference of "unreasonable neglect" could be gleaned from Plaintiff's action. Id. However, the Court reversed the "with prejudice" portion of the order, finding, "the particular facts of the case," did not warrant dismissal with prejudice. The court did **not** state that dismissal with prejudice was not an appropriate sanction in other circumstances. Id.

Similarly, Bond v. Corbin, 68 S.C. 294, 294-95, 47 S.E. 374, 374 (1904),

involved a plaintiff whose case was called for court, yet he failed to appear even after the court attempted to contact him and after granting two continuances. The trial court dismissed this action. Id. On appeal, the trial court's actions were affirmed, with the Supreme Court finding the trial court did not abuse its discretion in dismissing the action and that the plaintiff's actions warranted such a dismissal. Id.

The above cases involved the trial courts calling the plaintiffs when they failed to show up for court. This is not the case here. Further, even if it were somehow analogous to the case at bar, Respondents submit that Appellant's "repeated warnings" are in the form of the provisions in section 15-79-125; Rule 4, SCADR; and Rule 5(f), SCADR; which all contain the time limits of which Appellant was aware and conceded he knew. See Hearing Transcript p.4, line 20-p.5, line 6.

Additionally, Appellant cites Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990) (citing Societe Internationale Pour Participations Industrielles et Commercials, S.A. v. Rogers, 357 U.S. 197 (1958)), for the proposition that sanctions should be "aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of the case." Respondents agree. "The sanction should be aimed at the specific misconduct of the party sanctioned." Balloon, at 154, 399 S.E.2d at 440.[2]

[2] We would be remiss if we did not bring to the Court's attention that in Balloon, the Court of Appeals also reversed the circuit court's order because the circuit court judge who imposed the sanction based his decision on his reading of a previous judge's order and not of his own discretion. The Court of Appeals noted the judge did not exercise his discretion but acted in such a manner "because he [believed] he had no choice under the prior order." The Court of Appeals held, "It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." Here, the trial court did not improperly exercise its discretion. The Order of Dismissal clearly references the sanctions available in Rule 10, SCADR, and Rule 37, SCRCP, which evidences the trial court's awareness of the wide range of sanctions from which it could choose and, in its discretion, chose dismissal with prejudice. Further, a review of the transcript from the hearing demonstrates the trial judge thoroughly analyzed this issue. See e.g. Hearing Transcript p.9, line 8-p.10, line 5; p.15, lines 5-13; p.16, line 19-p.17,

Consequently, as here, Appellant's conduct in failing to notify Respondents the suit was subject to pre-suit mediation, failing to elect a mediator, and failing to otherwise attempt to initiate the mediation proceedings effectively prohibits the action from commencing; therefore, an order prohibiting same is aimed at the specific conduct of Appellant—his inactivity and unreasonable neglect. Therefore, dismissal with prejudice is not too severe, especially since it is authorized by Rule 37, SCRCP.

Furthermore, the trial court did not abuse its discretion in dismissing the Notice. An abuse of discretion with regard to the imposition of sanctions occurs when the decision is controlled by an error of law or based on unsupported factual conclusions. See Southeastern Site Prep, L.L.C. v. Atl. Coast Builders and Contractors, L.L.C., 394 S.C. 97, 105, 713 S.E.2d 650, 654 (Ct. App. 2011) (stating under the abuse of discretion standard, the imposition of sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or based on unsupported factual conclusions); Bayle v. South Carolina Dept. of Transp., 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) (stating an abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support). As noted above, because the sanction of dismissal with prejudice is supported by the SCADR and the South Carolina Rules of Civil Procedure, there was no error of law.

Further, the sanction of dismissal is also supported by the facts of this case. Appellant filed the Notice on June 19, 2012, without "language directed to the defendants that the dispute is subject to pre-suit mediation within 120 days [nor did it] contain a place for the names of the primary and secondary mediators." See Rule 4, SCADR. Appellant conceded this point at the hearing. [Hearing Transcript p.6, line 20-p.7, line 3].

line 1; p.17, line 21-p.18, line 10.

There is no evidence Appellant attempted to institute pre-suit mediation before October 17, 2012—120 days after the serving of his defective Notice.[3] At the hearing, the trial judge considered Appellant's arguments demonstrating his thorough analysis of this issue and demonstrates his decision was not without evidentiary support.

With regard to the effect of the statutory time frame, the following colloquy occurred:

> THE COURT: Tell me what the intent of the statute is.
>
> [Appellant's counsel]: I think the intent is to give the defendants an opportunity to look at a case, mediate the case before having to respond to a formal lawsuit. And I would submit that is what the time limitations are put in here for. It is not to cut off the plaintiff's access to the courts but give the defendants an opportunity.
>
> THE COURT: But how much time and opportunity do we give them?
>
> [Appellant's counsel]: Well, I would think it certainly was cleared up when the clerk of court issued an ADR notice appointing [sic] mediator and referring the case to mediation.
>
> THE COURT: Well, the problem I have, I will agree with you, all I can tell you is what the statute says, and the statute says that within 90 days and no later than 120 days from the service of the notice of intent to file suit the parties shall participate in a mediation conference unless an extension of no more than 60 days is granted by the Court upon a finding of good cause.
>
> [Appellant's counsel]: Right.
>
> THE COURT: That has got to mean something.

[3] Indeed, Appellant made no attempt to conduct pre-suit mediation until the Clerk of Court attempted to assign mediators in a letter filed December 13, 2013. Rule 4, SCADR directs the Clerk of Court to assign a mediator to cases in which one is required, but has not been assigned on the **210th** day after the filing of an action subject to ADR. Notwithstanding the Clerk's letter regarding mediators, the time for Plaintiff to schedule pre-suit mediation had clearly passed at the point the Clerk's letter was sent.

[Hearing Transcript p.9, line 8-p.10, line 5]. Additionally, the Court considered how the circumstances would have been different had Respondents refused to mediate within the statutory time frame:

> [Appellant's counsel]: What do you do if the defendant says, "I'm not going to mediate?"
>
> THE COURT: If you have where you scheduled the mediation and they just didn't show up or they said, "We're not going to mediate," then I think that is an exception. I mean, I think that is when you have complied with the statute but here I don't see where there was even an attempt to set up mediation.

[Hearing Transcript p.15, lines 5-13]. The trial judge also considered the effect of his ruling on the case and which party was responsible for the deficient filing:

> [Appellant's counsel]: You're about to hold that this filing, this notice that was deficient in terms of what it contained is going to sound the death knell for my client's medical malpractice action.
>
> THE COURT: Well, I mean why was it deficient? It was based upon the plaintiff's deficiency, it wasn't the defendant was deficient, [sic] it was the plaintiff was deficient in filing it [sic].

[Hearing Transcript p.16, line 19-p.17, line 1]. The trial judge also considered the untimely communication with mediator:

> THE COURT: When did the mediator, when did the mediator determine this was not viable.
>
> [Appellant's counsel]: The mediator notified us that he didn't feel comfortable in having the mediation, given the posture the defendant had taken in the case.
>
> THE COURT: That was after the time period had passed.
>
> [Appellant's counsel]: It was after the time period had passed.
>
> THE COURT: Yes, Okay. This doesn't extend it until after that or else then the 60 day time period would never mean anything.

[Hearing Transcript p.17, line 21-p.18, line 10]. The foregoing colloquies demonstrate the trial judge's investigation and analysis of the facts before using his discretion to determine the case should be dismissed.

The above highlighted portions of the hearing transcript also demonstrate Appellant's lack of effort in prosecuting his claim. Accordingly, Appellant's "lack of effort" demonstrates his unreasonable neglect in not diligently pursuing this action which further supports the dismissal of the claim with prejudice as an appropriate sanction. See McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006) ("The Plaintiff has the burden of prosecuting [his] action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with [his] cause.").

Finally, because Ross v. Waccamaw Community Hospital, 404 S.C. 56, 744 S.E.2d 547 (2013), was issued around the same time as the trial court's order denying reconsideration, addresses a situation involving the failure to mediate this type of action, and involves the same trial judge, Respondents offer this brief argument distinguishing Ross from the case at bar. The Ross decision essentially held that the failure to hold a mediation conference within the statutorily-required 120 days from the filing of the Notice of Intent to File Suit does not automatically divest the circuit court of jurisdiction nor does it categorically mandate dismissal of the case.[4] Specifically, the Supreme Court

[4] In Ross, the plaintiff brought suit against various entities for alleged medical malpractice. Ross at 59. In accordance with the statute, the parties scheduled mediation prior to the expiration of 120 days of filing of the Notice of Intent as mandated by S.C. Code Ann. § 15-79-125. Id. However, due to a scheduling conflict, plaintiff's counsel requested that mediation be postponed one week—still within the 120-day time period. Id. However, plaintiff's counsel was thereafter required to appear for trial in another case, and the mediation conference was rescheduled once again; except this time, with the consent of all the parties, it was scheduled outside the 120-day time period. Id. No party requested an extension, and everyone proceeded as though the mediation would occur, even after the 120-day deadline elapsed. Id. However, six days before mediation was scheduled to take place, defendants refused to participate in any mediation, claiming the mediation conference was untimely under section 15-79-125 because plaintiff failed to seek an

held that the circuit court retained jurisdiction after the expiration of the 120-day mediation period. Id. The Court further held, "**That under the facts presented and the motions before the circuit court**, the court should have granted Appellant's motion to compel mediation." Id. (emphasis added). The Court reasoned that a mandatory penalty of dismissal for lack of subject matter jurisdiction is at odds with the statute. Id. The Court further reasoned the time period espoused in the statute was not intended to place limits on the circuit court's subject matter. Id. Therefore, the failure to comply with the statutory time frame is a "non-jurisdictional procedural defect." Id. The Court further stated, "The circuit court retains discretion to permit the mediation process to continue beyond the 120-day time period . . . " Id. Notably, the Court went on to state, "This is not to say the 120-day time period is meaningless. Indeed it demonstrates the Legislature's desire that mediation takes place expeditiously. The failure to comply with the 120-day time period **could result in dismissal (as the [SCADR] provides) but as a function of the court's discretion based on the fact and circumstances, and not as a mandated one-size-fits-all result.**" Id. (emphasis added). The Court further supported its decision with a Wisconsin case which was factually similar to the facts of Ross, including that the mediation was originally scheduled within the statutory guidelines and then rescheduled due to scheduling conflicts. See Schulz v. Nienhuis, 448 N.W.2d 655 (Wis. 1989). Finally, the Supreme Court reiterated that "situations of non-compliance are to be resolved through application of the relevant provisions of the [SCADR]." Id.

Even in light of Ross, dismissal was still proper in this case because it was a

extension from the circuit court. Id. Defendants argued section 15-79-125 is a jurisdictional statute and that, absent an extension, the Notice of Intent automatically expires if mediation is not conducted within 120 days, thereby divesting the circuit court of subject matter jurisdiction to hear the case. Id. Plaintiff then filed a motion to compel the mediation and defendants moved to dismiss the Notice of Intent under Rule 12(b)(1), SCRCP. Id. The trial court dismissed the action. Id.

function of the court's discretion and based on the particular facts and circumstances of this case. Under the facts of Ross, dismissal was inappropriate because there, not only was the statute non-jurisdictional, but also because the plaintiff attempted to engage in pre-suit mediation prior to the deadline, but due to scheduling conflicts, could not attend. Then and only then, did defendants refuse to participate. Under those facts, dismissal was improper because the plaintiff made the effort to mediate, thereby demonstrating an attempt to comply with the statute. Here, Appellant has made no such effort. As the trial judge found, "There was absolutely no discussion about mediation and no contact with the mediator" until after the expiration of the 120 days statutory deadline and "permission from the Court [to mediate outside the statutory deadline] was neither sought nor granted prior to the expiration of the 120-day deadline." See Order of Dismissal at pg. 2. Unlike in Ross and Schulz, Appellant made no attempt to schedule pre-suit mediation within the statutory timeframe, did not attempt to contact Respondents, and made no efforts to prosecute his action. In Ross, the plaintiff was able to demonstrate he actively pursued his medical malpractice claim. In this case, Appellant cannot make such a showing.

Moreover, this case is further distinguishable from Ross in that, in Ross, plaintiff sought to compel the mediation to comply with the statute. Here, Appellant seeks to completely abandon his statutory requirements for initiating a medical malpractice action and proceed with this case on the merits. Respondents respectfully direct this Court to Appellant's Memorandum in Support of Motion to Reconsider Order of Dismissal, page 5, where Appellant asked the trial Court to "reconsider the dismissal with prejudice and allow the matter to proceed on the merits;" page 16, wherein Appellant "ask[s] th[e] [trial] Court to Reconsider its Order of Dismissal and allow this case to proceed on the

merits by declaring that mediation resolution was not possible in this case;" page 15 of his Initial Brief where he asks this court to declare Respondents liable and refer the matter for a damages hearing (which this Court should decline to do).[5] Appellant's continued desire to circumvent the statutory requirements further distinguishes him from the plaintiff in Ross, who, in good faith, attempted to abide by the requirements of section 15-79-125. Therefore, the trial court properly used its discretion to determine that dismissal of this case, based on the particular facts, was appropriate.

Additionally, dismissal of the Notice of Intent was proper and distinguishable from Ross because Appellant's failure to mediate was not the only deficiency in the Notice. Not only did Appellant fail to communicate or initiate pre-suit mediation, but Appellant also failed to even provide Respondents notice that they were subject to pre-suit mediation and failed to identify the name of a mediator. This is a violation of Rule 5, SCADR. Therefore, not only did Appellant fail to comply with section 15-79-125, he failed to comply with Rules 4 and 5, SCADR. Under Rule 10, SCADR, failure to comply with the ADR rules, subjects the party to certain sanctions. Dismissal is one such sanction.

Appellant's failure to actively participate in the litigation of his claim by scheduling pre-suit mediation distinguishes this case from Ross and presents a circumstance where the trial court, in its discretion, correctly determined dismissal was proper. This is a "situation of non-compliance to be resolved through the application of relevant [SCADR] rules" and dismissal was warranted.

[5] This is further evidenced by Appellants having already filed a Summons and Complaint to proceed on the merits of this case without an adjudication as to the status of the Notice of Intent to File Suit.

II. The trial court did not err in dismissing Appellant's Notice of Intent to File Suit when Appellant did not provide notice of ADR as required by the SCADR Rules.

In both the ADR rules and the South Carolina Code, the onus is on the plaintiff to file the Notice, thus providing defendants with notice of the required pre-suit mediation and the selected mediators.

Appellant focuses on Rule 4(f), SCADR which states, "The parties shall notify the selected or appointed neutral to initiate the **scheduling** of the ADR conference." Appellant's attempt to "hang his hat" on this provision is imprudent. Reading Rule 4, SCADR, in conjunction with section 15-79-125(c), it is clear that it is the plaintiff who shall include language in the Notice directing the defendants to participate in pre-suit mediation, thereby initiating such mediation—Appellant failed to do this here. Appellant overlooks the fact that he failed to include in his Notice, as required by Rule 4, SCADR, that the suit was subject to mediation or name a mediator. Appellant's counsel conceded this fact at the hearing on the Motion to Dismiss. He stated, "Now, what happened, Your Honor, we initially, when we filed this notice back on May 15 of 2012, the notice itself, the filing was defective because I . . . didn't put the little form on there that allows for the clerk at the time of filing to write in and appoint a mediator." [Hearing Transcript p.6, line 20-p.7, line 3]. Therefore, even if Respondents were responsible for commencing mediation, they cannot be expected to schedule a non-noticed mediation with an unnamed mediator.

Appellant also contends Respondents have "waived the right to mediate," and therefore, he is entitled to proceed with litigation "having done all [he] could do in the pre-suit mediation process" because he (1) provided a notice of intent; (2) Respondents

made no effort to schedule a mediation conference; and (3) Respondents offered no theory or defense on the merits to Appellant's allegations of malpractice or medical negligence. These assertions are without merit. First, as discussed above, Appellant filed a defective Notice which failed to alert Respondents they were subject to pre-suit mediation or provide the name of a mediator who had been selected for mediation. Second, it is not Respondents' obligation to commence pre-suit mediation, especially when nothing in either the statute or ADR rules requires them to do so and in the absence of Appellant's notification that mediation was required or name a mediator. Finally, no proper law suit has been filed; accordingly, Respondents have not been called upon to formally "answer" or otherwise defend the allegations against them.

Finally, even if it were not clear the plaintiff should commence pre-suit mediation, Appellant's position—that Defendants share in the obligation of scheduling pre-suit mediation—is inapposite to the very foundation of civil proceedings. It is the plaintiff who has the claim. It is the plaintiff who initiates actions. It is the plaintiff who has the initial burden of proof. It is the plaintiff who must follow the procedure rules with regards to initial pleadings to ensure that the defendant has proper notice of the claims against which he must defend himself. See e.g. McComas, at 59, 626 S.E.2d at 902 (stating "The Plaintiff has the burden of prosecuting [his] action."); Martasin v. Hilton Head Health Sys., 364 S.C. 430, 438, 613 S.E.2d 795, 799 (Ct. App. 2005) (stating that in a medical malpractice action plaintiff has the burden of proving defendant's negligence and that such negligence was the proximate cause of plaintiff's injury); Black's Law Dictionary 538 (3rd Pocket ed. 2006) (defining "plaintiff" as the party who brings a civil suit in a court of law). To somehow create an exception to a plaintiff's

responsibilities with regard to initiating lawsuits is untenable. Accordingly, the trial judge did not err in finding Appellant was responsible for initiating pre-suit mediation.

III. The trial court did not abuse its discretion in dismissing Appellant's case despite Appellant's contention that he was "lulled into a false sense of security."

Appellant's counsel's claim that he was "lulled into a false sense of security" because the parties engaged in exchanging medical records is without merit and, on its face, does not assign a particular error to the trial court. Further, the fact that Respondents' counsel subpoenaed medical records and provided copies of the received records to Appellant's counsel in accordance with section 15-79-125(B) or that defense counsel copied Appellant's counsel on requests for protection in all of their cases is irrelevant to the failure to mediate this case within the statutory deadline. There are no provisions in the statute which allow Respondents' actions to relieve Appellant of his obligations under the statute and SCADR rules. Nor could Respondents' actions be construed as somehow consenting to an extension of time. Indeed, Respondents did not consent to an extension of time nor could we have under the rules. Cf. Castell v. Stephenson Finance Co., 244 S.C. 45, 55, 135 S.E.2d 311, 316 (1964) (finding plaintiff's consent to defendant's receipt of bids for the sale of a truck under a mortgage was ineffective to relieve defendant of the duty to comply with the requirements of the statute as to the sale of personal property under mortgage); Appleby v. South Carolina & G.R. Co., 58 S.C. 33, 36 S.E. 109 (1900) ("The question, therefore, is whether this notice of intention to appeal was served within the time prescribed by law. If it was, then the motion under consideration must be refused; but if it was not, then the motion must be granted, for the time within which notice of intention to appeal must be given is

prescribed by statute, and it is imperative upon this court, as well as upon the parties to this cause, and hence this court has no power to relieve a party from omission to comply with this statutory requirement.").

The fact remains that Appellant's counsel never communicated with Respondents' counsel with regard to scheduling the mediation within the statutory time frame or asking if the Respondents needed more information prior to mediating the case. Moreover, Appellant never filed a motion requesting an Extension to Mediate beyond the 120 days as required by statute. The 120-day deadline to mediate the case is a distinct deadline, which can only be extended by Court order. There is nothing in the statute that would allow attorneys to extend the deadline on their own. See S.C. Code Ann. § 15-79-125; see also Castell, at 55, 135 S.E.2d at 316; Appleby at 33, 36 S.E. at 109.

Appellant's counsel's arguments with regard to his "false sense of security" can only be construed as Appellant again relying on Respondents to determine the fate of his own lawsuit. Appellant concedes as much when he states, "[Appellant] respectfully submits he was lulled into a false sense of security **that defendants would let him know when they were ready to mediate the case** after their collection of evidence pursuant to S.C. Code Ann. § 15-79-125(B)." [App.Br.p.17]. As discussed above, it is the plaintiff who must initiate lawsuits. It is the plaintiff who must establish a claim exists. Respondents' actions do not relieve Appellant of his obligations under the statute and the SCADR rules. Accordingly, the trial court did not err in dismissing Appellant's Notice because Appellant failed to comply with the ADR rules, and Respondents' actions had no bearing on this matter.

IV. The trial court did not err in failing to find mediation was not feasible.

Section 15-79-125(E) provides that if the matter cannot be resolved through

mediation, a plaintiff may initiate a civil action by filing a summons and complaint within sixty days of the mediator determining the mediation is not viable; that an impasse exists; that the mediation should end; or prior to the expiration of the statute of limitations. At the hearing, despite Appellant's arguments regarding the mediator having been contacted in December, the trial judge focused on the fact that the contact with the mediator occurred after the statutory time frame had elapsed. The trial judge ruled that even if the mediator determined the mediation was not feasible, the mediator's determination would have occurred after the expiration of the statutory time frame for instituting mediation and could not have extended the statutory time frame for mediating the case. As the trial judge explained, the time frame could not have been extended by the mediator "or else then the 60 day time period would never mean anything." [Transcript p.17, line 12-p.18, line 10]. Although Appellant assigns error to this analysis, contending the trial court should have found the mediation was not viable, his argument should be rejected.[6]

First, subsection (E) of section 15-79-125 is not applicable here because no mediation has occurred. The trial court could not have found mediation was not feasible when no such mediation was initiated. Appellant presented no evidence that he 1) provided notice to Respondents regarding pre-suit mediation prior to the expiration of the statutory time frame or 2) scheduled mediation within the statutorily-required time frame.

[6] It is questionable whether this issue is preserved for review. Although Appellant asked about the applicability of § 15-79-125(E) to the case at bar, (see e.g. Hearing Transcript p.17, line 6-p.18, line 13), he never specifically asked the Court to find mediation was not viable until his Memorandum in Support of his Motion for Reconsideration and a party may not raise an issue for the first time in a Motion for Reconsideration. See Brailsford v. Brailsford, 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008) ("Generally, a party cannot use a motion to alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.") (internal quotations omitted); Mailsource, L.L.C. v. M.A. Bailey & Assoc. Inc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) ("A party cannot raise an issue for the first time in a Rule 59(e), SCRCP motion which could have been raised at trial.").

Second, Appellant offers no evidence the mediation could not have occurred within the statutory time frame. In his Motion for Reconsideration, Appellant provided the trial court with all the requests Respondents made with regards to medical records and counsel for Respondents' request for orders of protection. These requests are not proof mediation was not feasible. First, requests for medical records are permissible under section 15-79-125. Nothing in the statute precludes the pre-suit mediation from occurring during the time period in which medical records are being collected. Next, while Appellant attempts to use counsel for Respondents' requests for protection as evidence mediation was not feasible; such protection requests are unhelpful to him. As discussed above, the deadline for initiating pre-suit mediation was October 17, 2012. Respondents' counsel requested protection for December 10, 2012 through February 2013 and February 15 through February 25, 2013; both time frames are well outside the statutory deadline for pre-suit mediation.

Finally, to the extent Appellant relies on mediator Christopher Pearce's characterization that one party has "specifically expressed an unwillingness to actually submit the case to mediation," [Letter from Christopher Pearce January 31, 2013], as evidence mediation was not feasible, such reliance is flawed for two reasons. First, Appellant told the trial court the mediator "stood down" and "made the decision he wasn't going to do any mediation in the case;" not that mediation was not feasible. [Hearing Transcript p.8, line 24-p.9, line 2]. Second, Respondents argued to the trial court, and maintain the same argument to this Court, that Mr. Pearce mischaracterized our position. Respondents contacted Mr. Pearce to inform him that it was our position that the case could no longer be mediated because the statutory deadline for mediation

had passed. [Letter from Marian Scalise to Christopher Pearce January 10, 2013]. At no point did Respondents state they were unwilling to mediate. See Id. Rather, Respondents expressed concern that there was no statutory authority to mediate the issue in January of 2013 when the original Notice was filed on June 19, 2012.

Appellant offered no evidence to the trial judge that mediation was not feasible, and it is questionable whether he even raised this issue to the trial judge. Instead, Appellant conceded to the Court that he never contacted Respondents to initiate mediation until almost six months after the Notice was served and almost two months after the expiration of the 120-day statutory deadline had passed. [Hearing Transcript p. 7, lines 15-25]. Accordingly, the trial court did not err in declining to find that mediation was not feasible.

V. The trial court did not err in declining to recognize Appellant's purported Amended Notice of Intent to File Suit.

On January 4, 2013, Appellant attempted to cure his defective Notice by filing an Amended Notice of Intent to File Suit which more closely comports with the provisions of Rule 4(c), SCADR. Section 15-79-125 is the statutory authority for initiating a medical malpractice suit, and it contains no provisions for amending the Notice. Accordingly, the trial court did not err in declining to recognize Appellant's purported Amended Notice as an attempt to cure his defective filing because section 15-79-125 does not specifically provide for the filing of an Amended Notice. See City of Rock Hill v. Harris, 391 S.C. 149, 153, 705 S.E.2d 53, 55 (2011) ("[W]hen determining the effect of statutory language, 'the canon of construction *expressio unius est exclusion alterius*' or '*inclusion unius exclusion alterius*' holds that 'to express or include one thing implies the exclusion of another, or the alternative.'"); Byrd v. Irmo High School, 321 S.C. 426,

433, 468 S.E.2d 861, 865 (1996) ("Where a statute expressly enumerates the requirements on which it is to operate, additional requirements are not to be implied.").

Additionally, Appellant's argument that he should be allowed to amend his Notice of Intent to File Suit because the Statute of Limitations has not run is specious. First, the Amended Notice came outside the 120-day window for instituting the pre-suit mediation as required by statute. Appellant should not be allowed to "re-start the clock" by amending his Notice. If the legislature intended the flexibility in the statute Appellant urges, the language of the statute would clearly reflect that intent. See Ranucci v. Crain, 397 S.C. 168, 171, 723 S.E.2d 242, 244 (Ct. App. 2012) (citing Gordon v. Phillips Utils. Inc., 362 S.C. 403, 608 S.E.2d 427 (2005)) (stating the primary purpose in construing a statute is to ascertain legislative intent); City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) (stating, "Where the language of the statute is clear and explicit, the Court cannot rewrite the statute and inject matters into it which are not in the legislature's language.").

Second, the statute only provides for the filing of a Notice and then subsequent Summons and Complaint if the matter cannot be resolved through mediation. There is no provision for amending the Notice to cure defects. Nor is there a provision for further action unless mediation has occurred. Accordingly, section 15-79-125 does not permit Appellant to file an Amended Notice of Intent. See Rock Hill, at 149, 705 S.E.2d at 55; Irmo, at 433, 468 S.E.2d at 865.

Appellant's contention—that Respondents have now waived their right to mediate and he should therefore be allowed to proceed on the merits of the action—is also specious and should be rejected by this Court. Appellant has already decided to proceed

on the merits of this action without complying with the provisions of section 15-79-125; he is not authorized to do so. See, Summons and Complaint. As noted above, section 15-79-125(E) makes clear that only if the matter cannot be resolved by mediation may a party initiate a civil action by filing a summons and complaint within sixty days of the mediator determining the mediation is not viable, an impasse exists, that the mediation should end, or prior to the expiration of the statute of limitations. No mediator has made such a finding.

Additionally, as Appellant aptly points out, the statute of limitations is far from expiring. Appellant is again attempting to usurp the provisions of section 15-79-125 and avoid his responsibilities under the statute by filing a Summons and Complaint. This is further evidenced by the relief requested by Appellant—an order allowing him to proceed with the merits of this case. [Initial App. Brief p. 20]. Appellant does not, and has not, wanted to operate within the parameters of section 15-79-125 from the very impetus of this litigation. Just like the plaintiffs in Ross, Appellant cannot use section 15-79-125 as a weapon to trap Respondents into proceeding on the merits and his actions are "ripe for mischief." Ross at 63, 744 S.E.2d at 550. There has been no waiver of the right to mediate. Further, Appellant should not be allowed to go "straight" to the merits of this action without giving Respondents the opportunity to benefit from section 15-79-125's "informal and expedient method of culling prospective medical malpractices cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims." Ross at 63, 744 S.E.2d at 550. Regardless, no mediation occurred in this action, almost exclusively due to Appellant's dilatory actions. Appellant should not be rewarded for failing to abide by the statute and SCADR rules; rather, his action was

properly dismissed for failing to abide by the statute, as the SCADR and SCRCP provide.

CONCLUSION

Based on the foregoing, Respondents respectfully request this Court affirm the trial judge's dismissal of this action and deny Appellant's request to allow this case proceed on the merits by declaring that mediation resolution was not possible in this case.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson

Civil Action No. 2012-CP-26-1859
Appellate Case No.: 2013-001478

Thomas Rickerson ..... Appellant,

v.

John Karl, M.D. and Virginia Bell, CS, FNP ..... Respondents

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., attorneys for John Karl, M.D. and Virginia Bell, CS, FNP, do hereby certify that I have this date served the foregoing Initial Brief of Respondent by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the following:

William Isaac Diggs, Esquire
Law Office of William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, South Carolina 29577

Daisy F. Bonds

Dated: October 23, 2013

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson
C/A No.: 2012-CP-26-1859
Appellate No.: 2013-001478

Thomas Rickerson .....Appellant

vs.

John Karl, M.D. and Virginia Bell, CS FNP .....Respondents.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Respondents propose the following to be included in the Record on Appeal:

1. Form 4 Order denying Appellant's Motion to Reconsider the Order of Dismissal.
2. Order of Dismissal as to Notice of Intent
3. Initial Notice of Intent
4. Amended Notice of Intent
5. Summons and Complaint
6. Transcript of Hearing on Motion to Dismiss
7. Notice of ADR
6. Attorney Diggs' 12/20/12 letter to mediator Pearce
7. Mediator Pearce's 1/2/13 letter to the parties
8. Attorney Diggs' 1/4/2013 letter to mediator Pearce

9. Mediator Pearce's 1/8/13 letter to the parties

10. Attorney Scalise's 1/10/13 letter to mediator Pearce

11. Attorney Diggs' 1/10/13 letter to mediator Pearce

12. Mediator Pearce's 1/31/13 letter to the parties

13. Appellant's Motion for Reconsideration

14. Appellant's Memorandum in Support of his Motion for Reconsideration

15. Respondents' Memorandum in Opposition to the Motion for Reconsideration

16. Summons and Complaint

17. Defendants' Motion to Dismiss

18. Respondents' counsel's Notice of Appearance

I certify that this designation contains no matter which is irrelevant to this appeal.

Respectfully submitted,

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Columbia, South Carolina
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CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., attorneys for John Karl, M.D. and Virginia Bell, CS, FNP, do hereby certify that I have this date served the foregoing **Respondent's Designation of Matter to be Included in the Record on Appeal** by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the following:

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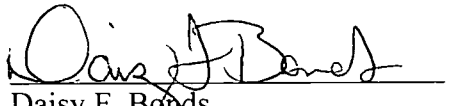

Daisy F. Bonds

Dated: October 23, 2013