

Arbitration

18043

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

RECEIVED

DEC 14 2010

SC Court of Appeals

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2008-CP-22-1496

Case No. 2009-CP-22-810

John Thomas Ross,.....Appellant,

v.

Waccamaw Community Hospital, Dr. Webster N. Jones, III, and Dr. David R. Anderson,

OF WHOM Dr. Webster N. Jones, III and Dr. David R. Anderson are.....Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CASE NOS.: 2008-CP-22-1496
	)	2009-CP-22-810
John Thomas Ross,	)	
	)	
Plaintiff,	)	
	)	Order Granting Motion to Dismiss
vs.	)	and Denying Motion to Compel
	)	Court Mandated Mediation
Waccamaw Community Hospital,	)	
Dr. Webster N. Jones, III, and	)	
Dr. David R. Anderson,	)	
	)	
Defendants.	)	

FILED
DEBORAH WHITE, S.C.
2009 AUG 24 PM 12:08
ALMA T. WHITE
CLERK OF COURT

This case is a medical malpractice action. Pending before the court is a motion by the plaintiff to compel mediation and motions by the defendants Dr. Webster N. Jones, III and Dr. David R. Anderson to dismiss the plaintiff's lawsuit.

The undisputed facts of this case are as follows:

1. On October 27, 2008, the plaintiff contemporaneously filed a Notice of Intent to File Suit, Summons and Complaint pursuant to S.C. Code Ann. §15-79-125.
2. The defendants Dr. Webster N. Jones, III and Dr. David R. Anderson ("defendants") were served with the Notice of Intent to File Suit on November 25, 2008.¹

¹ The Affidavits of Service indicate that the defendants were served with the Summons and Complaint only; however, neither defendant denies being served with the Notice of Intent to File Suit.

MHC

3. Mediation mandated by S.C. Code Ann. §15-79-125 was initially scheduled within 120 days of service of the Notice of Intent to File Suit. However, the initial mediation was cancelled by consent of the parties.

4. The mediation of this case was rescheduled for May 20, 2009. However, the defendants refused to attend the rescheduled mediation and filed motions to dismiss. In response, the plaintiff filed a motion to compel mediation.²

LAW AND DISCUSSION

S.C. Code Ann. §15-79-125 states, in pertinent part, as follows:

(A) Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit...

(C) 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 a finding of good cause...

(D) The circuit court has jurisdiction to enforce the provisions of this section.

(emphasis added).

In the case at hand, the Notice of Intent to File Suit was served on the defendants on November 25, 2008. Therefore, both parties had to participate in

² The plaintiff also filed a Notice of Intent to File Suit on June 2, 2009, in case number 2009-CP-22-810. That Notice of Intent to File Suit is identical to the Notice of Intent to File Suit in case number 2008-CP-22-1496. Further, the plaintiff attempted service on the defendants in case number 2009-CP-22-810 by mailing the pleadings to the defendants' attorneys in case number 2008-CP-22-1496. The defendant Webster N. Jones, III, filed a Notice to Dismiss in case number 2009-CP-22-810 which is dispositive by this order. No service on the defendant Dr. David R. Anderson is evidenced in case number 2009-CP-22-810.

MHC

mediation by March 25, 2009. Any extensions beyond that time could only be granted by the court upon a finding of good cause.

The plaintiff argues that these cases should not be dismissed because the defendants consented to the cancellation of the initial mediation conference which had been timely scheduled. However, S.C. Code Ann. §15-79-125(C) states that the parties "shall" participate in mediation within 120 days "unless an extension...is granted by the court." (emphasis added). Therefore, even if the defendants consented to cancel the initial mediation, if the rescheduled mediation date was more than 120 days after service of the Notice of Intent to File Suit on the defendants, the parties had to get court approval of the continuance.

Had the defendants refused to mediate this case within 120 days of the date of service of the Notice of Intent to File Suit or within an extended period granted by the court, then the plaintiff could have obtained an order of the court compelling the mediation pursuant to S.C. Code Ann. §15-79-125(D).

NOW, THEREFORE, based upon the above findings and conclusions, it is hereby

ORDERED, that the motion of the defendants to dismiss this action is granted; it is further

ORDERED, that the plaintiff's Motion to Compel Court Mandated Mediation is denied.

Page 3 of 4
/s/ MKC

AND IT IS SO ORDERED:

Benjamin H. Culbertson
Benjamin H. Culbertson
Presiding Judge

August 17, 2009
Georgetown, SC

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CASE NOS.: 2008-CP-22-1496
	)	2009-CP-22-810
John Thomas Ross,	)	
	)	
Plaintiff,	)	<u>SUBSTITUTE</u>
	)	Order Granting Motion to Dismiss
vs.	)	and Denying Motion to Compel
	)	Court Mandated Mediation
Waccamaw Community Hospital,	)	
Dr. Webster N. Jones, III, and	)	
Dr. David R. Anderson,	)	
	)	
Defendants.	)	
	)	

Before the court are motions by the parties seeking reconsideration of this court's order dated August 17, 2009, and filed with the clerk of court on August 24, 2009. Based upon arguments of counsel, this court sets aside the order dated August 17, 2009, and substitutes this order granting the defendants' motion to dismiss and denying the plaintiff's motion to compel court mandated mediation.

This case is a medical malpractice action. Pending before the court is a motion by the plaintiff to compel mediation and motions by the defendants Dr. Webster N. Jones, III and Dr. David R. Anderson to dismiss the plaintiff's lawsuit.

The undisputed facts of this case are as follows:

1. On October 27, 2008, the plaintiff contemporaneously filed a Notice of Intent to File Suit, Summons and Complaint pursuant to S.C. Code Ann. §15-79-125.

mte

2. The defendants Dr. Webster N. Jones, III and Dr. David R. Anderson ("defendants") were served with the Notice of Intent to File Suit on November 25, 2008.¹

3. Mediation mandated by S.C. Code Ann. §15-79-125 was initially scheduled for March 12, 2009, but was cancelled by plaintiff's attorney because he had depositions in another case scheduled the same day. Mediation in this case was rescheduled for March 18, 2009, but was cancelled because plaintiff's counsel was in trial in Richland County, SC.

4. The mediation of this case was rescheduled for May 20, 2009, more than 120 days after service of the Notice of Intent to File Suit. However, the defendants refused to attend the rescheduled mediation and filed motions to dismiss. In response, the plaintiff filed a motion to compel mediation.² Plaintiff never sought extension of the 120 day limit for mediation.

LAW AND DISCUSSION

S.C. Code Ann. §15-79-125 states, in pertinent part, as follows:

(A) Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit...

¹ The Affidavits of Service indicate that the defendants were served with the Summons and Complaint only; however, neither defendant denies being served with the Notice of Intent to File Suit.

² The plaintiff also filed a Notice of Intent to File Suit on June 2, 2009, in case number 2009-CP-22-810. That Notice of Intent to File Suit is identical to the Notice of Intent to File Suit in case number 2008-CP-22-1496. Further, the plaintiff attempted service on the defendants in case number 2009-CP-22-810 by mailing the pleadings to the defendants' attorneys in case number 2008-CP-22-1496. The defendant Webster N. Jones, III, filed a Notice to Dismiss in case number 2009-CP-22-810 which is dispositive by this order. No service on the defendant Dr. David R. Anderson is evidenced in case number 2009-CP-22-810.

(C) 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 a finding of good cause...

(D) The circuit court has jurisdiction to enforce the provisions of this section.

(emphasis added).

In the case at hand, the Notice of Intent to File Suit was served on the defendants on November 25, 2008. Therefore, both parties had to participate in mediation by March 25, 2009. Any extensions beyond that time could only be granted by the court upon a finding of good cause.

The plaintiff argues that these cases should not be dismissed because the defendants consented to the cancellation of the two mediation conferences which had been timely scheduled. Defendants argue that the first two mediation conferences were unilaterally cancelled by the plaintiff without their consent. Regardless of whether the parties consented to the cancellation of the first two mediation conferences, S.C. Code Ann. §15-79-125(C) states that the parties "shall" participate in mediation within 120 days "unless an extension...is granted by the court." (emphasis added). Therefore, even if the defendants consented to cancel the first two mediation conferences, if the mediation date was more than

120 days after service of the Notice of Intent to File Suit on the defendants, the parties had to get court approval of the continuance.

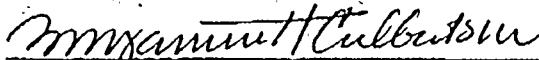
Had the defendants refused to mediate this case within 120 days of the date of service of the Notice of Intent to File Suit or within an extended period granted by the court, then the plaintiff could have obtained an order of the court compelling the mediation pursuant to S.C. Code Ann. §15-79-125(D). However, the plaintiff neither asked the court to extend the 120 day limit for mediation nor sought to enforce the mandated mediation until 179 days after service of the Notice of Intent to File Suit.

NOW, THEREFORE, based upon the above findings and conclusions, it is hereby

ORDERED, that the motion of the defendants to dismiss this action is granted; it is further

ORDERED, that the plaintiff's Motion to Compel Court Mandated Mediation is denied.

AND IT IS SO ORDERED.


Benjamin H. Culbertson
Presiding Judge

February 18, 2010
Georgetown, SC

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN)

C/A No: 2008-CP-22-01496

John Thomas Ross)

Plaintiff,)

NOTICE OF INTENT TO FILE SUIT

vs.)

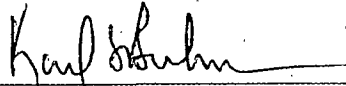
Waccamaw Community)
Hospital, Dr. Webster N. Jones,)
III and Dr. David R. Anderson,)

Defendants.)

FILED
GEORGETOWN COUNTY, S.C.
2008 OCT 27 AM 8:33
ALMA Y. WHITE
CLERK OF COURT

Pursuant to S.C. Code Ann. 15-79-125, Plaintiff above named files this Notice of Intent to File Suit. Attached hereto as Exhibit A, and incorporated herein by reference, is a Complaint that lays out to the factual allegations and legal claims. Exhibit A is the Plaintiff's "short and plain statement of the facts showing the parties are entitled to relief." Attached as Exhibit B is an affidavit from an expert delineating at least one negligent act or omission giving rise to this case. Attached as Exhibit C are answers to the Standard Interrogatories as set forth in S.C.R.C.P. 33 (b).

BROWN & BREHMER

By: 

Karl S. Brehmer
1720 Main Street, Suite 201
Post Office Box 7966
Columbia, South Carolina 29202
(803) 771-6600
Attorneys for Plaintiff

Columbia, South Carolina
October 14, 2008

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN)

C/A No: 2008-CP-22-01496

John Thomas Ross)

Plaintiff,)

vs.)

Dr. Webster N. Jones,)

III and Dr. David R. Anderson,)

Defendants.)

I, KEVIN R. HOGAN, HAVING BEEN DULY SWORN, DEPOSE AND SAY THAT I SERVED THE FOLLOWING; SUMMONS AND COMPLAINT IN THE ABOVE CAPTIONED ACTION ON **DR. WEBSTER JONES III** AT GEORGETOWN MEMORIAL HOSPITAL, GEORGETOWN, SOUTH CAROLINA ON THE 25th DAY OF NOVEMBER 2008 AT APPROX. 1:00 PM.

I AM OVER EIGHTEEN YEARS OF AGE AND NOT A PARTY TO THIS ACTION.


KEVIN R. HOGAN

Carolina Investigations &
Research Services LLC

SWORN to before me this

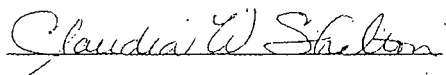
CLAUDIA W. SHELTON

NOTARY PUBLIC

STATE OF SOUTH CAROLINA

MY COMMISSION EXPIRES 11/17/2014

Notary Public for South Carolina



Date: DECEMBER 2, 2008

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN)

C/A No: 2008-CP-22-01496

John Thomas Ross)

Plaintiff,)

vs.)

Dr. Webster N. Jones,)

III and Dr. David R. Anderson,)

Defendants.)

I, KEVIN R. HOGAN, HAVING BEEN DULY SWORN, DEPOSE AND SAY THAT I SERVED THE FOLLOWING; SUMMONS AND COMPLAINT IN THE ABOVE CAPTIONED ACTION ON **DR. DAVID R. ANDERSON** AT HIS PLACE OF EMPLOYMENT OF IMAGINIG CENTER WACCAMAW MEDICAL PARK AT 4181 HIGHWAY BYPASS, MURRELLS INLET, SOUTH CAROLINA ON THE 25th DAY OF NOVEMBER 2008 AT APPROX. 11:00 AM.

I AM OVER EIGHTEEN YEARS OF AGE AND NOT A PARTY TO THIS ACTION.



KEVIN R. HOGAN

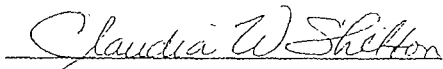
Carolina Investigations &
Research Services LLC

SWORN to before me this

CLAUDIA W. SHELTON
NOTARY PUBLIC

STATE OF SOUTH CAROLINA
MY COMMISSION EXPIRES 11/17/2011

Notary Public for South Carolina



Date: DECEMBER 2, 2008.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN)

John Thomas Ross)

Plaintiff,)

vs.)

Dr. Webster N. Jones,)

III and Dr. David R. Anderson,)

Defendants.)

C/A No: 08-CP-22-01496

**MOTION TO COMPEL COURT
MANDATED MEDIATION**

YOU WILL PLEASE TAKE NOTICE that the Plaintiff will move before the presiding Judge of the Georgetown County Court of Common Pleas at 10:00 a.m. on the 10th day after service hereof or very soon thereafter as counsel may be heard for an Order compelling the Defendants to participate in court mandated mediation pursuant to South Carolina Code § 15-79-125. The Plaintiff hereby certifies that it is in good faith attempted to resolve this issue with Defendants' counsel pursuant to Rule 11 but has been unable to do so.

BROWN & BREHMER

By: 

Karl S. Brehmer
1720 Main Street, Suite 201
Post Office Box 7966
Columbia, South Carolina 29202
(803) 771-6600
Attorneys for Plaintiff

May 19, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	
	)	
John Thomas Ross	)	C/A No: 08-CP-22-01496
Plaintiff,	)	CERTIFICATE OF MAILING
	)	
vs.	)	
	)	
Dr. Webster N. Jones,	)	
III and Dr. David R. Anderson,	)	
	)	
Defendants.	)	

I, the undersigned employee of Brown & Brehmer, hereby certify that copies of the following documents have been served on the following individual(s) by depositing same in the United States Postal Service with the proper amount of first-class postage duly affixed:

Pleadings: Motion to Compel Court Mandated Mediation

Served On: Lisa Thomas, Esq.
Post Office Box 1003
Conway, South Carolina 29528

Darren K. Sanders, Esq.
Post Office Box 2424
Mt. Pleasant, South Carolina 29465



Christle Turner

Columbia, South Carolina
May 19, 2009

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

John Thomas Ross,

Plaintiff,

Versus

Waccamaw Community Hospital, Dr. Webster
N. Jones, III and Dr. David R. Anderson,

Defendants.

) IN THE COURT OF COMMON PLEAS

) FIFTEENTH JUDICIAL CIRCUIT

) C/A No. 08-CP-22-01496

) **DEFENDANT WEBSTER N. JONES, III,**

) **M.D.'S NOTICE OF MOTION AND**

) **MOTION TO DISMISS**

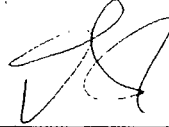
TO: KARL S. BREHMER, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant Webster N. Jones, III, M.D. (hereinafter "this Defendant") will move the Court in ten days or as soon thereafter as counsel may be heard for an Order dismissing the above-referenced Notice of Intent to File Suit pursuant to Rule 12(b)(1), SCRCP and S.C. Code Ann. Sections 15-79-125(C) and (D).

Dr. Jones was served with the Notice of Intent to File Suit on or about November 4, 2008. Pre-suit mediation was set up and cancelled on two separate occasions by counsel for the Plaintiff. Now that the 120 day timeframe has expired from the date of service of the Notice of Intent to File Suit, the Court hereby lacks jurisdiction over this matter. Accordingly, this matter should be dismissed.

This Defendant reserves the right to supplement this Motion with a Memorandum of Law at or prior to the time of the hearing.

BUYCK & SANDERS LAW FIRM, LLC
757 Johnnie Dodds Blvd., Ste. 100
P.O. Box 2424
Mt. Pleasant, SC 29465-2424
Telephone: (843) 377-1400
Facsimile: (843) 377-1403
Email: dks@buyckfirm.com



Hugh W. Buyck (S.C. Bar # 66462)
Darren K. Sanders (S.C. Bar # 68296)

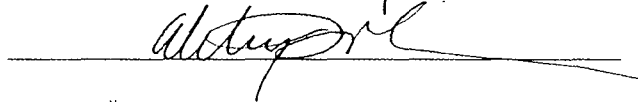
Attorneys for the Defendant
Dr. Webster N. Jones, III

5/19, 2009
Mt. Pleasant, South Carolina
TA21.34MTD (Notice of Intent).doc

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ emailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 19 day of May, 2009.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	FIFTEENTH JUDICIAL CIRCUIT
	)	C/A No.: 2008-CP-22-01496
John Thomas Ross,	)	
	)	
Plaintiff,	)	
	)	Defendant Dr. David R. Anderson
VS.	)	Notice of Motion and
	)	Motion to Dismiss
Waccamaw Community Hospital, Dr.	)	
Webster N. Jones, III and Dr. David R.	)	
Anderson,	)	
	)	
Defendants.	)	
	)	

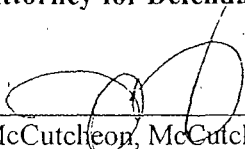
TO: KARL S. BREHMER, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, David R. Anderson, MD, (hereinafter "this Defendant") will move the court in ten days or as soon thereafter as counsel may be heard for an Order dismissing the above-referenced Notice of Intent to File Suit pursuant to Rule 12(b)(1), SCRCF and S.C. Code Ann. Sections 15-79-125(C) and (D).

Dr. Anderson was served with the Notice of Intent to File Suit and Pre-Suit Mediation was set up and cancelled on two separate occasions by counsel for the Plaintiff. The 120 day time frame has now expired from the date of service of the Notice of Intent to File Suit and therefore this Court lacks jurisdiction over this matter. Accordingly, this matter should be dismissed.

This Defendant reserves the right to supplement this Motion with a Memorandum of Law at or prior to the time of the hearing.

JOHN B. McCUTCHEON, JR.
LISA A. THOMAS
Attorney for Defendant, David R. Anderson, MD



McCutcheon, McCutcheon & Baxter, PA
208 Elm Street P. O. Box 1003
Conway, SC 29526 843/248-7225

May 27, 2009

STATE OF SOUTH CAROLINA,

COUNTY OF GEORGETOWN

John Thomas Ross,

Plaintiff,

VS.

Waccamaw Community Hospital, Dr.
Webster N. Jones, III and Dr. David R.
Anderson,

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL CIRCUIT
C/A No.: 2008-CP-22-01496

Affidavit of Mailing

PERSONALLY appeared before me, Janet A. Ramsden, who on oath says she mailed a copy of the Defendant, David R. Anderson, MD's, Notice of Motion and Motion to Dismiss, in connection with the above captioned matter by depositing same in the United States mail, Conway, South Carolina, on this 27 day of May, 2009, bearing proper postage and addressed as follows:

Karl S. Brehmer, Esquire
Brown & Brehmer
P. O. Box 7966
Columbia, SC 29202

Janet A Ramsden
Janet A. Ramsden.

SWORN TO before me this
27 day of May, 2009.

(Signature) (L.S.)
Notary Public for South Carolina
My commission Expires: 9/14/2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)
)
)
John Thomas Ross)
Plaintiff,)
)
vs.)
)
Dr. Webster N. Jones,)
III and Dr. David R. Anderson,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS

C/A No: 2009-CP-22-00810

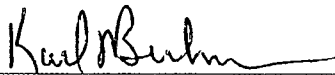
NOTICE OF INTENT TO FILE SUIT

FILED
GEORGETOWN COUNTY, S.C.
2009 JUN -2 PM 4:14
ALMA Y. WHITE
CLERK OF COURT

Pursuant to S.C. Code Ann. 15-79-125, Plaintiff above named files this Notice of Intent to File Suit. Attached hereto as Exhibit A, and incorporated herein by reference, is a Complaint that lays out to the factual allegations and legal claims. Exhibit A is the Plaintiff's "short and plain statement of the facts showing the parties are entitled to relief." Attached as Exhibit B is an affidavit from an expert delineating at least one negligent act or omission giving rise to this case. Attached as Exhibit C are answers to the Standard Interrogatories as set forth in S.C.R.C.P. 33 (b).

BROWN & BREHMER

By:


Karl S. Brehmer
1720 Main Street, Suite 201
Post Office Box 7966
Columbia, South Carolina 29202
(803) 771-6600
Attorneys for Plaintiff

Columbia, South Carolina
May 22, 2009.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN)

C/A No: 2009-CP-22-00810

John Thomas Ross)

Plaintiff,)

CERTIFICATE OF MAILING

vs.)

Dr. Webster N. Jones,)

III and Dr. David R. Anderson,)

Defendants.)

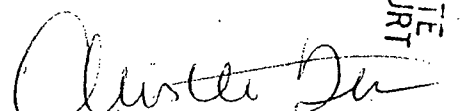
I, the undersigned employee of Brown & Brehmer, hereby certify that copies of the following documents have been served on the following individual(s) by depositing same in the United States Postal Service with the proper amount of first-class postage duly affixed:

Pleadings: Notice of Intent to File Suit

Served On: Lisa Thomas, Esq.
Post Office Box 1003
Conway, South Carolina 29528

Darren K. Sanders, Esq.
Post Office Box 2424
Mt. Pleasant, South Carolina 29465

FILED
GEORGETOWN COUNTY, S.C.
2009 JUN -2 PM 4:14
ALMA Y. WHITE
CLERK OF COURT


Christie Turner

Columbia, South Carolina
May 22, 2009

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

John Thomas Ross,

Plaintiff,

Versus

Dr. Webster N. Jones, III and Dr. David R.
Anderson,

Defendants.

) IN THE COURT OF COMMON PLEAS

)

) FIFTEENTH JUDICIAL CIRCUIT

)

) C/A No. 08-CP-22-01496

)

) **DEFENDANT WEBSTER N. JONES, III,**

) **M.D.'S NOTICE OF MOTION AND**

) **MOTION TO DISMISS THE PLAINTIFF'S**

) **SECOND NOTICE OF INTENT AND**

) **SUMMONS AND COMPLAINT**

)

)

)

TO: KARL S. BREHMER, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant Webster N. Jones, III, M.D. (hereinafter "this Defendant") will move the Court in ten days or as soon thereafter as counsel may be heard for an Order dismissing the above-referenced Notice of Intent to File Suit pursuant to Rule 12(b)(1), SCRCP and S.C. Code Ann. Sections 15-79-125(C) and (D). The Defendant will also move the Court for a dismissal of the Summons and Complaint filed in this matter pursuant to Rule 12(b)(1), SCRCP, S.C. Code Ann. Sections 15-79-125(C) and (D), Rule 12(b)(4), SCRCP and Rule 12(b)(5), SCRCP.

Dr. Jones was served with the original Notice of Intent to File Suit on or about November 4, 2008. Pre-suit mediation was set up and cancelled on two separate occasions by counsel for the Plaintiff. After the expiration of the 120 day timeframe from the date of service of the Notice of Intent to File Suit, on May 19, 2009, counsel for this Defendant filed a Motion to Dismiss the Notice of Intent.

On May 19, 2009 and again on May 22, 2009, counsel for the Plaintiff filed an additional Notice of Intent to File Suit with the Court bearing the original 2008 civil action number. Additionally on those dates, the Plaintiff apparently filed a Summons and Complaint also bearing the original 2008 civil action number. The letter from Plaintiff's counsel dated May 22, 2009 indicates the documents were being forwarded to the Georgetown County Clerk of Court's office

with the requisite filing fee. These documents were served on counsel for this Defendant on May 21, 2009 and May 22, 2009 respectively. These documents have not been served on Dr. Jones individually as of the date of this Motion.

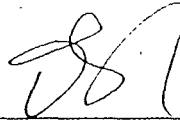
A dismissal of the second Notice of Intent and the Summons and Complaint is proper. Plaintiff's counsel failed to comply with the provisions of S.C. Code Ann. Sections 15-79-125(C) and (D). His failure to comply with the Notice of Intent statute means the Court hereby lacks jurisdiction over this matter. The applicable statute discussing the handling of medical malpractice actions which arise after July 1, 2005 does not provide for additional Notices of Intent to be filed after a failure to comply with the statute initially. The statute also sets forth pre-requisites to filing a Summons and Complaint in an alleged medical negligence matter to which Plaintiff's counsel has failed to adhere. Accordingly, the second Notice of Intent and Summons and Complaint should be dismissed pursuant to Rule 12(b)(1), SCRCP.

Further, the applicable statute of limitations has now expired relating to the care and treatment provided by Dr. Jones. A filing of either a second Notice of Intent and/or Summons and Complaint in May 2009 is beyond three years from the date of treatment by Dr. Jones. It is also in excess of three years from the date the Plaintiff either discovered or should have discovered the injuries about which he now complains. Accordingly, the Plaintiff's second Notice of Intent and Summons and Complaint regarding the care provided by Dr. Jones should be dismissed.

Finally, the Plaintiff has not served either the second Notice of Intent nor the Summons and Complaint on Dr. Jones individually. Accordingly, these matters should be dismissed pursuant to Rules 12(b)(4) and (5), SCRCP.

This Defendant reserves the right to supplement this Motion with a Memorandum of Law at or prior to the time of the hearing.

BUYCK & SANDERS LAW FIRM, LLC
757 Johnnie Dodds Blvd., Ste. 100
P.O. Box 2424
Mt. Pleasant, SC 29465-2424
Telephone: (843) 377-1400
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Email: dks@buyckfirm.com



Hugh W. Buyck (S.C. Bar # 66462)
Darren K. Sanders (S.C. Bar # 68296)

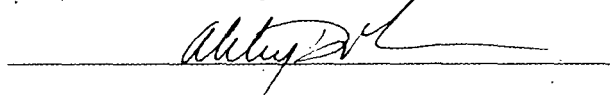
Attorneys for the Defendant
Dr. Webster N. Jones, III

6/5, 2009
Mt. Pleasant, South Carolina
T:\21.34\MTD (Notice of Intent2 and Complaint).doc

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ emailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 5 day of June, 2009.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
John Thomas Ross,	)	C/A No. 09-CP-22-00810
	)	
Plaintiff,	)	DEFENDANT WEBSTER N. JONES, III,
	)	M.D.'S NOTICE OF MOTION AND
Versus	)	MOTION TO DISMISS THE PLAINTIFF'S
	)	NOTICE OF INTENT
Dr. Webster N. Jones, III and Dr. David R.	)	
Anderson,	)	
	)	
Defendants.	)	

TO: KARL S. BREHMER, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant Webster N. Jones, III, M.D. (hereinafter "this Defendant") will move the Court in ten days or as soon thereafter as counsel may be heard for an Order dismissing the above-referenced Notice of Intent to File Suit pursuant to Rule 12(b)(1), SCRCP and S.C. Code Ann. Sections 15-79-125(C) and (D).

Dr. Jones was served with the original Notice of Intent to File Suit on or about November 4, 2008. Pre-suit mediation was set up and cancelled on two separate occasions by counsel for the Plaintiff. After the expiration of the 120 day timeframe from the date of service of the Notice of Intent to File Suit, on May 19, 2009, counsel for this Defendant filed a Motion to Dismiss the Notice of Intent.

On May 19, 2009 and again on May 22, 2009, counsel for the Plaintiff filed an additional Notice of Intent to File Suit with the Court bearing the original 2008 civil action number. Additionally on those dates, the Plaintiff apparently filed a Summons and Complaint also bearing the original 2008 civil action number. The letter from Plaintiff's counsel dated May 22, 2009 indicates the documents were being forwarded to the Georgetown County Clerk of Court's office with the requisite filing fee. These documents were served on counsel for this Defendant on May 21, 2009 and May 22, 2009 respectively. By letter dated June 9, 2009, counsel for the Plaintiff served on counsel for this Defendant a copy of an additional Notice of Intent bearing the

above-referenced 2009 civil action number. These documents have not been served on Dr. Jones individually as of the date of this Motion.

A dismissal of the Notice of Intent bearing the 2009 civil action number is proper. Plaintiff's counsel failed to comply with the provisions of S.C. Code Ann. Sections 15-79-125(C) and (D). His failure to comply with the Notice of Intent statute means the Court hereby lacks jurisdiction over this matter. The applicable statute discussing the handling of medical malpractice actions which arise after July 1, 2005 does not provide for additional Notices of Intent to be filed after a failure to comply with the statute initially. The statute also sets forth pre-requisites to filing a Summons and Complaint in an alleged medical negligence matter to which Plaintiff's counsel has failed to adhere. Accordingly, the Notice of Intent bearing a 2009 civil action number should be dismissed pursuant to Rule 12(b)(1), SCRPC.

Further, the applicable statute of limitations has now expired relating to the care and treatment provided by Dr. Jones. The filing of the Notice of Intent bearing the 2009 civil action number in June 2009 is beyond three years from the date of treatment by Dr. Jones. It is also in excess of three years from the date the Plaintiff either discovered or should have discovered the injuries about which he now complains. Accordingly, the Plaintiff's Notice of Intent bearing the 2009 civil action number should be dismissed.

Finally, the Plaintiff has not served the Notice of Intent bearing the 2009 civil action number on Dr. Jones individually. Accordingly, these matters should be dismissed pursuant to Rules 12(b)(4) and (5), SCRPC.

This Defendant reserves the right to supplement this Motion with a Memorandum of Law at or prior to the time of the hearing.

BUYCK & SANDERS LAW FIRM, LLC
757 Johnnie Dodds Blvd., Ste. 100
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Telephone: (843) 377-1400
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Hugh W. Buyck (S.C. Bar # 66462)
Darren K. Sanders (S.C. Bar # 68296)

Attorneys for the Defendant
Dr. Webster N. Jones, III

6/24, 2009
Mt. Pleasant, South Carolina
T:\21.34\MTD (Notice of Intent3 and Complaint).doc

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ emailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 24 day of June, 2009.



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN)

John Thomas Ross)

Plaintiff,)

vs.)

Dr. Webster N. Jones,)

III and Dr. David R. Anderson,)

Defendants.)

C/A No:

2009-CP-22-01366

NOTICE OF INTENT TO FILE SUIT

ALISA Y. WHITE
CLERK OF COURT

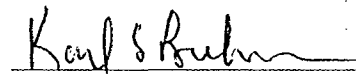
2009 AUG 31 AM 9:30

FILED
GEORGETOWN COUNTY, S.C.

Pursuant to S.C. Code Ann. 15-79-125, Plaintiff above named files this Notice of Intent to File Suit. Attached hereto as Exhibit A, and incorporated herein by reference, is a Complaint that lays out to the factual allegations and legal claims. Exhibit A is the Plaintiff's "short and plain statement of the facts showing the parties are entitled to relief." Attached as Exhibit B is an affidavit from an expert delineating at least one negligent act or omission giving rise to this case. Attached as Exhibit C are answers to the Standard Interrogatories as set forth in S.C.R.C.P. 33 (b).

BROWN & BREHMER

By:



Karl S. Brehmer
1720 Main Street, Suite 201
Post Office Box 7966
Columbia, South Carolina 29202
(803) 771-6600
Attorneys for Plaintiff

Columbia, South Carolina
August 25, 2009

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)
)
John Thomas Ross)
)
Plaintiff,)
)
vs.)
)
Dr. Webster N. Jones,)
)
III and Dr. David R. Anderson,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS

C/A No:

2009-CP-22-01366

CERTIFICATE OF MAILING

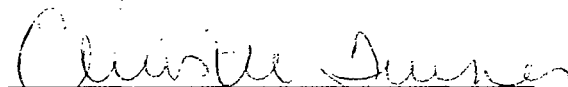
FILED
GEORGETOWN COUNTY, S.C.
2009 AUG 31 AM 9:30
ALMA Y. WHITE
CLERK OF COURT

I, the undersigned employee of Brown & Brehmer, hereby certify that copies of the following documents have been served on the following individual(s) by depositing same in the United States Postal Service with the proper amount of first-class postage duly affixed:

Pleadings: Notice of Intent to File Suit

Served On: Lisa Thomas, Esq.
Post Office Box 1003
Conway, South Carolina 29528

Darren K. Sanders, Esq.
Post Office Box 2424
Mt. Pleasant, South Carolina 29465


Christle Turner

Columbia, South Carolina
August 25, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
	)	C/A No: 08-CP-22-01496
John Thomas Ross	)	
Plaintiff,	)	PLAINTIFF'S MOTION FOR
	)	RECONSIDERATION AND/OR TO
vs.	)	ALTER OR AMEND JUDGMENT
	)	
Dr. Webster N. Jones, III and	)	
Dr. David R. Anderson,	)	
	)	
Defendants.	)	

TO: JOHN B. McCUTCHEON, JR., ATTORNEY FOR DEFENDANT ANDERSON, AND HUGH W. BUYCK, ATTORNEY FOR DEFENDANT JONES:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff will move¹ before the presiding Judge of the Georgetown County Court of Common Pleas at 10:00 a.m. on the 10th day after service hereof or very soon thereafter as counsel may be heard for an Order Reconsidering the Order Granting Motion to Dismiss and Denying Motion to Compel Court Mandated Mediation in both 2008-CP-22-01496 and 2009-CP-22-00810 pursuant to Rule 59(e), SCRCP, or for an Order Altering or Amending the Order Granting Motion to Dismiss and Denying Motion to Compel Court Mandated Mediation in both 2008-CP-22-01496 and 2009-CP-22-00810 pursuant to Rule 59(e), SCRCP.

PROCEDURAL HISTORY AND FACTS

Pursuant to S.C. Code Ann. § 15-79-125 [§ 15-79-125], the plaintiff filed a Notice of Intent to File Suit [Notice of Intent], Summons, and Complaint on October 27, 2008 for his medical malpractice claim against the Defendants. The Notice of Intent was given case number 2008-CP-22-01496 [the 08 case]. The Clerk of Court never appointed a

primary and secondary mediator as the Circuit Court is required to do when a Notice of Intent is filed according to Rule 4(c), Alternative Dispute Resolution. The Plaintiff served the Defendants with the Notice of Intent, Summons, and Complaint on November 25, 2008.

Plaintiff's attorney informed the Defendants' attorneys that the parties needed to have the pre-litigation mediation in this case via letter dated January 19, 2009. (Brehmer Affidavit, 9/1/09). The pre-litigation mediation mandated by § 15-79-125(C) for medical malpractice claims was scheduled for March 12, 2009, which was within one hundred twenty (120) days of the service of the Notice of Intent on the Defendants. (Brehmer Affidavit, 9/1/09, pg 1). Defendant Anderson's attorney confirmed the pre-litigation mediation with all parties via letter dated February 12, 2009. (Brehmer Affidavit, 9/1/09). The pre-litigation mediation was cancelled by consent of all of the parties because Plaintiff's attorney had an out of state deposition in another case that was about to go to trial. (Brehmer Affidavit, 9/1/09, pg 1). Plaintiff's attorney notified the Defendants' attorney of this conflict via letter dated February 19, 2009. (Brehmer Affidavit, 9/1/09).

The pre-litigation mediation was rescheduled for March 18, 2009. (Brehmer Affidavit, 9/1/09). Defendant Anderson's attorney confirmed the rescheduled pre-litigation mediation with all parties via letter dated February 24, 2009. (Brehmer Affidavit, 9/1/09). However, the pre-litigation mediation had to be canceled again because the Plaintiff's attorney was in trial in the Richland County Court of Common Pleas on March 18, 2009. (Brehmer Affidavit, 9/1/09, pg 1).

¹ The Plaintiff is filing identical Motions for Reconsideration and/or to Alter or Amend Judgment in both 2008-CP-22-01496 and 2009-CP-22-00810 since most of the issues in both cases are similar and interrelated.

The pre-litigation mediation was rescheduled for May 20, 2009 by consent of all parties. (Brehmer Affidavit, 9/1/09, pg 1). A pre-litigation mediation on May 20, 2009 would have occurred within the sixty (60) day extension allowed for good cause by § 15-79-125(C). Plaintiff's attorney believed that his out of state deposition and his trial conflicts would qualify as good cause shown under § 15-79-125(C). (Brehmer Affidavit, 9/1/09, pgs 1-2). The Defendants' attorneys consented to participating in a pre-litigation mediation on May 20, 2009, which was beyond the one hundred twenty (120) day deadline but within the extended sixty (60) day good cause deadline. (Brehmer Affidavit, 9/1/09, pg 2). Defendant Anderson's attorney confirmed the mediation with all parties via letter dated May 13, 2009. (Brehmer Affidavit, 9/1/09).

Surprisingly, via letter dated May 14, 2009, Defendant Jones' attorney decided to object to the pre-litigation mediation that had just been set via consent of all parties and refused to attend the pre-litigation mediation as scheduled on May 20, 2009. (Brehmer Affidavit, 9/1/09, pg 2). The Plaintiff filed a Motion to Compel Court Mandated Mediation [Motion to Compel Mediation] in the 08 case dated May 19, 2009 in response to the Defendants' refusal to attend the pre-litigation mediation. The Motion to Compel Mediation was filed within the sixty (60) day extension allowed for good-cause by § 15-79-125(C).

Notwithstanding the issues with scheduling the pre-litigation mediation, the Defendants conducted discovery of the Plaintiff's medical records after the Notice of Intent was filed and served as allowed by § 15-79-125(B). (Brehmer Affidavit, 9/1/09, pg 2). Plaintiff's attorney instructed Defendant Anderson's attorney to subpoena whatever

medical records she deemed necessary for this claim via letter dated December 15, 2008. (Brehmer Affidavit, 9/1/09, pg 2). Defendant Anderson's attorney asked the Plaintiff's attorney for a signed authorization from the Plaintiff so that she could obtain some of the Plaintiff's medical records via letter dated February 26, 2009. (Brehmer Affidavit, 9/1/09, pg 2). Plaintiff's attorney provided Defendant Anderson's attorney with a signed authorization from the Plaintiff so she could subpoena the plaintiff's records from the VA Hospital via letter dated March 10, 2009. (Brehmer Affidavit). Defendant Anderson's attorney sent the Plaintiff's signed authorization to the VA Hospital as they requested so she could get the Plaintiff's records from there via letter dated April 16, 2009. (Brehmer Affidavit, 9/1/09, pg 2). This request for Plaintiff's medical records from the VA Hospital by Defendant Anderson was after the one hundred twenty (120) day timeframe in § 15-79-125(C) to conduct the mandatory pre-litigation mediation. (Brehmer Affidavit, 9/1/09, pg 2).

Since the date the Notice of Intent was filed and served, Defendants' attorneys repeatedly told Plaintiff's attorney that the pre-litigation mediation was a formality and that settlement was unlikely. (Brehmer Affidavit, 9/1/09, pg 2). Defendant Anderson's attorney called Plaintiff's attorney in response to his January 19, 2009 letter and told him that her firm did their pre-litigation mediations informally via teleconference with Judge Breeden. (Brehmer Affidavit, 9/1/09, pg 2). She informed Plaintiff's attorney that she would get the pre-litigation mediation scheduled in a cost effective manner with all parties having no expectation that the claim would settle before an action was filed and developed. (Brehmer Affidavit, 9/1/09, pgs 2-3). Prior to May 14, 2009, it was Plaintiff's

attorney's impression that all parties were working together to get the pre-litigation mediation completed so the malpractice action could get filed, served, and developed. (Brehmer Affidavit, 9/1/09, pg 3).

Based upon the representations from the Defendants' attorneys, Plaintiff's attorney believed that the Defendants would not object to conducting the pre-litigation mediation as scheduled beyond the one hundred twenty (120) day deadline. (Brehmer Affidavit, 9/1/09, pg 3). During this period of trying to set up the pre-litigation mediation and conducting discovery of the Plaintiff's medical records, Plaintiff's attorney was under the impression that the Defendants would require him to file a Motion to Extend the Pre-Litigation Mediation Deadline an extra sixty (60) days for good cause shown. (Brehmer Affidavit, 9/1/09, pgs 2-3). Plaintiff's attorney had this impression based upon the representations of Defendants' attorneys in trying to obtain Plaintiff's medical records after the one hundred twenty (120) day deadline had expired, and based upon the actions of Defendants' attorneys in consenting to have the pre-litigation mediation on May 20, 2009, which was after the one hundred twenty (120) day deadline had expired but within the sixty day (60) extended deadline for good cause. (Brehmer Affidavit, 9/1/09, pg 2).

-Defendant Anderson filed a Motion to Dismiss the Notice of Intent to File Suit [Motion to Dismiss Notice of Intent] in the 08 case dated May 27, 2009. Defendant Jones filed a Motion to Dismiss the Notice of Intent to File Suit [Motion to Dismiss Notice of Intent] in the 08 case dated June 5, 2009.

Since it was clear the Defendants were not going to participate in mandatory pre-litigation mediation and the Defendants were moving to dismiss the Notice of Intent for 08

case, the Plaintiff filed a second Notice of Intent to File Suit [second Notice of Intent], Summons, and Complaint on June 2, 2009. The second Notice of Intent was given case number 2009-CP-22-00810 [the 09 case]. The Clerk of Court never appointed a primary and secondary mediator as the Circuit Court is required to do when a Notice of Intent is filed according to Rule 4(c), Alternative Dispute Resolution. The Plaintiff served the attorneys for the Defendants with the second Notice of Intent, Summons, and Complaint on June 9, 2009. Defendant Jones filed a Motion to Dismiss the Notice of Intent [Motion to Dismiss Second Notice of Intent] in the 09 case dated June 24, 2009.

The Defendants' Motions to Dismiss the Notices of Intent in both the 08 and 09 cases and the Plaintiff's Motion to Compel Mediation in the 08 case were argued before the Honorable Benjamin H. Culbertson [Judge Culbertson] on August 7, 2009. Judge Culbertson signed the Order Granting Motion to Dismiss and Denying Motion to Compel Court Mandated Mediation [the Order] in both the 08 and 09 cases on August 17, 2009. The Order was filed with the Clerk of Court on August 24, 2009. The Plaintiff received written notice of the Order on August 25, 2009.

The plaintiff contends that the Order contains some errors at law, and, therefore, the Order needs to be reconsidered, clarified, and/or altered for both the 08 and 09 cases. According to Rule 59(e), SCRCP, "a motion to alter or amend the judgment [in this case the Order] shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(g), SCRCP, requires that "a party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion." Therefore, Plaintiff's Motion to Reconsider and/or to Alter or

Amend Judgment must be served on the Defendants by September 4, 2009, and it must be provided to Judge Culbertson within ten (10) days after it is filed.

ANALYSIS AND RELIEF SOUGHT

Before a plaintiff can file civil action against a defendant for a medical malpractice claim, § 15-79-125 outlines several prerequisites that must be met by a plaintiff. First, the plaintiff must file a Notice of Intent to File Suit [Notice of Intent] against a proposed defendant. Second, the plaintiff must file an affidavit of an expert witness with the Notice of Intent supporting his claim. Third, the plaintiff and proposed defendant(s) must participate in a mandatory pre-litigation mediation. Finally, the plaintiff may file a civil action for medical malpractice if the pre-litigation mediation fails.

The pertinent portions of § 15-79-125 setting forth the procedures noted above are as follows:

(A) Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness...in a county in which venue would be proper for filing or initiating the civil action....Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations. The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules for Civil Procedure.

(C) Within ninety days and no later 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 a finding of good cause.

(D) The circuit court has jurisdiction to enforce the provisions of this section.

(E) If the matter cannot be resolved through mediation, the plaintiff may initiate the civil action by filing a summons and complaint pursuant to the South Carolina Rules of Civil Procedure.

Alternative Dispute Resolution, Rule 4(c) sets forth the procedures for the required appointment of a mediator by the circuit court in a medical malpractice action. ADR, Rule 4(c) notes:

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 be filed in accordance with procedures for filing a lis pendens and requires the same filing fee as provided by S.C. Code § 8-21-310(11)(b). 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. At the time the Notice of Intent to File Suit is filed, the Clerk of Court *shall* appoint a primary mediator and a secondary mediator in the manner set forth in the paragraph above. The plaintiff shall serve the defendants with the Notice of Intent to File Suit containing the mediator appointment. (emphasis added).

A. The Defendants only moved to dismiss the Notice of Intent to File Suit in both the 08 and 09 cases.

The Order is improper in noting in the first paragraph on the first page that the Defendants have moved "to dismiss the plaintiff's lawsuit." The first paragraph on the first page of each of the Defendants' Motions to Dismiss request only that the court dismiss the Notice of Intent to File Suit [Notice of Intent] in both the 08 and 09 cases. The Defendants have not moved to dismiss any "action" or "civil action" in the 08 or 09 cases. If the Order is not reconsidered in its entirety, the Order should be amended to indicate that the Defendants have moved to dismiss the plaintiff's Notice of Intent in both the 08 and 09 cases.

B. There is no "action" or "civil action" pending before the trial court in the 08 or 09 cases.

The Order is improper on page three in ruling that the "motion of the defendants to dismiss *this action* is granted." The plaintiff has only filed a Notice of Intent to File Suit

[Notice of Intent] in both the 08 and 09 cases as required by § 15-79-125. The only thing pending before the court is the plaintiff's Notice of Intent in both the 08 and 09 cases. The plaintiff has not filed any "action" or "civil action" in either the 08 or 09 case. As outlined in § 15-79-125(A), the plaintiff cannot institute an "action" or "civil action" in a medical malpractice claim until a Notice of Intent is filed. According to § 15-79-125(E), the medical malpractice "action" or "civil action" cannot be filed until the pre-litigation mediation is unsuccessful, and the "action" or "civil action" is not commenced until the summons and complaint are filed accordance with the South Carolina Rules of Civil Procedure. If the Order is not reconsidered in its entirety, the Order should be amended to indicate that the Defendants' Motion to Dismiss the Notice of Intent to File Suit is granted.

C. The Order is unclear as to whether it is dismissing just the 08 case or whether it is dismissing both the 08 and 09 cases.

The Order was sent to the parties by the Clerk of Court attached to a Form 4 Order. The Form 4 Order lists both the 08 and 09 civil action numbers. The Order itself lists both the 08 and 09 civil action numbers. However, the Order uses only singular terms in its body. In the first paragraph on the first page, the Order refers to "the plaintiff's lawsuit" and not lawsuits. On the third page the Order only dismisses "this action" and not actions. Additionally, the law and discussion section on pages two and three of the Order² only analyzes the alleged failure of the parties to conduct the pre-litigation mediation in the 08 case within the 120 day statutory period provided by 15-79-125(C). Because of these discrepancies in the Order, the plaintiff seeks clarification as to

whether the Order is dismissing just the 08 case or whether it is dismissing both the 08 and 09 cases. If the Order is not reconsidered in its entirety, the Order should be amended to indicate the clear intentions of the Court for the dismissal of the 08 and 09 cases.

D. While the Court has jurisdiction to enforce § 15-79-125, the statute and case law does not give the Court the authority to dismiss a Notice of Intent to File Suit if the parties do not conduct a pre-litigation mediation within 120 days from the service of the Notice of Intent to File Suit.

Pursuant to § 15-79-125(D), the circuit court does have jurisdiction to enforce the provisions of § 15-79-125. However, the statute does not give the Court the express authority to dismiss a Notice of Intent to File Suit [Notice of Intent] if the parties do not conduct a pre-litigation mediation within 120 days from the service of the Notice of Intent to File Suit as required by § 15-79-125(C). Additionally, the plaintiff could not find any South Carolina case law that extends this authority to the Court. Since the Court does not have express statutory authority or common law authority to dismiss the Notice of Intent for failure to conduct pre-litigation mediation within 120 days, the Order must be reconsidered and revoked in both the 08 and 09 cases.

E. The Court should have granted the Plaintiff's Motion to Compel Mandatory Mediation after the Defendants refused to participate in mandatory pre-litigation mediation in the 08 case.

The less drastic and more judicially efficient remedy for the motions pending before the Court in the 08 case would have been for the Court to compel the parties participate in the mandatory pre-litigation mediation based upon the parties' conduct and

² The Order does refer to the 09 case in a footnote on page two.

representations from the date the Notice of Intent was filed in the 08 case until the Plaintiff's Motion to Compel Mediation was filed. The parties worked together for nearly four (4) months from mid January 2009 through mid May 2009 to try and get the pre-litigation mediation scheduled at a mutually convenient time. Defendants' attorneys repeatedly insisted that the pre-litigation mediation was merely a formality and that the Plaintiff's claim would not settle prior to filing an action. The pre-litigation mediations that were scheduled were all canceled for valid reasons.

The parties all consented to a pre-litigation mediation on May 20, 2009 even though that date was beyond the one hundred twenty (120) day timeframe in § 15-79-125(C). The pre-litigation mediation on May 20, 2009 agreed to by all parties would have been within the sixty (60) day good cause shown extended timeframe in § 15-79-125(C). The parties were conducting medical discovery after the one hundred twenty (120) day timeframe for mandatory pre-litigation mediation expired. It was not until six (6) days before the pre-litigation mediation set for May 20, 2009 that the Defendants decided to refuse to participate in the pre-litigation mediation based on the technicality that it was set greater than one hundred twenty (120) days from the service of the Notice of Intent to File Suit in the 08 case, and the Plaintiff did not have a court order allowing the pre-litigation mediation within the sixty (60) day good cause extended timeframe.

Plaintiff's attorney relied upon the actions and representations of the Defendants' attorneys that they would not object to, and in fact consented to, a pre-litigation mediation that was set beyond the one hundred twenty (120) day deadline, but within the sixty (60) day good cause extended deadline. Based upon the conduct of the Defendant's

attorneys, they should be estopped from now attempting to invoke the technical deadlines and limitations for conducting the pre-litigation mediation that are found in § 15-79-125(C). Accordingly, the Court should reconsider and revoke the Order and enter a new one granting the Plaintiff's Motion to Compel Mediation in the 08 case.

F. The Court has no legal basis to dismiss the 09 case.

The Court has no legal basis to dismiss the 09 case if the Court in fact intended to dismiss the 09 case with the Order. In the law and discussion section on pages two and three, the Order only analyzes the issue of conducting a pre-litigation mediation for a medical malpractice claim within the statutory timeframe. The 120 day time limit to conduct a pre-litigation mediation pursuant to § 15-79-125(C) does not start until the service of the Notice of Intent to File Suit [Notice of Intent]. The Defendants claim they have never been served with the Notice of Intent in the 09 case. Therefore, the 120 time limit to conduct a pre-litigation mediation has not begun to run in the 09 case. If the Court intended to dismiss the 09 case in the Order, the Court must reconsider and revoke the Order as it relates to the 09 case.

G. The Court was silent in the Order regarding the actual merits of the Plaintiff's medical malpractice claim and the Statute of Limitations defense mentioned in Defendant Jones' Motions to Dismiss the 08 and 09 cases.

On page two of both of Defendant Jones' Motions to Dismiss the 08 and 09 cases, Jones asserts that the Statute of Limitations has expired for the plaintiff's medical malpractice claim. However, the only motion brought by Defendant Jones in the 08 and 09 cases was to dismiss the Notice of Intent to File Suit in each case based upon the plaintiff's alleged failure to comply with the provisions of § 15-79-125(C) regarding

mandatory pre-litigation mediation. As a result, the Court did not have the merits of the plaintiff's medical malpractice claim or Defendant's Jones Statute of Limitations defense before it at the hearing on these motions. The parties did not argue either of those issues at the hearing.

The Order is likely silent regarding both of those issues because they were not before the Court and were not argued at the hearing. The Plaintiff seeks to make certain that the Court has made no rulings or determinations on the merits of his medical malpractice claim and/or Defendant Jones' Statute of Limitations defense in the Order in light of the fact that Defendant Jones included them in his motions. If the Order is not reconsidered in its entirety, the Order should be amended to indicate that the Court has made no rulings or determinations on the merits of the Plaintiff's medical malpractice claim and/or Defendant Jones' Statute of Limitations defense in both the 08 and 09 cases.

H. The Court was silent in the Order regarding the contention in Defendant Jones' Motions to Dismiss the 08 and 09 cases that the Plaintiff cannot file additional Notices of Intent to File Suit if the first Notice fails to comply with the statute.

On page two of both of Defendant Jones' Motions to Dismiss the 08 and 09 cases, Jones asserts that § 15-79-125 does not allow the Plaintiff to file additional Notices of Intent to File Suit if the first Notice fails to comply with the statute. However, the only motion brought by Defendant Jones in the 08 and 09 cases was to dismiss the Notice of Intent to File Suit [Notice of Intent] in each case based upon the plaintiff's alleged failure to comply with the provisions of § 15-79-125(C) regarding mandatory pre-litigation mediation. As a result, the Court did not have Defendant Jones' claim about an alleged prohibition of filing additional Notices of Intent if the first Notice fails to comply with the

statute before it at the hearing on these motions. The parties did not argue this issue at the hearing.

As an initial matter, § 15-79-125 does not provide any prohibition preventing a plaintiff from filing a second Notice of Intent if his first Notice fails to comply with the statute in some manner. The Plaintiff could not find any South Carolina case law that sets any such rule. Defendant Jones did not provide any legal basis in support of his assertion on this issue in his motions. Accordingly, there is no basis in South Carolina law to support Defendant Jones' claim on this issue. Defendant Jones' claim does not make sense from a practical standpoint as well because the statute only concerns the prerequisite of filing a Notice of Intent and conducting a pre-litigation mediation before actually filing a medical malpractice action.

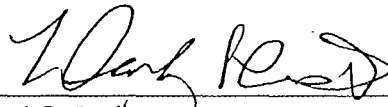
The Order is likely silent regarding whether the statute allows for filing additional Notices of Intent if the first Notice fails to comply with the statute because the issue was not before the Court and was not argued at the hearing. The Plaintiff seeks to make certain that the Court has made no rulings or determinations on whether the statute allows for filing additional Notices of Intent if the first Notice fails to comply with the statute in the Order in light of the fact that Defendant Jones included it in his motions. If the Order is not reconsidered in its entirety, the Order should be amended to indicate that the Court has made no rulings or determinations on whether the statute allows for filing additional Notices of Intent if the first Notice fails to comply with the statute in both the 08 and 09 cases.

CONCLUSION

For the reasons stated herein, the Plaintiff respectfully seeks an Order Reconsidering the Order Granting Motion to Dismiss and Denying Motion to Compel Court Mandated Mediation in both the 08 and 09 cases pursuant to Rule 59(e), SCRCP, or for an Order Altering or Amending the Court's Order Granting Motion to Dismiss and Denying Motion to Compel Court Mandated Mediation in both the 08 and 09 cases pursuant to Rule 59(e), SCRCP.

BROWN & BREHMER

By:



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1720 Main Street, Suite 201
Post Office Box 7966
Columbia, South Carolina 29202
(803) 771-6600

Attorneys for Plaintiff

September 1, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
	)	C/A No: 08-CP-22-01496
John Thomas Ross	)	
Plaintiff,	)	CERTIFICATE OF MAILING
	)	
vs.	)	
	)	
Dr. Webster N. Jones, III, and	)	
Dr. David R. Anderson,	)	
	)	
Defendants.	)	

I, the undersigned employee of Brown & Brehmer, hereby certify that copies of the following documents have been served on the following individuals by depositing same in the United States Postal Service with the proper amount of first-class postage duly affixed:

Pleadings: Plaintiff's Motion for Reconsideration and/or to Alter or Amend Judgment

Served On: John B. McCutcheon, Jr., Esq.
 Lisa A. Thomas, Esq.
 McCUTCHEON, McCUTCHEON & BAXTER, PA
 Post Office Box 1003
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Hugh W. Buyck, Esq.
 Darren K. Sanders, Esq.
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 Mt. Pleasant, South Carolina 29465


 L. Darby Plexico, III

Columbia, South Carolina
 September 1, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
	)	C/A No: 09-CP-22-00810
John Thomas Ross	)	
Plaintiff,	)	PLAINTIFF'S MOTION FOR
	)	RECONSIDERATION AND/OR TO
vs.	)	ALTER OR AMEND JUDGMENT
	)	
Dr. Webster N. Jones, III and	)	
Dr. David R. Anderson,	)	
	)	
Defendants.	)	

TO: JOHN B. McCUTCHEON, JR., ATTORNEY FOR DEFENDANT ANDERSON, AND HUGH W. BUYCK, ATTORNEY FOR DEFENDANT JONES:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff will move¹ before the presiding Judge of the Georgetown County Court of Common Pleas at 10:00 a.m. on the 10th day after service hereof or very soon thereafter as counsel may be heard for an Order Reconsidering the Order Granting Motion to Dismiss and Denying Motion to Compel Court Mandated Mediation in both 2008-CP-22-01496 and 2009-CP-22-00810 pursuant to Rule 59(e), SCRCP, or for an Order Altering or Amending the Order Granting Motion to Dismiss and Denying Motion to Compel Court Mandated Mediation in both 2008-CP-22-01496 and 2009-CP-22-00810 pursuant to Rule 59(e), SCRCP.

PROCEDURAL HISTORY AND FACTS

Pursuant to S.C. Code Ann. § 15-79-125 [§ 15-79-125], the plaintiff filed a Notice of Intent to File Suit [Notice of Intent], Summons, and Complaint on October 27, 2008 for his medical malpractice claim against the Defendants. The Notice of Intent was given case number 2008-CP-22-01496 [the 08 case]. The Clerk of Court never appointed a

primary and secondary mediator as the Circuit Court is required to do when a Notice of Intent is filed according to Rule 4(c), Alternative Dispute Resolution. The Plaintiff served the Defendants with the Notice of Intent, Summons, and Complaint on November 25, 2008.

Plaintiff's attorney informed the Defendants' attorneys that the parties needed to have the pre-litigation mediation in this case via letter dated January 19, 2009. (Brehmer Affidavit, 9/1/09). The pre-litigation mediation mandated by § 15-79-125(C) for medical malpractice claims was scheduled for March 12, 2009, which was within one hundred twenty (120) days of the service of the Notice of Intent on the Defendants. (Brehmer Affidavit, 9/1/09, pg 1). Defendant Anderson's attorney confirmed the pre-litigation mediation with all parties via letter dated February 12, 2009. (Brehmer Affidavit, 9/1/09). The pre-litigation mediation was cancelled by consent of all of the parties because Plaintiff's attorney had an out of state deposition in another case that was about to go to trial. (Brehmer Affidavit, 9/1/09, pg 1). Plaintiff's attorney notified the Defendants' attorney of this conflict via letter dated February 19, 2009. (Brehmer Affidavit, 9/1/09).

The pre-litigation mediation was rescheduled for March 18, 2009. (Brehmer Affidavit, 9/1/09). Defendant Anderson's attorney confirmed the rescheduled pre-litigation mediation with all parties via letter dated February 24, 2009. (Brehmer Affidavit, 9/1/09). However, the pre-litigation mediation had to be canceled again because the Plaintiff's attorney was in trial in the Richland County Court of Common Pleas on March 18, 2009. (Brehmer Affidavit, 9/1/09, pg 1).

¹ The Plaintiff is filing identical Motions for Reconsideration and/or to Alter or Amend Judgment in both 2008-CP-22-01496 and 2009-CP-22-00810 since most of the issues in both cases are similar and interrelated.

The pre-litigation mediation was rescheduled for May 20, 2009 by consent of all parties. (Brehmer Affidavit, 9/1/09, pg 1). A pre-litigation mediation on May 20, 2009 would have occurred within the sixty (60) day extension allowed for good cause by § 15-79-125(C). Plaintiff's attorney believed that his out of state deposition and his trial conflicts would qualify as good cause shown under § 15-79-125(C). (Brehmer Affidavit, 9/1/09, pgs 1-2). The Defendants' attorneys consented to participating in a pre-litigation mediation on May 20, 2009, which was beyond the one hundred twenty (120) day deadline but within the extended sixty (60) day good cause deadline. (Brehmer Affidavit, 9/1/09, pg 2). Defendant Anderson's attorney confirmed the mediation with all parties via letter dated May 13, 2009. (Brehmer Affidavit, 9/1/09).

Surprisingly, via letter dated May 14, 2009, Defendant Jones' attorney decided to object to the pre-litigation mediation that had just been set via consent of all parties and refused to attend the pre-litigation mediation as scheduled on May 20, 2009. (Brehmer Affidavit, 9/1/09, pg 2). The Plaintiff filed a Motion to Compel Court Mandated Mediation [Motion to Compel Mediation] in the 08 case dated May 19, 2009 in response to the Defendants' refusal to attend the pre-litigation mediation. The Motion to Compel Mediation was filed within the sixty (60) day extension allowed for good cause by § 15-79-125(C).

Notwithstanding the issues with scheduling the pre-litigation mediation, the Defendants conducted discovery of the Plaintiff's medical records after the Notice of Intent was filed and served as allowed by § 15-79-125(B). (Brehmer Affidavit, 9/1/09, pg 2). Plaintiff's attorney instructed Defendant Anderson's attorney to subpoena whatever

medical records she deemed necessary for this claim via letter dated December 15, 2008. (Brehmer Affidavit, 9/1/09, pg 2). Defendant Anderson's attorney asked the Plaintiff's attorney for a signed authorization from the Plaintiff so that she could obtain some of the Plaintiff's medical records via letter dated February 26, 2009. (Brehmer Affidavit, 9/1/09, pg 2). Plaintiff's attorney provided Defendant Anderson's attorney with a signed authorization from the Plaintiff so she could subpoena the plaintiff's records from the VA Hospital via letter dated March 10, 2009. (Brehmer Affidavit). Defendant Anderson's attorney sent the Plaintiff's signed authorization to the VA Hospital as they requested so she could get the Plaintiff's records from there via letter dated April 16, 2009. (Brehmer Affidavit, 9/1/09, pg 2). This request for Plaintiff's medical records from the VA Hospital by Defendant Anderson was after the one hundred twenty (120) day timeframe in § 15-79-125(C) to conduct the mandatory pre-litigation mediation. (Brehmer Affidavit, 9/1/09, pg 2).

Since the date the Notice of Intent was filed and served, Defendants' attorneys repeatedly told Plaintiff's attorney that the pre-litigation mediation was a formality and that settlement was unlikely. (Brehmer Affidavit, 9/1/09, pg 2). Defendant Anderson's attorney called Plaintiff's attorney in response to his January 19, 2009 letter and told him that her firm did their pre-litigation mediations informally via teleconference with Judge Breeden. (Brehmer Affidavit, 9/1/09, pg 2). She informed Plaintiff's attorney that she would get the pre-litigation mediation scheduled in a cost effective manner with all parties having no expectation that the claim would settle before an action was filed and developed. (Brehmer Affidavit, 9/1/09, pgs 2-3). Prior to May 14, 2009, it was Plaintiff's

attorney's impression that all parties were working together to get the pre-litigation mediation completed so the malpractice action could get filed, served, and developed. (Brehmer Affidavit, 9/1/09, pg 3).

Based upon the representations from the Defendants' attorneys, Plaintiff's attorney believed that the Defendants would not object to conducting the pre-litigation mediation as scheduled beyond the one hundred twenty (120) day deadline. (Brehmer Affidavit, 9/1/09, pg 3). During this period of trying to set up the pre-litigation mediation and conducting discovery of the Plaintiff's medical records, Plaintiff's attorney was under the impression that the Defendants would require him to file a Motion to Extend the Pre-Litigation Mediation Deadline an extra sixty (60) days for good cause shown. (Brehmer Affidavit, 9/1/09, pgs 2-3). Plaintiff's attorney had this impression based upon the representations of Defendants' attorneys in trying to obtain Plaintiff's medical records after the one hundred twenty (120) day deadline had expired, and based upon the actions of Defendants' attorneys in consenting to have the pre-litigation mediation on May 20, 2009, which was after the one hundred twenty (120) day deadline had expired but within the sixty day (60) extended deadline for good cause. (Brehmer Affidavit, 9/1/09, pg 2).

Defendant Anderson filed a Motion to Dismiss the Notice of Intent to File Suit [Motion to Dismiss Notice of Intent] in the 08 case dated May 27, 2009. Defendant Jones filed a Motion to Dismiss the Notice of Intent to File Suit [Motion to Dismiss Notice of Intent] in the 08 case dated June 5, 2009.

Since it was clear the Defendants were not going to participate in mandatory pre-litigation mediation and the Defendants were moving to dismiss the Notice of Intent for 08

case, the Plaintiff filed a second Notice of Intent to File Suit [second Notice of Intent], Summons, and Complaint on June 2, 2009. The second Notice of Intent was given case number 2009-CP-22-00810 [the 09 case]. The Clerk of Court never appointed a primary and secondary mediator as the Circuit Court is required to do when a Notice of Intent is filed according to Rule 4(c), Alternative Dispute Resolution. The Plaintiff served the attorneys for the Defendants with the second Notice of Intent, Summons, and Complaint on June 9, 2009. Defendant Jones filed a Motion to Dismiss the Notice of Intent [Motion to Dismiss Second Notice of Intent] in the 09 case dated June 24, 2009.

The Defendants' Motions to Dismiss the Notices of Intent in both the 08 and 09 cases and the Plaintiff's Motion to Compel Mediation in the 08 case were argued before the Honorable Benjamin H. Culbertson [Judge Culbertson] on August 7, 2009. Judge Culbertson signed the Order Granting Motion to Dismiss and Denying Motion to Compel Court Mandated Mediation [the Order] in both the 08 and 09 cases on August 17, 2009. The Order was filed with the Clerk of Court on August 24, 2009. The Plaintiff received written notice of the Order on August 25, 2009.

The plaintiff contends that the Order contains some errors at law, and, therefore, the Order needs to be reconsidered, clarified, and/or altered for both the 08 and 09 cases. According to Rule 59(e), SCRCP, "a motion to alter or amend the judgment [in this case the Order] shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(g), SCRCP, requires that "a party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion." Therefore, Plaintiff's Motion to Reconsider and/or to Alter or

Amend Judgment must be served on the Defendants by September 4, 2009, and it must be provided to Judge Culbertson within ten (10) days after it is filed.

ANALYSIS AND RELIEF SOUGHT

Before a plaintiff can file civil action against a defendant for a medical malpractice claim, § 15-79-125 outlines several prerequisites that must be met by a plaintiff. First, the plaintiff must file a Notice of Intent to File Suit [Notice of Intent] against a proposed defendant. Second, the plaintiff must file an affidavit of an expert witness with the Notice of Intent supporting his claim. Third, the plaintiff and proposed defendant(s) must participate in a mandatory pre-litigation mediation. Finally, the plaintiff may file a civil action for medical malpractice if the pre-litigation mediation fails.

The pertinent portions of § 15-79-125 setting forth the procedures noted above are as follows:

(A) Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, the plaintiff shall contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness...in a county in which venue would be proper for filing or initiating the civil action....Filing the Notice of Intent to File Suit tolls all applicable statutes of limitations. The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules for Civil Procedure.

(C) Within ninety days and no later 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 a finding of good cause.

(D) The circuit court has jurisdiction to enforce the provisions of this section.

(E) If the matter cannot be resolved through mediation, the plaintiff may initiate the civil action by filing a summons and complaint pursuant to the South Carolina Rules of Civil Procedure.

Alternative Dispute Resolution, Rule 4(c) sets forth the procedures for the required appointment of a mediator by the circuit court in a medical malpractice action. ADR, Rule 4(c) notes:

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 be filed in accordance with procedures for filing a lis pendens and requires the same filing fee as provided by S.C. Code § 8-21-310(11)(b). 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. At the time the Notice of Intent to File Suit is filed, the Clerk of Court *shall* appoint a primary mediator and a secondary mediator in the manner set forth in the paragraph above. The plaintiff shall serve the defendants with the Notice of Intent to File Suit containing the mediator appointment. (emphasis added).

A. The Defendants only moved to dismiss the Notice of Intent to File Suit in both the 08 and 09 cases.

The Order is improper in noting in the first paragraph on the first page that the Defendants have moved "to dismiss the plaintiff's lawsuit." The first paragraph on the first page of each of the Defendants' Motions to Dismiss request only that the court dismiss the Notice of Intent to File Suit [Notice of Intent] in both the 08 and 09 cases. The Defendants have not moved to dismiss any "action" or "civil action" in the 08 or 09 cases. If the Order is not reconsidered in its entirety, the Order should be amended to indicate that the Defendants have moved to dismiss the plaintiff's Notice of Intent in both the 08 and 09 cases.

B. There is no "action" or "civil action" pending before the trial court in the 08 or 09 cases.

The Order is improper on page three in ruling that the "motion of the defendants to dismiss *this action* is granted." The plaintiff has only filed a Notice of Intent to File Suit

[Notice of Intent] in both the 08 and 09 cases as required by § 15-79-125. The only thing pending before the court is the plaintiff's Notice of Intent in both the 08 and 09 cases. The plaintiff has not filed any "action" or "civil action" in either the 08 or 09 case. As outlined in § 15-79-125(A), the plaintiff cannot institute an "action" or "civil action" in a medical malpractice claim until a Notice of Intent is filed. According to § 15-79-125(E), the medical malpractice "action" or "civil action" cannot be filed until the pre-litigation mediation is unsuccessful, and the "action" or "civil action" is not commenced until the summons and complaint are filed accordance with the South Carolina Rules of Civil Procedure. If the Order is not reconsidered in its entirety, the Order should be amended to indicate that the Defendants' Motion to Dismiss the Notice of Intent to File Suit is granted.

C. The Order is unclear as to whether it is dismissing just the 08 case or whether it is dismissing both the 08 and 09 cases.

The Order was sent to the parties by the Clerk of Court attached to a Form 4 Order. The Form 4 Order lists both the 08 and 09 civil action numbers. The Order itself lists both the 08 and 09 civil action numbers. However, the Order uses only singular terms in its body. In the first paragraph on the first page, the Order refers to "the plaintiff's lawsuit" and not lawsuits. On the third page the Order only dismisses "this action" and not actions. Additionally, the law and discussion section on pages two and three of the Order² only analyzes the alleged failure of the parties to conduct the pre-litigation mediation in the 08 case within the 120 day statutory period provided by 15-79-125(C). Because of these discrepancies in the Order, the plaintiff seeks clarification as to

whether the Order is dismissing just the 08 case or whether it is dismissing both the 08 and 09 cases. If the Order is not reconsidered in its entirety, the Order should be amended to indicate the clear intentions of the Court for the dismissal of the 08 and 09 cases.

D. While the Court has jurisdiction to enforce § 15-79-125, the statute and case law does not give the Court the authority to dismiss a Notice of Intent to File Suit if the parties do not conduct a pre-litigation mediation within 120 days from the service of the Notice of Intent to File Suit.

Pursuant to § 15-79-125(D), the circuit court does have jurisdiction to enforce the provisions of § 15-79-125. However, the statute does not give the Court the express authority to dismiss a Notice of Intent to File Suit [Notice of Intent] if the parties do not conduct a pre-litigation mediation within 120 days from the service of the Notice of Intent to File Suit as required by § 15-79-125(C). Additionally, the plaintiff could not find any South Carolina case law that extends this authority to the Court. Since the Court does not have express statutory authority or common law authority to dismiss the Notice of Intent for failure to conduct pre-litigation mediation within 120 days, the Order must be reconsidered and revoked in both the 08 and 09 cases.

E. The Court should have granted the Plaintiff's Motion to Compel Mandatory Mediation after the Defendants refused to participate in mandatory pre-litigation mediation in the 08 case.

The less drastic and more judicially efficient remedy for the motions pending before the Court in the 08 case would have been for the Court to compel the parties participate in the mandatory pre-litigation mediation based upon the parties' conduct and

² The Order does refer to the 09 case in a footnote on page two.

representations from the date the Notice of Intent was filed in the 08 case until the Plaintiff's Motion to Compel Mediation was filed. The parties worked together for nearly four (4) months from mid January 2009 through mid May 2009 to try and get the pre-litigation mediation scheduled at a mutually convenient time. Defendants' attorneys repeatedly insisted that the pre-litigation mediation was merely a formality and that the Plaintiff's claim would not settle prior to filing an action. The pre-litigation mediations that were scheduled were all canceled for valid reasons.

The parties all consented to a pre-litigation mediation on May 20, 2009 even though that date was beyond the one hundred twenty (120) day timeframe in § 15-79-125(C). The pre-litigation mediation on May 20, 2009 agreed to by all parties would have been within the sixty (60) day good cause shown extended timeframe in § 15-79-125(C). The parties were conducting medical discovery after the one hundred twenty (120) day timeframe for mandatory pre-litigation mediation expired. It was not until six (6) days before the pre-litigation mediation set for May 20, 2009 that the Defendants decided to refuse to participate in the pre-litigation mediation based on the technicality that it was set greater than one hundred twenty (120) days from the service of the Notice of Intent to File Suit in the 08 case, and the Plaintiff did not have a court order allowing the pre-litigation mediation within the sixty (60) day good cause extended timeframe.

Plaintiff's attorney relied upon the actions and representations of the Defendants' attorneys that they would not object to, and in fact consented to, a pre-litigation mediation that was set beyond the one hundred twenty (120) day deadline, but within the sixty (60) day good cause extended deadline. Based upon the conduct of the Defendant's

attorneys, they should be estopped from now attempting to invoke the technical deadlines and limitations for conducting the pre-litigation mediation that are found in § 15-79-125(C). Accordingly, the Court should reconsider and revoke the Order and enter a new one granting the Plaintiff's Motion to Compel Mediation in the 08 case.

F. The Court has no legal basis to dismiss the 09 case.

The Court has no legal basis to dismiss the 09 case if the Court in fact intended to dismiss the 09 case with the Order. In the law and discussion section on pages two and three, the Order only analyzes the issue of conducting a pre-litigation mediation for a medical malpractice claim within the statutory timeframe. The 120 day time limit to conduct a pre-litigation mediation pursuant to § 15-79-125(C) does not start until the service of the Notice of Intent to File Suit [Notice of Intent]. The Defendants claim they have never been served with the Notice of Intent in the 09 case. Therefore, the 120 time limit to conduct a pre-litigation mediation has not begun to run in the 09 case. If the Court intended to dismiss the 09 case in the Order, the Court must reconsider and revoke the Order as it relates to the 09 case.

G. The Court was silent in the Order regarding the actual merits of the Plaintiff's medical malpractice claim and the Statute of Limitations defense mentioned in Defendant Jones' Motions to Dismiss the 08 and 09 cases.

On page two of both of Defendant Jones' Motions to Dismiss the 08 and 09 cases, Jones asserts that the Statute of Limitations has expired for the plaintiff's medical malpractice claim. However, the only motion brought by Defendant Jones in the 08 and 09 cases was to dismiss the Notice of Intent to File Suit in each case based upon the plaintiff's alleged failure to comply with the provisions of § 15-79-125(C) regarding

mandatory pre-litigation mediation. As a result, the Court did not have the merits of the plaintiff's medical malpractice claim or Defendant's Jones Statute of Limitations defense before it at the hearing on these motions. The parties did not argue either of those issues at the hearing.

The Order is likely silent regarding both of those issues because they were not before the Court and were not argued at the hearing. The Plaintiff seeks to make certain that the Court has made no rulings or determinations on the merits of his medical malpractice claim and/or Defendant Jones' Statute of Limitations defense in the Order in light of the fact that Defendant Jones included them in his motions. If the Order is not reconsidered in its entirety, the Order should be amended to indicate that the Court has made no rulings or determinations on the merits of the Plaintiff's medical malpractice claim and/or Defendant Jones' Statute of Limitations defense in both the 08 and 09 cases.

H. The Court was silent in the Order regarding the contention in Defendant Jones' Motions to Dismiss the 08 and 09 cases that the Plaintiff cannot file additional Notices of Intent to File Suit if the first Notice fails to comply with the statute.

On page two of both of Defendant Jones' Motions to Dismiss the 08 and 09 cases, Jones asserts that § 15-79-125 does not allow the Plaintiff to file additional Notices of Intent to File Suit if the first Notice fails to comply with the statute. However, the only motion brought by Defendant Jones in the 08 and 09 cases was to dismiss the Notice of Intent to File Suit [Notice of Intent] in each case based upon the plaintiff's alleged failure to comply with the provisions of § 15-79-125(C) regarding mandatory pre-litigation mediation. As a result, the Court did not have Defendant Jones' claim about an alleged prohibition of filing additional Notices of Intent if the first Notice fails to comply with the

statute before it at the hearing on these motions. The parties did not argue this issue at the hearing.

As an initial matter, § 15-79-125 does not provide any prohibition preventing a plaintiff from filing a second Notice of Intent if his first Notice fails to comply with the statute in some manner. The Plaintiff could not find any South Carolina case law that sets any such rule. Defendant Jones did not provide any legal basis in support of his assertion on this issue in his motions. Accordingly, there is no basis in South Carolina law to support Defendant Jones' claim on this issue. Defendant Jones' claim does not make sense from a practical standpoint as well because the statute only concerns the prerequisite of filing a Notice of Intent and conducting a pre-litigation mediation before actually filing a medical malpractice action.

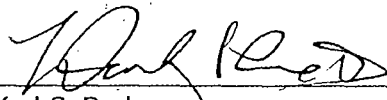
The Order is likely silent regarding whether the statute allows for filing additional Notices of Intent if the first Notice fails to comply with the statute because the issue was not before the Court and was not argued at the hearing. The Plaintiff seeks to make certain that the Court has made no rulings or determinations on whether the statute allows for filing additional Notices of Intent if the first Notice fails to comply with the statute in the Order in light of the fact that Defendant Jones included it in his motions. If the Order is not reconsidered in its entirety, the Order should be amended to indicate that the Court has made no rulings or determinations on whether the statute allows for filing additional Notices of Intent if the first Notice fails to comply with the statute in both the 08 and 09 cases.

CONCLUSION

For the reasons stated herein, the Plaintiff respectfully seeks an Order Reconsidering the Order Granting Motion to Dismiss and Denying Motion to Compel Court Mandated Mediation in both the 08 and 09 cases pursuant to Rule 59(e), SCRPC, or for an Order Altering or Amending the Court's Order Granting Motion to Dismiss and Denying Motion to Compel Court Mandated Mediation in both the 08 and 09 cases pursuant to Rule 59(e), SCRPC.

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Attorneys for Plaintiff

September 1, 2009

STATE OF SOUTH CAROLINA)

COUNTY OF GEORGETOWN)

John Thomas Ross)

Plaintiff,)

vs.)

Dr. Webster N. Jones, III, and)

Dr. David R. Anderson,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C/A No: 09-CP-22-00810

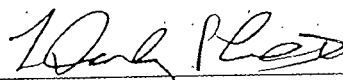
CERTIFICATE OF MAILING

I, the undersigned employee of Brown & Brehmer, hereby certify that copies of the following documents have been served on the following individuals by depositing same in the United States Postal Service with the proper amount of first-class postage duly affixed:

Pleadings: Plaintiff's Motion for Reconsideration and/or to Alter or Amend Judgment

Served On: John B. McCutcheon, Jr., Esq.
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L. Darby Plexico, III

Columbia, South Carolina
September 1, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	
	)	C/A No: 09-CP-22-00810
John Thomas Ross	)	08-CP-22-01496
Plaintiff,	)	
	)	AFFIDAVIT OF KARL S. BREHMER
vs.	)	
	)	
Dr. Webster N. Jones, III and	)	
Dr. David R. Anderson,	)	
	)	
Defendants.	)	

The Deponent, being duly sworn, deposes and states that he is the attorney for the Plaintiff in the above-captioned matter. The Deponent makes this Affidavit in support of Plaintiff's Motion to Reconsider and/or Alter or Amend the Judgment in this matter.

The Deponent filed the Notice of Intent to File Suit in 2008-CP-22-0149 (the 08 case) and attempted to mediate the 08 case for the first time on March 12, 2009. However, because of a scheduling conflict, the Deponent had to cancel the mediation because a deposition was being taken of a witness in Charlotte, North Carolina in a case that was rapidly approaching its trial date. The mediation was rescheduled but had to be canceled again since the Deponent was in a trial in the Richland County Court of Common Pleas. During this timeframe, the Deponent's office was working with the Defendants' counsel to attempt to schedule another mediation.

Another mediation was scheduled and was confirmed in writing on or about March 13, 2009 for May 20, 2009. Please note that May 20, 2009 is within the sixty (60) days allowed by the statute and the Deponent believed that other court

appearances would qualify as good cause shown. The Defendants consented to the mediation and agreed to do the mediation on or about May 20, 2009 and actually confirmed the same to the Deponent in writing. It was not until May 14, 2009 that the Defendant Webster N. Jones, III objected after he had consented to the same. The Motion to Compel Mediation was filed on May 19, 2009, which was within the sixty (60) day window for Good Cause Shown.

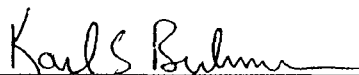
Additionally, during the timeframe, the parties had been requesting discovery of the Plaintiff's medical records. By way of a letter dated February 26, 2009, the Defendant Anderson requested voluntary Medical Authorizations and actually sent the Medical Authorizations to the Veteran's Medical Center by way of letter dated April 16, 2009 (The significance is Defendant Anderson was requesting medicals after the one hundred twenty (120) day timeframe). During this timeframe, Plaintiff's counsel was under the impression by the representations of the Defendants' counsel (obtaining medical records) and the actions of the Defendants' counsel (in voluntarily rescheduling the mediation) that there was no need to file a Motion for Good Cause Shown to extend the mediation deadline due to the fact that the parties were consenting to mediation and did actually consent to mediation within the sixty (60) day timeframe.

As additional information, the Defendants had represented since the service of the Notice of Intent that the mediation was a formality and that settlement was unlikely. Attorney Lisa Thomas called in response to a January 19, 2009 letter from the Deponent to advise that her firm did their mediations informally with Judge Breeden over the phone and she would get the same scheduled in a cost effective manner with

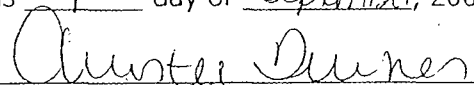
all parties having no expectation that the case would settle. It was the Deponent's impression prior to May 14, 2009, that all parties were working together to get the mediation completed so that the action would get filed, served and developed.

It had been represented to the Deponent by attorney Thomas that she would get mediation done and Attorney Sanders' agreement to reschedule beyond the one hundred twenty (120) days lead the Deponent to believe that no party would invoke the Good Cause provision of mediation being done beyond the one hundred twenty (120) days without an Order of the Court. Plaintiff's counsel relied upon the actions and representations of the defense counsel and request that they be estopped from now attempting to invoke the Court approval provision of the statute when they represented that the Mediation was nothing more than a formality and had been working with the Plaintiff's counsel to get the mediation done beyond the one hundred twenty (120) day limitation and seeking discovery beyond the one hundred twenty (120) day limitation.

Further Affiant saith not.


Karl S. Brehmer

Sworn to and subscribed before me
this 1 day of September, 2009


Notary Public for South Carolina
My Commission Expires 4/10/13

December 15, 2008

Lisa Thomas, Esq.
Post Office Box 1003
Conway, South Carolina 29528

RE: John Thomas Ross v. Dr. Webster N. Jones, III and Dr. David R. Anderson
Civil Action Number: 08-CP-22-01496

Dear Lisa:

Please go ahead and subpoena whatever medical records you deem necessary. The only thing that I would ask is that you send me copies of the medical records you receive pursuant to the subpoena.

With warmest personal regards, I am

Sincerely yours,

Karl S. Brehmer

KSB/ct

cc: John Ross (via email)

January 19, 2009

Lisa Thomas, Esq.
Post Office Box 1003
Conway, South Carolina 29528

Darren K. Sanders, Esq.
Post Office Box 2424
Mt. Pleasant, South Carolina 29465

RE: John Thomas Ross v. Dr. Webster N. Jones, III and Dr. David R. Anderson
Civil Action Number: 08-CP-22-01496

Dear Lisa and Darren:

We need to go ahead and mediate the above-captioned matter as soon as possible. Please let me know dates you can mediate the same. Also, please let me know who you like to mediate this case.

With warmest personal regards, I am

Sincerely yours,

Karl S. Brehmer

KSB/ct

cc: John Ross (via email)
Gary Popwell

McCUTCHEON, McCUTCHEON & BAXTER

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

208 ELM STREET
POST OFFICE BOX 1003
CONWAY, SOUTH CAROLINA 29528-1003

JOHN B. McCUTCHEON, SR. (1915-1997)

JOHN B. McCUTCHEON, JR.
MARY RUTH M. BAXTER
LISA A. THOMAS

TELEPHONE
(843) 248-7225

FACSIMILE
(843) 248-3568

February 12, 2009

Karl S. Brehmer
Brown & Brehmer
P. O. Box 7966
Columbia, SC 29202

RE: John Thomas Ross v. David R. Anderson, MD, Webster Jones, MD and Waccamaw
Hospital

Dear Karl:

This will confirm that a Pre-Suit Mediation has been scheduled for Thursday, March 12, 2009 at 10:00 AM. This mediation will be handled via teleconference and the AT&T operator will call each participant and then connect all parties once they are all on the line.

With kindest regards, I remain

Very truly yours,

McCUTCHEON, McCUTCHEON & BAXTER, PA



John B. McCutcheon, Jr.

JBMjr/jar

cc: The Honorable John L. Breeden, Jr.
Darren K. Sanders, Esquire
Zane Eller - JUA

February 19, 2009

Lisa Thomas, Esq.
Post Office Box 1003
Conway, South Carolina 29528

Darren K. Sanders, Esq.
Post Office Box 2424
Mt. Pleasant, South Carolina 29465

RE: John Thomas Ross v. Dr. Webster N. Jones, III and Dr. David R. Anderson
Civil Action Number: 08-CP-22-01496

Dear Lisa and Darren:

Unfortunately, I cannot participate in mediation on Thursday, March 12, 2009, as I will be at depositions in Charlotte, North Carolina. Please have your assistant contact my assistant, Christle Turner to have this mediation rescheduled.

With warmest personal regards, I am

Sincerely yours,

Karl S. Brehmer

KSB/ct

cc: John Ross (via email)
Gary Popwell

McCUTCHEON, McCUTCHEON & BAXTER

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW
208 ELM STREET
POST OFFICE BOX 1003
CONWAY, SOUTH CAROLINA 29528-1003

JOHN B. McCUTCHEON, SR. (1915-1997)

JOHN B. McCUTCHEON, JR.
MARY RUTH M. BAXTER
LISA A. THOMAS

TELEPHONE
(843) 248-7225
FACSIMILE
(843) 248-3568

February 24, 2009

Karl S. Brehmer
Brown & Brehmer
P. O. Box 7966
Columbia, SC 29202

RE: John Thomas Ross v. David R. Anderson, MD, Webster Jones, MD and Waccamaw
Hospital

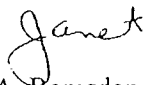
Dear Mr. Brehmer:

This will confirm that a Pre-Suit Mediation has been *re-scheduled* scheduled for
Wednesday, March 18, 2009 at 10:00 AM. This mediation will be handled via teleconference
and the AT&T operator will call each participant and then connect all parties once they are all on
the line.

With kindest regards, I remain

Very truly yours,

McCUTCHEON, McCUTCHEON & BAXTER, PA


Janet A. Ramsden
Asst. To John B. McCutcheon, Jr.

JBMjr/jar

cc: The Honorable John L. Breeden, Jr.
Darren K. Sanders, Esquire
Zane Eller - JUA

March 10, 2009

Lisa Thomas, Esq.
Post Office Box 1003
Conway, South Carolina 29528

RE: John Thomas Ross v. Dr. Webster N. Jones, III and Dr. David R. Anderson
Civil Action Number: 08-CP-22-01496

Dear Lisa:

Enclosed is the authorization you asked Mr. Ross to sign so you could get his VA records. If you have any questions, please do not hesitate to contact me.

With warmest personal regards, I am

Sincerely yours,

Karl S. Brehmer

KSB/ct
Enclosure

McCutcheon, McCutcheon & Baxter

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW
208 ELM STREET
POST OFFICE BOX 1003
CONWAY, SOUTH CAROLINA 29528-1003

JOHN B. McCUTCHEON, SR. (1915-1997)

JOHN B. McCUTCHEON, JR.
MARY RUTH M. BAXTER
LISA A. THOMAS

TELEPHONE
(843) 248-7225
FACSIMILE
(843) 248-3568

Janet
April 16, 2009

VA Medical Center
ATTN: MEDICAL RECORDS CUSTODIAN
102 Bee Street
Charleston, SC 29401

**RE: JOHN THOMAS ROSS V. DAVID R. ANDERSON, M.D., WEBSTER
JONES, III, M.D. AND WACCAMAW HOSPITAL
C/A NO.: 2008-CP-22-01496**

Dear Sir/Madame:

Pursuant to correspondence dated February 20, 2009, a copy of which is enclosed from the Department of Veteran Affairs in Columbia regarding your receipt of our subpoena dated January 14, 2009, requesting copies of medical records pertaining to John Thomas Ross [DOB: 01/29/1971; SSN: 412-27-9195] please find enclosed the required VA Form 10-5345, Request for and Authorization to Release Medical Records or Health Information which has been executed by Mr. Ross in connection with the above referenced matter. I am also enclosing a copy of the subpoena dated January 14, 2009, together with a current subpoena requesting Mr. Ross's medical records. You will note that the enclosed subpoenas are for your records only and not for you personally. You may mail these records to us in lieu of appearing on Tuesday, April 28, 2009. We will, of course, reimburse your reasonable expenses incurred in providing us with these records. Should you have any questions concerning this matter, please call me.

With kindest regards, I remain

Very truly yours,

McCutcheon, McCutcheon & Baxter, P.A.

Lisa A. Thomas
Lisa A. Thomas

LAT/mla
Enclosure

VA Medical Center
ATTN: MEDICAL RECORDS CUSTODIAN
April 16, 2009
Page Two

cc: Karl S. Brehmer, Esquire
Darren K. Sanders, Esquire
Zane Eller, [CB085466M]

Department of Veterans Affairs

REQUEST FOR AND AUTHORIZATION TO RELEASE MEDICAL RECORDS OR HEALTH INFORMATION

Privacy Act and Paperwork Reduction Act Information: The execution of this form does not authorize the release of information other than that specifically described below. The information requested on this form is collected under Title 38, U.S.C. The form authorizes release of information in accordance with the Health Insurance Portability and Accountability Act, 45 CFR Parts 160 and 164, 50 U.S.C. 552a, and 38 U.S.C. 5701 and 5732 that you specify. Your disclosure of the information requested on this form is voluntary. However, if the information including Social Security Number (SSN) (the SSN will be used to locate records for release) is not furnished completely and accurately, Department of Veterans Affairs will be unable to comply with the request. The Veterans Health Administration may not condition treatment, payment, enrollment or eligibility on signing the authorization. VA may disclose the information that appears on the form as permitted by law. VA information is not to be disclosed to the public. You do not have to provide the information to VA, but if you don't, VA will be unable to process your request and serve your medical needs. Failure to furnish the information will not have any effect on any other benefits to which you may be entitled. If you provide VA your Social Security Number, VA will use it to administer your VA benefits. VA may also use this information to identify veterans and persons claiming or receiving VA benefits and their records, and for other purposes authorized or required by law. The Paperwork Reduction Act of 1995 requires us to notify you that this information collection is in accordance with the clearance requirements of section 3507 of the Paperwork Reduction Act of 1995. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a valid OMB number. We anticipate that the time expended by all individuals who must complete this form will average 2 minutes. This includes the time it will take to read instructions, gather the necessary facts and fill out the form.

ENTER BELOW THE PATIENT'S NAME AND SOCIAL SECURITY NUMBER IF THE PATIENT DATA CARD IMPRINT IS NOT USED.

TO: DEPARTMENT OF VETERANS AFFAIRS (Print or type name and address of health care facility)	PATIENT NAME (Last, First, Middle Initial) <u>Ross, John T.</u>
	SOCIAL SECURITY NUMBER <u></u>

NAME AND ADDRESS OF ORGANIZATION, INDIVIDUAL OR TITLE OF INDIVIDUAL TO WHOM INFORMATION IS TO BE RELEASED

VETERAN'S REQUEST: I request and authorize Department of Veterans Affairs to release the information specified below to the organization, or individual named on this request. I understand that the information to be released includes information regarding the following condition(s):

☐ DRUG ABUSE ☐ ALCOHOLISM OR ALCOHOL ABUSE ☐ TESTING FOR OR INFECTION WITH HUMAN IMMUNODEFICIENCY VIRUS (HIV) ☐ SICKLE CELL ANEMIA

INFORMATION REQUESTED (Check applicable box(es) and state the extent or nature of the information to be disclosed, giving the dates or approximate dates covered by each):

☐ COPY OF HOSPITAL SUMMARY ☐ COPY OF OUTPATIENT TREATMENT NOTE(S) ☐ OTHER (Specify)

PURPOSE(S) OR NEED FOR WHICH THE INFORMATION IS TO BE USED BY INDIVIDUAL TO WHOM INFORMATION IS TO BE RELEASED

NOTE: ADDITIONAL ITEMS OF INFORMATION DESIRED MAY BE LISTED ON THE BACK OF THIS FORM

AUTHORIZATION: I certify that this request has been made freely, voluntarily and without coercion and that the information given above is accurate and complete to the best of my knowledge. I understand that I will receive a copy of this form after I sign it. I may revoke this authorization, in writing, at any time except to the extent that action has already been taken to comply with it. Written revocation is effective upon receipt by the Release of Information Unit at the facility housing the records. Redisclosure of my medical records by those receiving the above authorized information may be accomplished without my further written authorization and may no longer be protected. Without my express revocation, the authorization will automatically expire: (1) upon satisfaction of the need for disclosure; (2) on (date supplied by patient); (3) under the following condition(s):

I understand that the VA health care practitioner's opinions and statements are not official VA decisions regarding whether I will receive other VA benefits or, if I receive VA benefits, their amount. They may, however, be considered with other evidence when these decisions are made at a VA Regional Office that specializes in benefit decisions.

DATE <u>3/5/09</u>	SIGNATURE OF PATIENT OR PERSON AUTHORIZED TO SIGN FOR PATIENT (Attach authority to sign, e.g., POA) <u>John T. Ross</u>
-----------------------	--

FOR VA USE ONLY

IMPRINT PATIENT DATA CARD (or enter Name, Address, Social Security Number)	TYPE AND EXTENT OF MATERIAL RELEASED
	DATE RELEASED RELEASED BY

McCutcheon, McCutcheon, & Baxter

PROFESSIONAL ASSOCIATION

ATTORNEYS AND COUNSELORS AT LAW

208 ELM STREET

POST OFFICE BOX 1003

CONWAY, SOUTH CAROLINA 29528-1003

JOHN B. MCCUTCHEON, SR. (1915-1997)

TELEPHONE

(843) 248-7225

FACSIMILE

(843) 248-3568

JOHN B. MCCUTCHEON, JR.

MARY RUTH M. BAXTER

LISA A. THOMAS

May 13, 2009

Karl S. Brehmer
Brown & Brehmer
P. O. Box 7966
Columbia, SC 29202

RE: John Thomas Ross v. David R. Anderson, MD, Webster Jones, MD and Waccamaw
Hospital

Dear Mr. Brehmer:

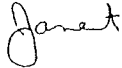
This will confirm that we have scheduled a pre-suit mediation teleconference for
Wednesday, May 20, 2009 beginning at 3:00PM. AT&T will be facilitating this conference call
and will be calling each party to get everyone on line. Set forth below are the phone numbers
that AT&T will be calling - if you will not be at this number, please let me know so that I can get
the correct call out number to AT&T.

John McCutcheon	-	843/248-7225
Darren Sanders	-	843/377-1400
Karl Brehmer	-	803-360-2987
Zane Eller	-	864/240-5405
Judge Breeden	-	843/488-5888

With kindest regards, I remain

Very truly yours,

McCutcheon, McCutcheon & Baxter, PA



Janet A. Ramsden

Assistant to John B. McCutcheon, Jr.

JBMjrjar

cc: Darren Sanders

Zane Eller

Judge Breeden

BUYCK & SANDERS, LLC

ATTORNEYS & COUNSELORS AT LAW

757 JOHNNIE DODDS BLVD., SUITE 100
P.O. BOX 2424
MT. PLEASANT, SC 29465-2424

TELEPHONE: (843) 377-1400
FAX (843) 377-1403
E-MAIL: DKS@BUYCKFIRM.COM

Hugh W. Buyck
Darren K. Sanders
G. Wade Cooper

May 14, 2009

Karl S. Brehmer, Esquire
Brown & Brehmer
1720 Main St., Suite 201
P.O. Box 7966
Columbia, SC 29202

John B. McCutcheon, Jr., Esquire
McCutcheon McCutcheon & Baxter, PA
208 Elm St.
P.O. Box 1003
Conway, SC 29526

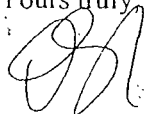
Re: John Thomas Ross v. Waccamaw Community Hospital, Dr. Webster N. Jones, III and Dr. David
R. Anderson
C/A No. 08-CP-22-01496 (Georgetown Co.)
BSLF File No. 21.34

Dear Gentlemen:

I note the pre-suit mediation has been set in the above-referenced matter for May 20, 2009. Please note it is my position the Court no longer has jurisdiction over the Notice of Intent to File Suit. The Notice of Intent statute requires the pre-suit mediation be conducted no sooner than 90 and no later than 120 days from the service of the Notice of Intent. The only exception to this timeframe set out within the statute is if the Court for good cause provides for an extension. Dr. Jones was served in November 2008. The pre-suit mediation was twice scheduled within the required timeframe and twice cancelled by Plaintiff's counsel. Accordingly, I do not believe a pre-suit mediation outside of the statutory timeframe is proper. I hereby put you on notice of my intention to contest subject matter jurisdiction of any pleadings subsequently filed. By copy of this letter to Judge Breeden, I am informing him as the selected mediator of my position on behalf of Dr. Jones. If you have any questions, please do not hesitate to contact me.

With kind regards,

Yours truly,



Darren K. Sanders

DKS:adm

cc: Judge Breeden

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
John Thomas Ross,	)	C/A No. 08-CP-22-01496
	)	09-CP-22-810
Plaintiff,	)	DEFENDANT WEBSTER N. JONES, III,
	)	M.D.'S NOTICE OF MOTION AND
Versus	)	MOTION TO AMEND THE ORDER OF
	)	THE HONORABLE BENJAMIN H.
Dr. Webster N. Jones, III and Dr. David R. Anderson,	)	CULBERTSON FILED AUGUST 24, 2009
	)	
Defendants.	)	

TO: KARL S. BREHMER, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant Webster N. Jones, III, M.D. (hereinafter "this Defendant") will move the Court in ten days or as soon thereafter as counsel may be heard for an order amending the Order of Judge Culbertson filed August 24, 2009. This Motion is made pursuant to Rule 59(e), SCRCP and Rule 60, SCRCP.

Judge Culbertson's order indicates the following on page 2:

"3. Mediation mandated by S.C. Code Ann. §15-79-125 was initially scheduled within 120 days of service of the Notice of Intent to File Suit. However, the initial mediation was cancelled by consent of the parties."

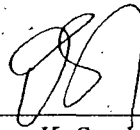
During the hearing, counsel for the Defendant Dr. Jones explained mediation was set up twice during the 90 to 120 day timeframe set forth within the statute. On each of those occasions, the attorneys for the Defendants received notification from Plaintiff's counsel of his intentions to not go forward as scheduled with the pre-suit mediation at the time and date previously agreed upon. Plaintiff's counsel explained during the hearing on one of the dates he attended a deposition and on the other date he was on the Richland County trial roster. Accordingly, the two mediations set up during the requisite timeframe were both cancelled by Plaintiff's counsel, not by consent of the parties.

Accordingly, this Defendant respectfully requests the Order of Judge Culbertson be amended to indicate Plaintiff's counsel cancelled both pre-suit mediations set up during the

timeframe required by S.C. Code Ann. §15-79-125. Pursuant to the South Carolina Rules of Civil Procedure, a copy of this motion is being sent to Judge Culbertson.

This Defendant reserves the right to supplement this Motion with a Memorandum of Law at or prior to the time of the hearing.

BUYCK & SANDERS LAW FIRM, LLC
757 Johnnie Dodds Blvd., Ste. 100
P.O. Box 2424
Mt. Pleasant, SC 29465-2424
Telephone: (843) 377-1400
Facsimile: (843) 377-1403
Email: dks@buyckfirm.com



Darren K. Sanders (S.C. Bar # 68296)

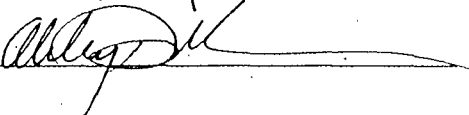
Attorneys for the Defendant
Dr. Webster N. Jones, III

9/2, 2009
Mt. Pleasant, South Carolina
T:\21.34\MTD (Mtn to Amend).doc

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ emailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 2 day of September, 2009.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
John Thomas Ross,	)	C/A No: 08-CP-22-01496
	)	09-CP-22-810
	)	DEFENDANT DAVID R. ANDERSON,
Plaintiff,	)	MD'S NOTICE OF MOTION AND
	)	MOTION TO AMEND THE ORDER OF
Versus	)	THE HONORABLE BENJAMIN H.
	)	CULBERTSON FILED AUGUST 24, 2009
Dr. Webster N. Jones, III and Dr. David R. Anderson,	)	
	)	
Defendants.	)	

TO: KARL S. BREHMER, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, David R. Anderson, M.D. (hereinafter "this Defendant") will move the Court in ten days or as soon thereafter as counsel may be heard for an order amending the Order of Judge Culbertson filed August 24, 2009. This Motion is made pursuant to Rule 59(e), SCRCP and Rule 60, SCRCP.

Judge Culbertson's order indicates the following on page 2:

"3. Mediation mandated by S.C. Code Ann. §15-79-125 was initially scheduled within 120 days of service of the Notice of Intent to File Suit. However, the initial mediation was cancelled by consent of the parties."

During the hearing, counsel for the Defendant Dr. Anderson explained mediation was set up twice during the 90 to 120 day timeframe set forth within the statute. On each of those occasions, the attorneys for the Defendants received notification from Plaintiff's counsel of his intentions to not go forward as scheduled with the pre-suit mediation at the time and date previously agreed upon. Plaintiff's counsel explained during the hearing on one of the dates he attended a deposition and on the other date he was on the Richland County trial roster. Accordingly, the two mediations set up during the requisite timeframe were both cancelled by Plaintiff's counsel, not by consent of the parties.

77

Accordingly, this Defendant respectfully requests the Order of Judge Culbertson be amended to indicate Plaintiff's counsel cancelled both pre-suit mediations set up during the

timeframe required by S.C. Code Ann. §15-79-125. Pursuant to the South Carolina Rules of Civil Procedure, a copy of this motion is being sent to Judge Culbertson.

This Defendant reserves the right to supplement this Motion with a Memorandum of Law at or prior to the time of the hearing.

McCUTCHEON, McCUTCHEON &

BAXTER, PA

208 Elm Street
P.O. Box 1003
Conway, SC 29526
Telephone: (843) 248-7225
Facsimile: (843) 248-3568
Email: lisathom@sccoast.net



Lisa A. Thomas (S.C. Bar # 66458)

Attorney for the Defendant
Dr. David R. Anderson

September 3, 2009
Conway, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ emailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 3 day of Sept, 2009.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
John Thomas Ross,	)	C/A No. 2009-CP-22-810
	)	
Plaintiff,	)	DEFENDANT DAVID R. ANDERSON,
	)	MD'S NOTICE OF MOTION AND MOTION
Versus	)	TO AMEND THE ORDER OF THE
	)	HONORABLE BENJAMIN H.
Dr. Webster N. Jones, III and Dr. David R.	)	CULBERTSON FILED AUGUST 24, 2009
Anderson,	)	
	)	
Defendants.	)	

TO: KARL S. BREHMER, ATTORNEY FOR THE PLAINTIFF:

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roster. Accordingly, the two mediations set up during the requisite timeframe were both cancelled by Plaintiff's counsel, not by consent of the parties.

Accordingly, this Defendant respectfully requests the Order of Judge Culbertson be amended to indicate Plaintiff's counsel cancelled both pre-suit mediations set up during the timeframe required by S.C. Code Ann. §15-79-125. Pursuant to the South Carolina Rules of Civil Procedure, a copy of this motion is being sent to Judge Culbertson.

This Defendant reserves the right to supplement this Motion with a Memorandum of Law at or prior to the time of the hearing.

McCUTCHEON, McCUTCHEON &

BAXTER, PA

208 Elm Street

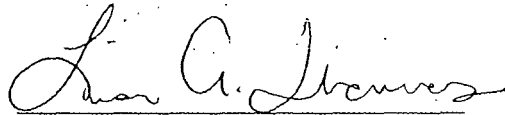
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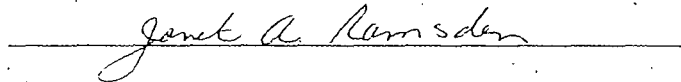
Dr. David R. Anderson

September 10, 2009
Conway, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ emailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 10 day of Sept., 2009.



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN) 2008-CP-22-1496

John Thomas Ross,)

Plaintiff,)

vs.)

Waccamaw Community)

Hospital, Dr. Webster)

N. Jones, III, and Dr.)

David R. Anderson,)

Defendants.)

Transcript of Record

July 16, 2009

B E F O R E :

Honorable Benjamin H. Culbertson
Georgetown County Courthouse
Georgetown, South Carolina

A P P E A R A N C E S :

Karl S. Brehmer, Esquire
Attorney for Plaintiff

Darren K. Sanders, Esquire
Attorney for Dr. Jones

Lisa A. Thomas, Esquire
Attorney for Dr. Anderson

Grace L. Hurley, CVR-CM
Circuit Court Reporter

1 (On the record, July 16, 2009.)

2 THE COURT: All right, this is case number 08-CP-22-
3 1496, the case of John Thomas Ross versus Dr. Webster N.
4 Jones, III, and Dr. David R. Anderson.

5 MR. BREHMER: Yes, sir.

6 THE COURT: Now, I've got a motion to compel - wait a
7 minute - yeah, a motion to compel mandated mediation, a motion
8 to dismiss, two motions to dismiss; is that correct?

9 MR. BREHMER: Yes, sir.

10 THE COURT: All right.

11 MR. SANDERS: Actually, Judge, I think that technically
12 there are probably three motions to dismiss but it all flows
13 out of the exact same issue.

14 THE COURT: Okay, all right, if I could get you to -
15 let's go down and give your names and who you represent in the
16 action.

17 MR. BREHMER: My name's Karl Brehmer. I represent the
18 Plaintiff, John Thomas Ross.

19 THE COURT: All right.

20 MR. SANDERS: Your Honor, I'm Darren Sanders. I
21 represent Dr. Webster Jones.

22 THE COURT: All right.

23 MS. THOMAS: Your Honor, I'm Lisa Thomas. I represent
24 Dr. David Anderson.

25 THE COURT: All right, now, who has what motions and

1 which ones do we want to hear first?

2 MR. BREHMER: Well, mine was filed first to compel the
3 mediation. So, I think that it would probably be in order.
4 It may resolve the rest of them.

5 THE COURT: Okay, so, that one might be dispositive of
6 the others?

7 MR. BREHMER: Well, they're all interrelated.

8 THE COURT: Okay.

9 MR. BREHMER: They're all, they're all basically
10 interrelated on the same issue.

11 MS. THOMAS: Probably hear them - the same issues, one
12 time for all.

13 MR. BREHMER: So, I think that they can all be argued as
14 a group.

15 THE COURT: Okay, all right, well, Mr. Brehmer, let me
16 hear from you then on your motion to compel.

17 MR. BREHMER: Your Honor, I filed this action, the
18 filing date is October the 27th, 2008, and for lack of a better
19 terms it's a notice of intent to file lawsuit that is required
20 pursuant to South Carolina Code Section 15 - I mean, 15-79-
21 125, and it was filed and paid. It was served on both the
22 Defendants on October the 25th of 2008.

23 THE COURT: This is a medical malpractice?

24 MR. BREHMER: Yes, sir.

25 THE COURT: All right.

1 MR. BREHMER: And no action has been filed, just a
2 notice of intent to file suit, which is required, and what has
3 occurred was we've had various communications between myself
4 and the Defense counsel. On December the 15th of 2008, Ms.
5 Thomas, who is representing, I believe, Dr. Anderson, wanted
6 to subpoena some records. I wrote her back and said, "Go
7 ahead and subpoena all the records you want. We don't - do
8 not object." Then I wrote both Defendants on January the 19th
9 of 2009 saying pursuant to the rules we need to mediate this
10 particular case so that we can comply with the rules and so I
11 can file my action. Okay?

12 THE COURT: All right.

13 MR. BREHMER: We've had several informal conversation
14 between themselves and it was proposed that we contact Judge
15 Breeden and was represented to me that defense counsel had
16 done others with Judge Breeden and that he would do it by way
17 of telephone conference. As Your Honor well knows none of
18 these cases resolve in this particular, especially medical
19 malpractice under this mediation and we're simply trying to
20 comply with the rules.

21 We had the mediation set up for a time of March the 12th
22 of 2009. That was confirmed by way of letter dated February
23 12, 2009, by my office but my office, I had to be in a
24 deposition in Charlotte on that particular day and I wrote
25 defense counsel February the 19th of 2009. I have copies of

1 the letter saying that, you know, "This is something that's
2 got to be done because these people are not going to be
3 available, it's a trucking accident, I've got to do this, can
4 we postpone and reschedule it?"

5 Well, we postponed it and rescheduled it for a later date,
6 and low and behold, whenever that date came around I was in
7 trial in the Richland County Court of Common Pleas.

8 THE COURT: Okay.

9 MR. BREHMER: So, I couldn't be there, okay. So, it got
10 postponed again. Well, I tried to get it rescheduled again
11 and we established the date of May the 20th of 2009, and on or
12 about May - I received a letter from Mr. Sanders dated May the
13 14th of 2009 saying that he was not going to participate in the
14 mediation because more than 90 days had elapsed, and that he
15 didn't think that - he thought my actions would fail because
16 more than 90 days had elapsed. Now - and that I had to apply
17 to the Court for - to show good cause to extend the time for
18 mediation. Well, I was working under the premise that we were
19 working together to try to get this resolved, to try to get
20 this matter concluded, and I was trying to get it done as
21 expeditiously as possible. Immediately upon receiving Mr.
22 Sanders' letter I filed my motion to compel the mediation to
23 show or to get the court involved, which has brought us to
24 where we are here today.

25 The basis for my motion is that, well, there's a lot of

1 misunderstanding, I guess, or lack of clarity and this
 2 particular code, the 15-79, medical malpractice action, and
 3 it's, one, if you read it carefully and I've gone back and
 4 read it more carefully after Mr. Sanders brought up his
 5 issues, what is supposed to happen if you read 15-79-125(C)
 6 mediation is supposed to occur within 90 days. In that
 7 particular section, subsection, it refers us to the
 8 alternative dispute resolution rules that have been provided
 9 by the Court or the Court mandated rules and basically
 10 premises 4(C). What's supposed to happen, I guess, if I'm
 11 reading these rules correctly is that when you file this
 12 notice of intent the Clerk's Office is supposed to appoint two
 13 mediators with the return notice of intent and that's supposed
 14 to be served at the time. That wasn't done, and to be honest
 15 with the Court I wasn't aware that that was supposed to be
 16 done at the time, and I don't think the Clerk's Office was
 17 aware, only until this came to issue did this come to be done,
 18 but ---

19 THE COURT: Well, now, let me ask you this, how is the
 20 clerk supposed to know this? I mean, when they get it ---

21 MR. BREHMER: It's the rule.

22 THE COURT: Okay, but I mean, they - this isn't a - I
 23 understand that mediation is mandated in this case because
 24 it's medical malpractice.

25 MR. BREHMER: Yes.

1 THE COURT: Georgetown is not an ADR county. So, when
2 they see medical malpractice they're supposed to know or is
3 there some notice ---

4 MR. BREHMER: Well, it's the rule.

5 THE COURT: Okay.

6 MR. BREHMER: It's the rule specifically ---

7 THE COURT: Okay, let me see what it says.

8 MR. BREHMER: --- these types of cases.

9 THE COURT: That's what I'm saying these - in medical
10 malpractice.

11 MR. BREHMER: Yes.

12 THE COURT: So, when they get the - nobody puts them
13 on notice other than the cover sheet that says medical
14 malpractice; is that correct?

15 MR. BREHMER: And, and the fact that it's a notice of
16 intent to file suit as opposed to a summons and complaint.

17 THE COURT: Okay.

18 MR. BREHMER: If you read the rules correctly I guess
19 what they're supposed to do if I'm reading it is this notice
20 of intent is not treated like a summons and complaint, you're
21 only charged, I guess, the fee that you charge for filing a
22 lis pendens which is 25, and it actually refers to the lis
23 pendens in that particular rule and it just, well, operates on
24 different rules, I guess, but ---

25 THE COURT: Well, I mean, is there a civil action

1 cover sheet that goes with the notice of intent or is it just
2 this notice of intent?

3 MR. BREHMER: I don't recollect.

4 CLERK: I believe they have just prepared a new
5 one. We just had a new one to come out that has that on it,
6 but it did not.

7 THE COURT: It didn't at this time, okay, okay.

8 MR. BREHMER: It didn't, it didn't at that, didn't at
9 that time, but the long and short of it is all of us are kind
10 of hunting and pecking as we're going through.

11 THE COURT: Okay.

12 MR. BREHMER: But nevertheless, we did have some
13 conversations and we did agree on Judge Breeden, which the
14 rules say that you can do.

15 THE COURT: Okay.

16 MR. BREHMER: You can do and the - I have filed a motion
17 to compel the mediation so that we can get on with my case and
18 I can file my case and I can pursue my case.

19 The Defendants, both Defendants have filed motions to
20 dismiss my case on the basis that the court doesn't have
21 jurisdiction now since more than 90 days have elapsed.

22 THE COURT: Okay, does anybody have the statute?

23 MR. BREHMER: I do.

24 THE COURT: All right, let me take a look at that.

25 Thank you, sir.

1 So, the 90-day requirement is in the rules?

2 MR. BREHMER: It's in that statute. I think it's
3 Subsection C.

4 MR. SANDERS: That's right.

5 MR. BREHMER: Subsection C in that particular rule.

6 THE COURT: Oh, I see, on - I was looking at 120,
7 okay.

8 MR. BREHMER: Yes.

9 THE COURT: All right, all right, go ahead.

10 MR. BREHMER: The significance of that is is if I'm
11 reading that correctly it says the filing of the notice of
12 intent gives the Court, this Court jurisdiction for the
13 purpose, and if you read on down where it says mandate this
14 mediation, nothing in that rule that says that if more than 90
15 days expires is the Court divested of jurisdiction to mandate
16 that mediation. That's the position as I understand it that
17 Defense is taking that this Court lacks jurisdiction and I
18 don't think that that is the fact, what the intent of that
19 particular statute was. I think the simple filing of the
20 notice of intent gives the Court jurisdiction to mandate the
21 mediation occur pursuant to that because if it wasn't all the
22 Defendants could say is, "I'm not showing up. I'm not showing
23 up," and Your Honor knows that as hard as we try, you know, if
24 you filed it and on the day you filed a notice of intent you
25 filed a motion to compel theoretically more than 90 days could

1 elapse before you got that motion heard, but, you know, the
 2 rule says that this gives the Court the intent or the
 3 jurisdiction to compel it, the fact, simple fact. There's no
 4 authority that I can find for the Defendants' position that
 5 this Court does not have jurisdiction to mandate this
 6 mediation occur. I don't think that that is the intent of the
 7 rule, and I would ask the Court mandate that the mediation
 8 occur and have the clerk appoint us two or give us a primary
 9 mediator and a secondary mediator and let's start from scratch
 10 and get it done correctly and get it done as soon as possible,
 11 just set a date it will occur and we'll have to be there.

12 THE COURT: All right.

13 All right, sir, who wants to argue first?

14 MR. SANDERS: May it please the Court, Your Honor?

15 THE COURT: All right.

16 MR. SANDERS: Darren Sanders.

17 Let me take a couple of steps back to sort of get the
 18 timeline a little more certain and also point to the statute.
 19 About 95 percent of what I do is medical malpractice defense
 20 and I deal with this statute a lot, and I'm only aware of one
 21 circuit court order from Judge Goodstein that even touches on
 22 any interpretation of any of the statute and I'm with Mr.
 23 Brehmer, there are parts of it that are a little bit unclear
 24 that we're going to have to work through, but it relates to
 25 causes of action arising after July 1 of 2005. So, I've been

1 dealing with it for about three years at this point as the
2 actions are filed and the basis of the problem that I have
3 with his motion to compel mediation is he's outside of the
4 confines of the statute and I think the statute is a
5 jurisdictional statute. So, let me take a couple of steps
6 back. The notice of intent that he filed was originally filed
7 in October of '08. It was served on the second of the
8 Defendants, Dr. Anderson, on November the 24th. So, as I read
9 15-79-125(C) we have to pre-suit mediate the case between 90
10 and 120 days of that date of service. According to my
11 calculations that means that the pre-suit mediation had to
12 take place sometime between February the 22nd and March the
13 24th. As Mr. Brehmer said, we had pre-suit mediation set up
14 two times in that timeframe, one time on the 12th of March, one
15 time on the 18th of March, and he cancelled them. We were
16 ready to do it. We were planning on doing it. He cancelled
17 it the morning of or the day before, whatever it is. Once we
18 got past the 120 day timeframe it's my position that the
19 notice of intent is stale because the statute says in
20 subsection C that the parties shall mediate the case between
21 90 and 120 days from the service. So, it's my position and
22 I've filed a motion to dismiss the original notice of intent
23 that bears the 2008 civil action number because I don't
24 believe that the statute allows us to go forward with
25 mediating the case outside of 120 days. There's one exception

1 as I read the statute, that's if Plaintiff's counsel or a
2 party applies to the Court for an extension of 60 days before
3 that 120 lapses. We're now even beyond that 60 days and no
4 application to the Court was ever made by Plaintiff's counsel
5 to extend the timeframe. So, it's my position that the '08
6 notice of intent is stale. After - I had this conversation
7 with Mr. Brehmer about my position and the reason why I
8 thought that there was no longer any jurisdiction under the
9 original notice of intent he did a couple of things, he filed
10 an additional notice of intent with the Court bearing the 2008
11 civil action number. He filed a notice of intent with the
12 Court that bears a 2009 civil action number and he actually
13 filed a summons and a complaint and I've moved, also, to
14 dismiss all of those filings, but really the arguments are the
15 same and I want to set aside for a moment the arguments as it
16 relates to the notice of intent to file suit bearing the 2009
17 civil action number. I don't think that the filing of a
18 summons and complaint is appropriate because we haven't
19 satisfied the statute and in subsection E it indicates that
20 until the pre-suit mediation takes place there's no basis for
21 filing the summons and complaint.

22 Now, as I read the statute and maybe I read it a little bit
23 more literally than others somewhere down the road might, it
24 doesn't provide for any amended notices of intent. It doesn't
25 provide for second notices of intent and I mentioned this

1 order from Judge Goodstein earlier and I wish that I had it
2 here with me today. Tried to find it all morning this
3 morning, couldn't put my hands on it, but the issue in that
4 case was there were some device manufacturers sued in the
5 case. They were not included in the notice of intent. Judge
6 Goodstein ruled that because the statute says all parties must
7 be in the notice of intent that summons and complaint against
8 the device manufacturers failed because they were not included
9 in the notice of intent. It says shall, it just says it says
10 shall in subsection C. So, as it relates to both his summons
11 and complaint and both notices of intent bearing the '08 civil
12 action number they're stale, they should be dismissed because
13 we're outside of the confines of subsection C.

14 As it relates to the 2009 notice of intent it's my position
15 as it relates to Dr. Jones he's missed the statute of
16 limitations at this point. As a little bit of background for
17 the care and treatment of the case, Mr. Ross came to the
18 Waccamaw ER February the 5th of 2006, excuse me, Judge. He was
19 complaining of severe abdominal pain. He was given a CT scan
20 of his abdomen and his pelvis that was interpreted by my
21 client, Dr. Jones. Dr. Jones interpreted that CT scan as
22 showing abnormal thickening of his colon. Conversation takes
23 place as usual as it would between radiologist and ER doctor.
24 The ER doctor was Dr. Mahout [spelled phonetically]. Dr.
25 Mahout has in his note, and I'll pass it up to the Court,

1 after discussing this issue with Dr. Jones ---

2 MR. BREHMER: I'm going to object to this, Your Honor.
3 This is a Rule 12 motion and he's trying to put in evidence,
4 which would be not allowed, I think, under a Rule 12(B)
5 motion. If he - I mean, he's trying to - he's filed a motion
6 to dismiss which would be a Rule 12(B) motion. Apparently
7 with this evidence now he's trying to convert it and argue a
8 statute of limitations argument, which is a Rule 56 motion.

9 THE COURT: Well, I was thinking 12(B) on the
10 pleadings you could still convert it to a like a motion for
11 summary judgment.

12 MR. BREHMER: Well, we have a ---

13 THE COURT: Well, okay, I'll sustain, I sustain your
14 objection.

15 MR. SANDERS: All right, Judge, I guess then if we, if
16 we don't want to deal with the statute of limitations issue at
17 this point then I can certainly understand that, but I think
18 that what ---

19 THE COURT: Excuse me. Refresh my memory and I
20 apologize.

21 MR. SANDERS: Yes, sir.

22 THE COURT: What was the reason for the 2009 intent,
23 notice of intent? What was the difference?

24 MR. SANDERS: My understanding is it's an exact replica
25 of the '08 notice of intent but he filed it to try to start

1 the new 90 to 120 day timeframe. That's, that's how I
2 interpret it.

3 THE COURT: All right, what's - tell me what's the
4 difference?

5 MR. BREHMER It was, just as a matter of, as a matter
6 of information whenever I had this - I got this notice of
7 their position I was out of my office. I had the same
8 procedure that my client had and I was basically incapacitated
9 and home for a day and a half and I called my office and tried
10 to direct my staff as to what to do and they filed, re-filed
11 the '08 action, which was not what I intended for them to do.

12 THE COURT: I see.

13 MR. BREHMER: The purpose - when I got back to my office
14 and realized what had occurred I simply re-filed my action so
15 that if the Court said they're correct then I simply re-filed
16 my notice of intent to sue to start a new 120 day timeframe
17 running.

18 THE COURT: Okay, I understand.

19 MR. BREHMER: That, that, that was my intent in doing
20 that because I simply wanted to make sure that I had myself
21 covered. I didn't really think that I needed to do that, but
22 I've been wrong before, Your Honor.

23 THE COURT: I got you. I understand what you're
24 saying.

25 MR. BREHMER Yes, sir.

1 THE COURT: All right.

2 MR. SANDERS: And Judge, and he also then filed just a
3 summons and complaint as well whenever he filed that second
4 notice of intent.

5 THE COURT: I see.

6 MR. SANDERS: And my assumption was and I think Karl and
7 I might, Mr. Brehmer and I might have talked about this that
8 he was sort of trying to cover himself both ways, if the first
9 notice of intent was stale, then he's filed a second notice of
10 intent to start the timeframe over, and if the first notice of
11 intent wasn't stale then he went ahead and move forward with
12 the filing of the summons and complaint and I've moved to, for
13 lack of knowing exactly how to handle it procedurally I moved
14 to dismiss everything and particularly the summons and
15 complaint I moved to dismiss because I didn't want to have to
16 file a responsive pleading to something that I didn't think he
17 had the basis for filing anyway.

18 THE COURT: Okay.

19 MR. SANDERS: So, if we, if we set aside the statute of
20 limitations argument then what I'm asking the Court to do is
21 to dismiss the first notice of intent as stale because we
22 tried to mediate it in the 90 to 120 days. The statute says
23 that we shall do it. It didn't happen, not because of the
24 fault of the Defendants; and therefore, that notice of intent
25 is stale. If we then get rid of the summons and complaint

1 that was filed as a result of that, if we're only left with
2 the '09 second notice of intent I'll argue the statute of
3 limitations at some other time. I think that it would be
4 appropriate to argue it right now because the statute says
5 that the Court has - the circuit court has jurisdiction to
6 enforce the provisions of the section. I think that would
7 give me the opportunity to argue the statute of limitations,
8 but if I need to argue that later I just need an order from
9 the Court saying that first notice is stale.

10 THE COURT: Well, I guess what I'm saying under this
11 case number there's only been one notice of intent filed;
12 hasn't there?

13 MR. BREHMER: Yes, sir.

14 THE COURT: Okay.

15 MR. SANDERS: Well, Judge, there was one dated October
16 the 28th, I believe, or October the 27th.

17 THE COURT: 27th.

18 MR. SANDERS: Then there's one dated May the 19th of '09
19 under the '08 civil action number as well, and then there's

20 ---

21 THE COURT: See, that's what I'm not seeing is the
22 May.

23 MR. BREHMER: They may have returned that one to me,
24 Your Honor. I think - if I - my recollection is that the
25 Clerk's Office may have returned that to me and Mr. Sanders

1 may have been served with it, and I think that the Clerk may
2 have returned it to me.

3 THE COURT: Okay.

4 MR. SANDERS: Judge, I don't see in my file - I see the
5 ones that are dated May the 19th, but I don't see one that's
6 got a clerk stamp on it.

7 THE COURT: I see the October 27th notice of intent.
8 As a matter of a fact I see an un-clocked one.

9 MR. SANDERS: Is it dated May the 19th down in the bottom
10 left-hand corner?

11 THE COURT: No.

12 MR. SANDERS: No.

13 THE COURT: The only thing - I see a cover letter and
14 a notice of intent dated October 14th, 2008, that has not been
15 clocked.

16 MR. SANDERS: And then I'm sorry, Judge, then do you
17 have one that was clocked in June the 2nd of 2009 bearing the
18 civil action number 810?

19 MR. BREHMER: It's 09.

20 MR. SANDERS: Yeah, 09, I'm sorry. What did I say?

21 MR. BREHMER: You didn't, you didn't say what year.

22 MR. SANDERS: Oh, 09.

23 THE COURT: No, I don't ---

24 MR. SANDERS: This is ---

25 THE COURT: I'm looking at case number 08-1496, and it

1 ---

2 MR. SANDERS: Yes, sir, that's the 09 one right there.

3 THE COURT: Okay, we don't have that file.

4 CLERK: We don't. What, what file was that?

5 THE COURT: 09, but I do see - all right, the only
6 thing I have I have an un-clocked, I mean, an un-clocked
7 notice of intent to - I'm talking about case number 2008-CP-
8 22-1496, an un-clocked notice of intent to file suit. Then I
9 have the same notice of intent or it looks like the same
10 notice of intent to file suit dated October 14th, 2008, filed
11 on October 27th, 2008, and it appears - well, and then right
12 after - with that, the Plaintiff's Exhibit A, a summons, un-
13 clocked, Plaintiff's Exhibit, summons and complaint, both of
14 which are un-clocked, Plaintiff's Exhibit B, an affidavit of
15 Thomas Frolick, un-clocked, Plaintiff's Exhibit C, standard
16 Rule 33 interrogatories, un-clocked. Okay, I don't have that
17 other file in front of me. Was your motion filed in those
18 cases, too, under those case numbers?

19 MR. SANDERS: - Yes, sir.

20 THE COURT: Okay, all right, well, I'm following your
21 argument, go ahead.

22 MR. SANDERS: I think that I've concluded my argument,
23 Judge.

24 THE COURT: Okay.

25 MR. SANDERS: It's just that what I'm asking the Court

1 to do is to rule that that '08 notice of intent that you have
2 there that was clocked in in October of '08 is stale because
3 the mediation didn't go forward as required in the statute,
4 that if there's not a filed summons and complaint then I
5 suppose that makes that motion to dismiss moot. I just wanted
6 to make sure that I put it on the record so I didn't have to
7 calendar a responsive pleading. If we're going to operate
8 under the '09 notice of intent, as long as my arguments are
9 preserved on the statute of limitations, then I'll take that
10 up unless the Court thinks it's appropriate to do that today I
11 suppose I'll have to take it up some other time.

12 THE COURT: Let me see what your motion to dismiss in
13 this case.

14 (Court and clerk confer.)

15 THE COURT: Okay, I see motion to dismiss Plaintiff's
16 Second Notice of Intent and Summons and Complaint it's in this
17 case and it was simultaneously in the other case, okay.

18 MR. SANDERS: Yes, sir, Your Honor, there should also be
19 clocked in on May the 20th of '09 the motion to dismiss the
20 original notice of intent, the '08 notice of intent. The
21 Clerk's Office probably wants to strangle us for filing all
22 this stuff and I apologize for it.

23 THE COURT: All right, that's in case number 1496, 08-
24 1496?

25 MR. SANDERS: Yes, sir, it is.

1 THE COURT: Oh, okay, yeah, it is. Okay, so, you've
2 got both of those in here.

3 All right, all right, Ms. Thomas, anything you would like
4 to state?

5 MS. THOMAS: Your Honor, I pretty much echo and concur
6 with the arguments made by Mr. Sanders, would point out the
7 differences in the positions of our clients. Our clients are
8 partners in the same radiology practice. However, Dr. Jones
9 read films on the Plaintiff approximately a year before Dr.
10 Anderson read films. So, Dr. Anderson would have read his
11 films February 14th of 2007. So, we don't have the same
12 statute of limitations argument that Mr. Sanders has. I would
13 point out to the Court that the same two notices with the two
14 causes of action numbers were filed as to Dr. Anderson.
15 However, to date I am not aware that Dr. Anderson has ever
16 been served with the '09 notice of intent and that's why we've
17 not filed a motion to dismiss in that case because it's never
18 been served on our client as the statute requires. A copy was
19 sent to myself and I sent a letter, I believe, June - sometime
20 in June, June 17th indicating that I was not authorized to
21 accept service of that, and to date, I've not been notified
22 that that has been served on my client So, we still, Your
23 Honor, have these two notice of intents out there. I would
24 take the same position as Mr. Sanders that we believe the
25 first one is stale because it has failed to meet the

1 requirements of the statute.

2 THE COURT: All right, Mr. Brehmer, anything in reply?

3 MR. BREHMER: I'd just like to reiterate that the Court
4 gives jurisdiction to compel it, and there's nothing in the
5 statute that says that the Court loses jurisdiction and I
6 think that that is the critical issue in this particular case
7 because I understand what the Plaintiffs are saying but
8 there's just no legal authority that I see for their position.

9 THE COURT: Okay, well, let me ask you this.

10 MR. BREHMER: Yes, sir.

11 THE COURT: What is your argument or let me hear you
12 respond to the requirement of 15-79-125(C) that says within 90
13 days, no later than 120 days of filing, I mean, of service of
14 the notice of intent to file suit you have to participate in
15 the mediation unless an extension, let's say there even is
16 good cause to grant an extension for no more than 60
17 additional days.

18 MR. BREHMER: Well, we had it set up for the 20th of May
- 19 and I was fully prepared to attend and participate in that
20 particular timeframe, and the Court needs to realize that we
21 were - well, I thought ---

22 THE COURT: So, you're saying that the reason it was
23 not held within the, within I guess 180 days is because they
24 did not appear at the May..

25 MR. BREHMER: Well, I'm sorry?

1 THE COURT: All right, as I understand this everything
2 is extended for good cause shown or whatever. The absolute
3 maximum amount of time you've got 180 days from the notice,
4 from service of the notice of intent to file suit.

5 MR. BREHMER: Yes, sir.

6 THE COURT: So, are you saying that there was a
7 mediation scheduled within that 180 days?

8 MR. BREHMER: I haven't counted it but I believe May the
9 20th would fall within that 180 days.

10 THE COURT: Of the - of - I haven't done it either,
11 but it was served November the 24th.

12 MR. BREHMER: 5th, that's what the affidavits of service
13 say.

14 THE COURT: Okay.

15 MR. BREHMER: They're in the court record.

16 THE COURT: And you had a mediation scheduled for May
17 the ---

18 MR. BREHMER: 20th.

19 THE COURT: 2009?

20 MR. BREHMER: Yes, sir.

21 THE COURT: And that is the one where the Defendant
22 did not come because they said it was - you did not get the
23 extension.

24 MR. BREHMER: Yes, sir.

25 THE COURT: Okay, is that correct?

1 MR. SANDERS: Yes, sir, Your Honor, and the - as I'm
2 reading 15-79-125(C) it says the parties shall participate in
3 a mediation conference unless an extension for no more than 60
4 days is granted by the Court based upon a finding of good
5 cause. So, the first two mediations that we had set up he
6 cancelled. They were both within the 120-day timeframe.

7 THE COURT: Right.

8 MR. SANDERS: They were between 90 and 120. As we got
9 to - and in that 120-day timeframe from the date of service
10 ended on March the 24th of 2009.

11 THE COURT: That was 120 days.

12 MR. SANDERS: That's correct.

13 THE COURT: Yeah.

14 MR. SANDERS: So, participating in any mediation beyond
15 that date isn't allowed by statute unless someone has applied
16 to the Court for an extension for good cause and that was not
17 done.

18 THE COURT: I got you. I understand your arguments
19 but the May 20th mediation did everybody agree to that

20 mediation and then - I mean, how did we get May 20th as a
21 mediation day? MR. BREHMER: It was agreed, it was

22 agreed - Ms. Thomas's office was - her paralegal was, for lack
23 of a better term, ramrodding this thing.

24 THE COURT: Okay.

25 MR. BREHMER: And she got it set up and it was my

1 understanding everybody had agreed to that and then I got the
2 letter from Mr. Sanders saying, well, the letter says here ---

3 THE COURT: All right, and when was, when was the May
4 20th, 2009, mediation set up?

5 MR. BREHMER: Hold on. I'll see if I got written.

6 THE COURT: Well, let me ask you this, was it prior to
7 the expiration - was it prior to March 24th, 2009?

8 MR. SANDERS: I'll check through my correspondence,
9 Judge. My recollection is I received a letter from Jack
10 McCutcheon and Lisa Thomas's office setting up that date -
11 we'll see when that was. Okay, Judge, by letter of May the
12 13th, 2009, a letter to Mr. Brehmer from Janet Ramston [spelled
13 phonetically] at Jack McCutcheon's office, it discusses the
14 May the 20th, 2009, mediation. So, it was outside of the March
15 the 24th deadline.

16 THE COURT: Okay.

17 MR. SANDERS: And I suspect that probably what happened,
18 Judge, is that the paralegals called around like they do to
19 set things up and then I raised the issue with Mr. Brehmer at
20 some point in time before that date on the telephone about my
21 position and why I was taking the position I was taking based
22 on the statute.

23 MR. BREHMER: No, I do have this document. The first
24 thing I got was the May 14th, 2009, letter. The first
25 communication I got from Mr. Sanders was his letter, and our,

1 you know, I had my colonoscopy the next day and he called and
2 I think he'll recollect that, you know, I was talking to him
3 from my house or I represented to him I was talking to him
4 from my house.

5 MR. SANDERS: I remember that.

6 MR. BREHMER: And you know, I was asking him about his
7 position and the authority for his position. So, the first
8 day that I got it was, you know, the letter is dated May 24th,
9 2009, and however long it would have taken to get to me. I
10 can go back in my records and look.

11 THE COURT: That's okay. I got - I - I've got a
12 handle of the facts. I've got it.

13 MR. SANDERS: The letter, the letter is dated May the
14 14th.

15 MR. BREHMER: It is, it is, you know.

16 MR. SANDERS: Right.

17 THE COURT: Okay, but in any event that was my
18 question is if March 24th, 2009, is the 120 days was there a
19 mediation, was the May 20th, 2009, mediation scheduled prior to
20 March the 24th?

21 MR. SANDERS: The answer to that is no. Here's the
22 letter from May 13th, '09.

23 THE COURT: Okay, all right, all right, thank you very
24 much. I'll take it under advisement and let you know.

25 MR. SANDERS: Thank you, Judge.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN) 2008-CP-22-1496

John Thomas Ross,)

Plaintiff,)

vs.)

Transcript of Record

October 8, 2009

Waccamaw Community)

Hospital, Dr. Webster)

N. Jones, III, and Dr.)

David R. Anderson,)

Defendants.)

B E F O R E :

Honorable Benjamin H. Culbertson
Georgetown County Courthouse
Georgetown, South Carolina

A P P E A R A N C E S:

Karl S. Brehmer, Esquire
Attorney for Plaintiff

Darren K. Sanders, Esquire
Attorney for Dr. Jones

Lisa A. Thomas, Esquire
Attorney for Dr. Anderson

Grace L. Hurley, CVR-CM
Circuit Court Reporter

1 (On the record, October 8, 2009.)

2 THE COURT: All right, the next case I have is 2008-
3 CP-22-1496, John Thomas Ross versus Waccamaw Community.

4 All right, this is case number 2008-CP-22-1496, the case
5 of John Thomas Ross versus Dr. Webster N. Jones, III, and Dr.
6 David R. Anderson. The matter is before the Court on a motion
7 to amend by the Plaintiff and motion to amend by the
8 Defendants.

9 Present at the call of the case Karl Stephen Brehmer as
10 Plaintiff's counsel and, I'm sorry, your names again?

11 MR. SANDERS: I'm Darren Sanders, Your Honor.

12 THE COURT: Darren Sanders representing?

13 MR. SANDERS: Dr. Web Jones.

14 THE COURT: All right.

15 MS. THOMAS: And Lisa Thomas, Your Honor, on behalf of
16 Dr. Anderson.

17 THE COURT: All right.

18 Do we need to argue these separately or can they all be
19 done at the same time? I know ---

20 MR. BREHMER: Separately I would prefer.

21 THE COURT: Okay, all right, which one was filed
22 first?

23 MR. BREHMER: Mine, Your Honor, the Plaintiff's.

24 MR. SANDERS: I don't think that's accurate, but I ---

25 THE COURT: Let me see I've got - well, I've got two

1 motions to amend filed on September the 4th, the Plaintiff's
2 and Ms. Thomas's and then - well, wait a minute. How many
3 have I got? I've got a motion to amend by the Plaintiff. A
4 motion for reconsideration by both Defendants or just one
5 Defendant?

6 MS. THOMAS: By both, Your Honor.

7 THE COURT: Okay, all right, well, let me hear from
8 Plaintiff first. Go ahead.

9 MR. BREHMER: Your Honor, as the Court knows, my name is
10 Karl Brehmer and I represent the Plaintiff, Mr. John Thomas
11 Ross. Your Honor heard us and issued an order in this
12 particular case dismissing the Plaintiff's notice of intent to
13 file a lawsuit on the basis that the time for the mediation
14 had expired. I am here before the Court for several purposes
15 today and the purpose is is to get some clarification of the
16 Court's order and also ask the Court to reconsider its
17 position on the facts. Please before I start I want to direct
18 to the Court that I say everything that I'm fixing to say with
19 all due respect and all due respect to the bench but I think
20 that the law has been misapplied in this particular case and
21 I'd like to set out to the Court why.

22 THE COURT: All right.

23 MR. BREHMER: All right, the Defendants filed a motion
24 to dismiss in the 08 civil action on the - on 08 and I'm going
25 to use the last four numbers, 1496, action as a Rule 12(B)(1)

1 motion pursuant to the South Carolina Rules of Civil Procedure
2 to dismiss the notice of intent to file suit in this
3 particular case on the basis that the time allotted under Code
4 Section 15-79-125 had expired, okay.

5 THE COURT: Right.

6 MR. BREHMER: Now, and as I understand the Court's
7 order, the Court granted that motion. Well, we, the Plaintiff
8 believes that that is an improper standard and here's why
9 because this action - there was no action pending before the
10 Court. What was pending before the Court is a notice of
11 intent to file a suit which is a precursor under 15-79-125.
12 What that statute says in effect is is that you have to file
13 this notice of intent and have the mediation, have a
14 disposition of the mediation by the mediator and then and only
15 then can the action be filed. So, there was no action before
16 the Court, okay?

17 THE COURT: All right.

18 MR. BREHMER: There was only a notice of intent. If you
19 go to Rule 12(B)(1) or 12(B) of the South Carolina Rules of
20 Civil Procedure in the very first sentence it says and it
21 says, "How Presented. Every defense, in law or fact, to a
22 cause of action in any pleading whether claim, counterclaim,
23 cross-claim or third-party claim," there was no cause of
24 action pending before the Court, okay. Therefore, Rule 12(B)
25 is not applicable in this particular case on the notice of

1 intent. The rules that would be applicable under the notice
2 of intent are the Alternative Dispute Resolution Rules that
3 are in the South Carolina Rules of Civil Procedure and they
4 would govern how this case should go and how this matter
5 should be handled.

6 South Carolina Code Section 15-79-125, Subsection B only
7 gives several instances where the Rules of Procedure are to be
8 used. Rule 12(B) is not one of those. They give them the
- 9 right to do a deposition, under the notice of intent to
10 subpoena documents and the service of the notice of intent,
11 but Rule 12(B) as far as dismissal is not authorized by this
12 particular statute. Therefore, dismissing it is improper
13 because Rule 12(B) applies only to where there's a cause of
14 action before the Court.

15 THE COURT: Well, I understand your argument. My
16 question is what does a Defendant do when there's been a
17 notice of intent to file suit but the Plaintiff never goes to
18 the mediation?

19 MR. BREHMER: Okay.

20 THE COURT: What is the Defendant's - how do they
21 resolve the issue? You've got a Plaintiff that won't, and I'm
22 not saying that you won't go but you were clearly outside the
23 time limits.

24 MR. BREHMER: Yes, sir.

25 THE COURT: What does the Defendant do?

1 MR. BREHMER: Rule 10 of the Alternative Dispute
2 Resolutions.

3 THE COURT: Which says what?

4 MR. BREHMER: It deals with the sanctions and it goes
5 through what the Court can do... It can basically rule me in to
6 show, to say basically like you do in the Alternative Dispute
7 Resolutions where the ADR form hasn't been filed in the 300
8 days to show the Court why good cause or give good cause for
9 why you haven't done this.

10 THE COURT: All right, let's say we go to that and you
11 can't give good cause, the time limit for the mediation has
12 passed, you don't have good cause as to why you didn't go to
- 13 mediation, what can the Court do? Issue an order that says
14 you can't file a lawsuit?

15 MR. BREHMER: No, sir, what they can do is it can
16 dismiss the notice of intent without prejudice as I read the
17 rules as one of the sanctions.

18 THE COURT: But then what, what is the purpose, I
19 mean, you've - the problem I have is you have a statute that
20 says you cannot file a malpractice action ---

21 MR. BREHMER: Yes, sir.

22 THE COURT: --- until you first file a notice of
23 intent.

24 MR. BREHMER: Yes, sir.

25 THE COURT: You file that notice of intent you have to

1 have a mediation within a certain number of days.

2 MR. BREHMER: Yes, sir.

3 THE COURT: Now, the law says shall.

4 MR. BREHMER: Yes, sir.

5 THE COURT: Shall file a notice of intent, you shall
6 comply with mediation, I think it was at least within 120 days
7 and the last 60 of that you have to get an extension of time.
8 In other words, you have to have a mediation within the time
9 period and then after that time period the only way mediation
10 can be extended is by court order. So, what is the purpose of
11 the law if the only thing the Court can do is strike the
12 notice of intent and you can turn around and re-file it? I
13 mean, the sole, the sole purpose of this is before you file
14 the suit is to go to a mediation and it gives you a deadline
15 as to when you have to do that so that the Defendant doesn't
16 have to keep coming back to court and coming back to court.

17 MR. BREHMER: Your Honor, and I don't think the notice
18 of intent and the rules of notice of intent and before this
19 Court and this statute authorizes this Court to dismiss or
20 prohibit the Plaintiff from bringing their action. This - my
21 understanding ---

22 THE COURT: Well, I thought, wait a minute, wait a
23 minute. What I thought - maybe I need to get the statute in
24 front of me. Let me see what it says because I thought it
25 said that you were prohibited from bringing an action, okay,

1 here we go, "prior to filing or initiating a civil action",
2 so, you can't bring an action, you cannot initiate a civil
3 action as a result of medical malpractice unless you file a
4 notice of intent to file suit, an affidavit of an expert
5 witness, and then, let's see, let me finish reading the
6 statute, all right, so, you have to file your notice of
7 intent, you have to attach your affidavit, you have to have a
8 mediation within 90 days unless the Court extends it for no
9 more than 60 days. "The Circuit Court has jurisdiction to
10 enforce the provisions," and then if it cannot be resolved
11 through mediation you may initiate the civil action. So, what
12 are you saying - what can the Defendant do if you don't have
13 the mediation? You're saying they can just get the notice of
14 intent dismissed and then you can turn around and re-file it?

15 MR. BREHMER: Yes, sir.

16 THE COURT: And the second time you don't go to
17 mediation, you can - they can just get that dismissed and you
18 can turn around and re-file it?

19 MR. BREHMER: Rule 10 imposes the sanctions under the
20 Alternative Dispute Resolutions and it says that it can
21 dismiss or dismiss it without prejudice, which would to me say
22 that you can - have to re-file it in this particular action.
23 Your Honor, I don't think - the purpose, as I understand the
24 purpose of this statute is is to get these matters before the
25 parties and to try some early resolution or to get the issues

1 out there between the parties as soon as possible, and I don't
2 think it is to foreclose Plaintiffs from bringing actions and
3 to prohibit them or to create a bar for them to get to the
4 court. I have been able to find no authority that would
5 support what a reasonable interpretation of Your Honor's order
6 is. As I understood or as I think that your order may be able
7 to be interpreted is is that it's a Rule 41(B) order that
8 dismisses the merits of the case, and I don't believe that
9 that is the intent of this Alternative Dispute Resolution.
10 Now, I may be subject to some sanctions for not doing this and
11 may have to face the wrath of the Court or the authority of
12 the Court for failing to make sure that all this was done, but
13 I don't think that my client should be punished to the extent
14 that their action or that he's prohibited from bringing the
15 action and I have searched this authority and I've spent a lot
16 of time on this issue and I don't think that that is the
17 intent of the Rules of Procedure. I can find no case
18 authority in the State of South Carolina that anywhere
19 remotely or reasonably could be argued to support this
20 position and I'm respectfully asking the Court to reconsider
21 it. Now, if I have to pay their attorney's fees, you know, I
22 suppose that's one sanction that the Court could impose upon
23 me.

24 THE COURT: Well, I mean, what is it you're asking me
25 to change in my order?

1 MR. BREHMER: I'm asking you to change in your order and
2 as I read your order that, one, that their motion to dismiss
3 pursuant to Rule 12(B) is denied and the reason that it's
4 denied is that it's not - that was the issue before the
5 Court, okay.

6 The second thing I'm asking is your order dismisses the
7 action. There was no action pending. I never got to file the
8 action, okay. That, all I was doing was trying to get the
9 precursor and get the Alternative Dispute Resolution mechanism
10 before the Court and get this taken care of, and the two
11 reasons, Your Honor, that I had to postpone the mediation was
12 was that I had a case really high up on the trial docket, the
13 first time that it was scheduled and there was a subpoena,
14 there was a witness noticed in Charlotte that I had to attend,
15 and the second time I was actually in a trial in front of
16 Judge, I think it was Judge Barber in the Richland County
17 Courthouse and I didn't apply to the Court for good cause for
18 an additional 60 days and the reason that I didn't is I was
19 under the impression that we were working together to get this
20 done. Mr. McCutcheon's office had been in touch with me and
21 they actually had arranged to do it by way of a telephone
22 conference with Judge Breeden and I had agreed with that and
23 it had been set up, but Your Honor, by no means did I ever
24 think that the Court could or would dismiss my client's case
25 on the merits or prohibit me from bringing a case for my

1 clients on the merits and I didn't think and I still don't
2 think that that is the intent of the rules.

3 THE COURT: All right.

4 MR. BREHMER: Okay.

5 Now, can I point out something else, Your Honor?

6 THE COURT: Yeah, go ahead.

7 MR. BREHMER: I think it's very important that this is,
8 one, this is a new statute and a new rule that we're all
9 facing; okay?

10 THE COURT: Right.

11 MR. BREHMER: Rule 4(C) in this rule, okay, now, while I
12 admit that my slate is not clean, but, you know, everybody is
13 having problems with this particular statute. Rule 4(C) of
14 the Alternative Dispute Resolutions requires that whenever you
15 file the civil action or whenever you file the notice of
16 intent as you would a lis pendens that the Clerk of Court is
17 to return to you an appointment of a primary mediator and a
18 secondary mediator from their rules and that is required to be
19 served with the summons and complaint and notice of intent on
20 the appropriate parties on the opposing side. That wasn't
21 done in this particular case.

22 THE COURT: So, it's done in other - that's done
23 statewide?

24 MR. BREHMER: Yes, sir.

25 THE COURT: You get that list back from all the clerks

1 when you file a, that action.

2 MR. BREHMER: Well, rule, that's what Rule 4(C) requires
3 and if you read Rule 4(C) of the Alternative Dispute
4 Resolutions and Rule 18 of the Alternative Dispute Resolution
5 Rules I believe that that's what is required in this
6 particular - in this particular scenario.

7 THE COURT: So, in order words, if Judge Breeden
8 wasn't on that list then you all could not have agreed to use
9 him?

10 MR. BREHMER: Yes, sir, there is a provision, there is a
11 provision in this particular scenario where if the parties
12 agree to do so that you can do it, okay.

13 THE COURT: All right, so, if you all have agreed to
14 use an alternate does that relieve the Clerk from sending that
15 list?

16 MR. BREHMER: Well, here's the point that I'm trying to
17 make, Your Honor.

18 THE COURT: All right.

19 MR. BREHMER: Okay, in the package of materials that I
20 forwarded to you there is a letter from me dated, dated
21 January the 19th of 2002, and in that letter I address both the
22 defense counsel and ask them, "Please let's get this mediation
23 done and let's get it done as soon as possible and let's try
24 to get this taken care of," and I also asked them, "Who would
25 you like to use as the particular mediator," and on the 12th of

1 February of 2009 there is a letter from Mr. McCutcheon where
2 he's confirming the mediation and you can see that Judge
3 Breeden or the former Judge Breeden has been agreed to as the
4 mediator.

5 Sometime between, and I don't recollect and I don't have
6 a recorded recollection of this, sometime between January the
7 19th and February the 12th we apparently agreed on the
8 mediator. Now, under the service rules I think that it
9 possibly could be reasonably argued that the prerequisites
10 weren't met until we agreed as to the mediator and at that
11 time, if you use those dates, I'm within the timeframe, okay,
12 and what I'm asking the Court to do is is, one, is this on the
13 08 civil action number is to reconsider your position and not
14 dismiss my notice of intent because under Rule 12(B)(1) the
15 Court doesn't have or that is not the appropriate authority
16 and really that's the only issue before the Court on that
17 issue, and the second I'm asking the Court to grant my motion
18 to compel mediation which I think would be timely filed and
19 that particular issue and to have this mediation done as soon
20 as physically possible to get it done so that we can move on
21 with this particular case, and the other thing that I'm asking
22 the Court to do on the 08 civil action number is to clarify
23 its order because I don't believe, I don't believe that the
24 rules provide for the Court on a notice of intent to dismiss
25 an action that has never been filed on the merits, okay, or

1 address the issue on the merits as I think that Your Honor's
2 order could be ruled as a Rule 41(B) order, okay, and the
3 basis and the other thing that I'm asking is under Rule 41(B),
4 41(B) says that the Court can dismiss it with prejudice, okay.
5 Rule - let's just take it for argument, they moved on Rule
6 12(B)(1) okay for lack of jurisdiction, okay.

7 THE COURT: Right.

8 MR. BREHMER: Rule 41(B) gives the Court the authority
9 to dismiss it for everything other, with prejudice other than
10 for lack of jurisdiction. So, it would be an order of
11 dismissal without prejudice, okay.

12 The next thing that I'm asking the Court to do is and I
13 pointed this out to the Court and I need clarification because
14 I don't understand. I told the Court that I had filed the 09
15 action, okay, if they were right, okay, that and the Court
16 should rule pursuant with Alternative Dispute Resolution Rule
17 10 to dismiss without prejudice my notice of intent. I filed
18 a separate action. The Court in its order dismissed my 09
19 action and the only basis was a 12(B)(4) and a 12(B)(5) motion
20 that they did which was sufficiency of process and service of
21 process and, Your Honor, I had never served those, and I
22 pointed out to the Court and the hearing was I am to get these
23 notices from the Court. I haven't gotten these notices from
24 the Court. So, you know, it was apparent to me at that time
25 that I had to have those things to serve them. Okay, I had

1 sent opposing counsel copies of them but I had never served
2 them on the parties that I was complaining against. So, and
3 I'm asking the Court to rescind that order as well because the
4 120 days doesn't start or the 90 days doesn't start until such
5 time as I serve it and the last person is served. For
6 instance, in this particular case there's two Defendants.

7 THE COURT: Well, I'm trying to think, how did that
8 issue even come up in front of me then, how did they even know
9 about it if they never received it?

10 MR. BREHMER: Well, I sent them courtesy copies, my
11 communications with the Court. I, and since that time, Your
12 Honor, I'm in a great flux about what the Court's order was.
13 I have actually filed another action, another notice of intent
14 because I was not ---

15 THE COURT: Well, yeah, and that's where I guess maybe
16 I'm getting confused, too, with all of these different actions
17 on the same thing, for the same reason, I mean, it - as I
18 understand you filed a notice of intent, you didn't have the
19 mediation, they filed a motion to dismiss for jurisdictional
20 reasons saying the statute is clear, you don't have the
21 mediation within this time period, you can't file an action.
22 Then before that hearing comes up you just turn around and re-
23 file.

24 MR. BREHMER: Yes, sir.

25 THE COURT: Correct?

1 MR. BREHMER: Yes, sir.

2 THE COURT: And so, then, I guess because of the
3 courtesy copy they file or you file, re-filed with a motion to
4 enforce the mediation in your re-filing.

5 MR. BREHMER: Yes, sir.

6 THE COURT: But yet you hadn't even served it yet, but
7 yet ---

8 MR. BREHMER: No, sir.

9 THE COURT: --- you were wanting me to enforce a
10 mediation in that one.

11 MR. BREHMER: No, sir.

12 THE COURT: Okay.

13 MR. BREHMER: That was not, the motion for - the motion
14 to compel the mediation was in the 08 action. Okay, I didn't
15 file a motion to compel the mediation.

16 THE COURT: So, there was no motions pending in the 09
17 action?

18 MR. BREHMER: One of the Defendants, Mr. Sanders, on
19 behalf of his client filed a Rule 12(B)(4) motion and a Rule
20 12(B)(5) motion which was insufficiency of process and
21 insufficiency of service of process in that action.

22 THE COURT: And I never did even address those issues
23 then in my order; did I?

24 MR. BREHMER: Well, in a footnote in your order that ---

25 THE COURT: Yeah.

1 MR. BREHMER: --- I was unclear about on page two ---

2 THE COURT: I see it now.

3 MR. BREHMER: --- you did, but I, to be honest with you,
4 I didn't understand what it meant.

5 THE COURT: All right, "Plaintiff also filed a notice
6 of intent to file suit on June 2nd in case number 09-810. That
7 notice of intent to file suit is identical to the notice of
8 intent to file suit in case number 08-1496. Plaintiff
9 attempted service on the Defendants in 09-810 by mailing the
10 pleadings to the Defendants' attorneys in 08-1496. The
11 Defendant" - all right, so, he filed - all right, so, I see
12 where, "The Defendant Webster N. Jones, III, filed a notice to
13 dismiss in case number 09-810, which is dispositive by this
14 order," - well, it might not be dispositive by this order
15 because I didn't address whether or not there was
16 insufficiency of process or something of that nature. So,
17 you're acknowledging that that has never been served on them.

18 MR. BREHMER: That's never been served because I haven't
19 gotten anything ---

20 THE COURT: Okay.

21 MR. BREHMER: --- from the Court's order and, you know,
22 I don't see how my time could run.

23 THE COURT: I see what you're saying.

24 MR. BREHMER: And Your Honor ---

25 THE COURT: I understand what you're saying now.

1 MR. BREHMER: Yes, sir.

2 THE COURT: I follow, I follow that argument on the,
3 on the 09 case.

4 MR. BREHMER: Okay, the other point that I would like to
5 point out is in the statute, and as I understand it the
6 statute was supposed to give them the plain ordinary reading
7 meaning. Nowhere in this statute do I believe that the
8 legislature authorizes the Court to dismiss an action on the
9 merits that has never been filed or prohibit me from filing
10 one. I think that where you go from this is you have to go to
11 the rules, Alternative Dispute Resolution, to see where you
12 head in that particular.

13 THE COURT: Well, where does that say that in the
14 statute? All this says is, "Within 90 days and no later than
15 120 days from the service of the notice of intent to file suit
16 the parties shall participate in a mediation conference unless
17 an extension for no more than 60 days is granted by the Court
18 based upon a finding of good cause. The Circuit Court has
19 jurisdiction to enforce the provisions of this section."

20 MR. BREHMER: Subsection.

21 THE COURT: But it doesn't limit that enforcement to
22 the alternative dispute.

23 MR. BREHMER: Subsection 4(C) says, "Unless inconsistent
24 with this section, the Circuit Court Alternative Dispute
25 Resolution Rules in effect at the time of the mediation

1 conference for any and all part of the State shall govern the
2 mediation process, including compensation of the mediator,
3 payment of fees and expenses of the mediation conference.
4 Otherwise, the parties are responsible for their own
5 expenses." I believe that's what directs us to this and the
6 other thing is is I think logically, okay, this also, 15-79-
7 125 doesn't say how the mediators are appointed, okay.
8 There's no reference in it whatsoever, but if you go to the
9 Alternative Dispute Resolution Rules it's right there in Rule
10 4(C) of this one and this particular statute is referenced in
11 it and it references in medical malpractice cases subject to
12 the pre-mediation, okay; and so, I think that that is how or
13 what the intent is is for the Alternative Dispute Resolution
14 Rules to control the process and procedure of the notice of
15 intent and that the Rules of Procedure, Rules of Civil
16 Procedure govern once the action, once you're through that
17 process far as the filing of the action and the administration
18 of the case from that point forward, okay, and you know, the
19 remedy, to respond to the question, the Court's remedy, I
20 think that the only remedy would be maybe the Court could
21 sanction me under Rule 10 for not doing this or for failing to
22 do it if I didn't have good cause if the Court, the Court
23 found that the reasons that I didn't have for good cause, but
24 the worst that it could do would be to dismiss the action
25 without prejudice or dismiss the notice of intent without

1 prejudice. That's the basis.

2 Now, Your Honor, I want to be honest with the Court, I'm
3 trying, I mean, this thing has worried me to death, I mean, it
4 really, it really has because what, what it's basically done
5 is is says that I've screwed up and committed malpractice, and
6 you know, I'd do most anything to keep from doing that. Now,
7 and it's caused me great concern and I've poured over these
8 books and I've poured over the law and I honestly think that
9 what I'm telling the Court is not just an argument, it's the
10 truth and the way it's supposed to go, okay, but there's an
11 equitable side to this, too, that I want the Court to
12 understand, okay, and I filed an affidavit which is enclosed
13 in this particular case.

14 I was working and I thought relatively well with the
15 opposing side, okay, and it's true that I had to go to a
16 deposition in Charlotte, and you know, the mediation was
17 scheduled in the exact same time this deposition was scheduled
18 and my secretary and I had a conflict. She was talking to
19 them and I was talking to the people about the deposition in
20 Charlotte. So, we had to get it rescheduled immediately,
21 okay, and I told her, you can see from my letter and the date
22 that, "Look, there's a conflict here, we need to redo this."

23 The second time I had no control over being called to
24 trial and doing anything. Now, I'm doing the best I can
25 because I want to get my case before the Court and I want to

1 give my client, good, bad, indifferent, I want to give him
2 every opportunity to have his day in court, and there was no
3 mention of this issue, okay, by the other parties, and from
4 their actions or inactions I assumed that we were working
5 together and it was not until I got Mr. Sanders' letter
6 objecting to all of this that I ever acknowledged that this
7 was going to be a problem, and as a matter of fact it had
8 been agreed to by them to set this mediation on the 20th of May
9 and/or, you know, then he fires off this letter, "Well, we're
10 not coming and this is the reason why," and then Mr.
11 McCutcheon jumps on the same bandwagon and says the reason
12 why.

13 There's an equitable argument there, too, because, you
14 know, I thought we were working together to get this precursor
15 for my filing of the suit. Now, they were very candid with
16 me, okay, and said, "Don't expect us to pay you or agree to
17 pay your client anything in this mediation because these cases
18 are complicated and they're going to require discovery and
19 they're going to require discovery and, you know, this is
20 basically a formality and we'll do it over the phone with the
21 judge and, you know, he'll hear us out and he'll come to a
22 resolution pretty quick, you know, save the expenses," but
23 there was no secret about the fact that nobody, you know, and
24 they didn't make any misrepresentations, that nobody had any
25 intent of resolving this case at that time. So, Your Honor, I

1 really believe that the worst remedy for me would be a
 2 dismissal without prejudice of the notice of intent under the
 3 08 civil action number, and I do respectfully, and I say it
 4 with all due respect, ask the Court to reconsider his ruling,
 5 and also I ask the Court to re-clarify his ruling because,
 6 Your Honor, when I, and I've read your order many, many times,
 7 many ways and tried to interpret it, you know, in my favor,
 8 against my favor or just the best as I possibly could, and I
 9 think that Your Honor's order could be written as a Rule 41(B)
 10 dismissal on the merits and I respectfully tell the Court that
 11 I don't believe that the Court has that authority, nor do I
 12 think that that was the intent under these particular rules
 13 and I apologize for any inconvenience that I've caused any
 14 parties of this court.

15 THE COURT: All right, anything else?

16 MR. BREHMER: I would just adopt and I've provided the
 17 Court with my memorandum and ---

18 THE COURT: Yes.

19 MR. BREHMER: --- my affidavits and my attachments and I
 20 would like to incorporate all those into the arguments that I
 21 made before Your Honor.

22 THE COURT: I've got it, yeah, and I've reviewed it,
 23 sure have.

24 MR. BREHMER: Thank you, Your Honor.

25 THE COURT: Thank you.

1 All right, Mr. Sanders, let me hear from you.

2 MR. SANDERS: Yes, sir, Your Honor, may it please the
3 Court, and if I could approach I've got a timeline that I've
4 made because the filings are quite complicated and it might
5 ---

6 THE COURT: Well, I mean, I understand all that. My -
7 let me hear you address the Plaintiff's argument that I can't
8 dismiss the action because there was no action filed, the only
9 thing I can dismiss is their notice of intent to file an
10 action.

11 MR. SANDERS: The argument, I would say first of all
12 that whenever 15-79-125(D) says that you have jurisdiction to
13 enforce the provisions, that this is precisely a
14 jurisdictional argument which is why I made a motion under
15 Rule 12(B)(1) and there are some things that are in his
16 memorandum that he's passed up to you and also some of the
17 representations that he's made that are just not consistent
18 with what the filings are that are in the Court's record,
19 which is part of the reason why I wanted to pass up this
20 timeline and some of the other correspondence, but this is a
21 jurisdictional issue. So, if Mr. Brehmer is right, if he says
22 that the only thing that you have the power to do is to
23 dismiss without prejudice the notice of intent, my argument to
24 that would be then the Court will never have jurisdiction to
25 ever hear this action and the reason why that is is because

1 15-79-125 gives us all of the precursors that absolutely have
2 to be met before he can institute a medical malpractice action
3 through the summons and complaint. So, if the statute has not
4 been complied with - now, I think that your order is precisely
5 correct, that there's a jurisdictional concern here because
6 he's never going to be able to move forward with the summons
7 and complaint and that's why I believe ---

8 THE COURT: Well, I mean, if he's within his statute,
9 I mean, if he's within the statute of limitations why can't he
10 just re-file another notice of intent and a request for
11 mediation?

12 MR. SANDERS: Well, the first argument against that
13 would be that the statute does not provide for second notices
14 of intent; amended notices of intent. This is an argument
15 that, that I think that our Court of Appeals will probably be
16 hearing sooner rather than later. The 15-79-125 specifically
17 says that the notice of intent has to include all adverse
18 parties who will be named as Defendants. So I do not believe
19 that under the statute as it is written that there is even
20 authority for second notices of intent or amended notices of
21 intent to ever be filed and there's an order, a circuit order
22 from Judge Goodstein that touches on this issue that I don't
23 have possession of and I tried to get, and I tried to get
24 before the time for our hearing. So, my argument, Judge,
25 would be that the statute is clear on its face when one does

1 not mediate in 90 to 120 days the Court then is deprived of
2 jurisdiction to ever have the notice of the summons and
3 complaint filed.

4 Now, one of the other reasons why I wanted to pass up
5 this timeline is because he actually filed a summons and
6 complaint in the 08 civil action back on May the 19th of this
7 year and part of the motions that I filed, I had three motions
8 before the Court, two related to the filings in the 08 notice
9 of intent as well as that summons and complaint and also
10 related to the 09 notice of intent that he filed after he got
11 my motion to dismiss. I haven't filed anything related to the
12 most recent notice of intent that he's filed because I figured
13 that's part of what we're here today to try to sort out. So,
14 and in all of those motions, Judge, I have made jurisdictional
15 arguments as it relates to the 09 notice of intent and the
16 summons and complaint that were filed bearing the 09 civil
17 action number. That motion which was filed by me on June the
18 26th of this year says in the first sentence that it is a
19 motion pursuant to Rule 12(B)(1). He is right that I also
20 have made alternative arguments related to his failure to
21 serve it, but I also made the jurisdictional argument that
22 I've made in the other, in the other motions, and there are
23 several ---

24 THE COURT: Well, yeah, but that one hadn't even been
25 served yet.

1 MR. SANDERS: That's true. That's true, and my argument
2 would be that he doesn't have the authority to re-file
3 anything to serve, which is the reason why I made the 12(B)(1)
4 motion. The statute doesn't allow for it.

5 THE COURT: All right, go ahead.

6 MR. SANDERS: And then, you know, to sort of push this
7 off on the Clerk's Office for not sending the notice of the
8 selected neutral I think is a little out of balance in light
9 of the fact that we - he's right, we had agreed on the
10 mediator. There was no question about who was going to serve
11 as our mediator. So, I, you know, I can - this is all I do,
12 Judge, I mean, this is what I do. I handle malpractice cases
13 and I can't remember even one notice of intent coming to me
14 with a document from a Clerk's Office anywhere up and down the
15 coast, on into the Pee Dee area where I handle cases,
16 selecting mediators for me. I mean, we always agree exactly
17 how we did in this case.

18 THE COURT: Well, he's saying it's the mediator list.
19 They send you a - he's saying that all of them when he files
20 them the Clerk sends back the mediation, the list of mediators
21 and arbitrators.

22 MR. SANDERS: What I'm telling you, Judge, is in - since
23 July 1 of 2005 when this rule became applicable in probably
24 the 50 malpractice cases that I've handled in that timeframe
25 I've not yet seen one document from the Clerk's Office

1 appointing the mediator for me. Now, whether or not the
2 Clerk's Office has some duty to do it I don't think that that
3 in any way changes your ruling in this case. It's completely
4 inapplicable because we selected a mediator.

5 THE COURT: Well, the problem I'm having is according
6 to Mr. Brehmer that that's routinely done by every clerk in
7 the state and that Georgetown County didn't do it, and you're
8 saying that that's not routinely done, he's saying that the
9 rules require it, virtually every clerk where he's got a
10 pending case except for Georgetown has done that and that that
11 was one of the reasons for the delay in this case.

12 MR. SANDERS: Judge, I think that's an argument being
13 made after the fact. It wasn't brought up originally in that
14 fashion. I mean ---

15 THE COURT: I know. I don't recall hearing at the
16 original motion hearing, but I want to find out if Georgetown
17 is doing it wrong.

18 MR. SANDERS: Well, I don't think that Georgetown is
19 doing anything wrong, Judge. I think that, you know, there is
20 a ministerial, technical obligation on the Clerk's Office
21 according to the ADR rules to select a primary and secondary
22 mediator. However, I do not believe that that has any bearing
23 on this argument in this case because we selected a neutral
24 which we're all allowed to do. So, no one was contesting
25 whether or not his original notice of intent was properly

1 served. It was. It was properly served on my client and I.
2 won't speak for Ms. Thomas, but as I understand the arguments
3 that we've already made there was never a contest that the 08
4 notice of intent was improperly served or that on its face it
5 was deficient because it didn't contain all of those things
6 that it ought to contain. So, what I would submit to you,
7 Judge, is if the statute as I interpret it and my
8 interpretation is just based upon what it says, if he filed
9 originally in 08 a deficient notice of intent then I don't
10 think under the statute he's got the right to go back and cure
11 that, but I don't even think that's an argument that needs to
12 be made because we had a mediator, we selected the neutral and
13 we agreed upon it. So, that's a ministerial act by the Clerk
14 of Court and I submit to you that based upon my experience
15 Georgetown County's handling it precisely the same way that
16 every clerk in Beaufort, Georgetown, Florence, Marion, Horry
17 and the places where I practice law are handling it. I've
18 never seen it handled differently.

19 In regards to several of the other arguments that have
20 been made, again, Judge, it's, Rule 41(B), as I read it, is
21 inapplicable to this scenario as well, the South Carolina
22 Rules of Civil Procedure because I believe that that deals
23 with involuntary dismissals when the Court is hearing a non-
24 jury argument and the Court is serving as the trier of fact.
25 So, again, I think that that rule has no applicability here.

1 The equitable argument that's been made, part of what I
2 want to pass up to you, Judge, in this timeline of the filings
3 and what I want to give to the Clerk to include in this record
4 in the event that we're examining this moving forward is the
5 timeliness of how this happened because with all due respect
6 to Mr. Brehmer there's a typo in his affidavit. His affidavit
7 says that he sent a letter a couple of months before it
8 actually was sent. Here's what matters, Judge, I received a
9 letter saying that the pre-suit mediation was being set up at
10 a time beyond the 120 days. That letter was dated May the
11 13th. On May the 14th I immediately wrote to both Mr.
12 McCutcheon and to Mr. Brehmer and stated my position that we
13 were beyond the bounds of the 120 days and that I did not
14 believe that I had, without someone applying to the Court for
15 a good cause to extend the deadline, the authority to move
16 forward and litigate this case or attend the pre-suit
17 mediation because I was outside the statute. The argument
18 that I've worried about, Judge, in operating outside the
19 bounds of the statute is in any malpractice case obviously
20 what we worry about is the question of non-economic damages.
21 This act, the Senate Bill 83 that passed this legislation
22 specifically provides for a cap on non-economic damages. My
23 fear is if I do something outside the bounds of the statute am
24 I waiving my right for a cap and I'm not going to do that,
25 Judge. I will be the first person to admit that we do not

1 have authority from, as best I know, the Court of Appeals or
2 the South Carolina Supreme Court telling us or interpreting
3 15-79-125. There's no cases that I know of that even touch
4 on. That being said it's very clear on its face what is
5 required prior to the Court ever having jurisdiction for a
6 medical malpractice case to be filed, and unfortunately those
7 requirements were not met and that actually moves into the
8 reason why I filed a motion to amend the order and it's really
9 slightly, it's technical and it's slight. The only thing that
10 I am asking the Court to reconsider and to amend is on the
11 second page of your order in the third paragraph, the final
12 sentence says, "However, the initial mediation was cancelled
13 by consent of the parties." Part of what we argued before and
14 part of what is in the materials that I want to pass up to
15 you, Judge, is the sequence of events, how mediation came to
16 be cancelled. Mr. Brehmer has already explained it better
17 than I can. It was - this mediation was not cancelled by
18 consent of everybody. It was cancelled by Mr. Brehmer and I
19 don't know what we could do as Defendants to possibly move
20 forward with the mediation in the absence of Plaintiff and
21 Plaintiff's counsel. So, I would ask that the order be
22 amended to set forth exactly what happened which was the
23 mediation was set up twice during the 90 to 120-day time
24 period and that mediation was cancelled by Plaintiff's counsel
25 on both instances and that's precisely what happened and I can

1 be more specific about the dates. The 90-day deadline based
2 upon the filing would have run in the latter part of February,
3 about February the 3rd, February the 23rd, 2009. The 120-day
4 deadline reached March the 24th or March the 25th, depending on
5 how you count it. We set up pre-suit mediation originally for
6 March the 12th, within the 90 to 120-day timeframe. Mr.
7 Brehmer's right. We received a letter from him saying that he
8 had another obligation, that he could not attend that
9 mediation. We immediately set it up again within the 90 to
10 120-day timeframe. That's when the morning of mediation we
11 got a call from Mr. Brehmer saying that he was also not going
12 to be available. Now, that's just the way that it happened.
13 There was no consent. I don't know what I could do when I'm
14 getting a letter and a telephone call saying, "I'm not going
15 to participate in mediation." As a Defense lawyer I don't
16 know if the duty is on me to just call the mediator or attend
17 the mediation. I don't know what I'm supposed to do, Judge.
18 So, I would ask that the order be amended in the third
19 paragraph and anywhere else in the order where it is stated
20 that mediation during the 90 to 120-day timeframe was
21 cancelled by consent of the parties because that's just not
22 accurate.

23 THE COURT: Well, what about Mr. Brehmer's argument
24 that both times Defendants just told him, said, "No, don't
25 worry about it. This is a technicality. It's not going to

1 settle at mediation, don't worry about the mediation. We'll -
2 that's no big deal"?

3 MR. SANDERS: Respectfully, Your Honor, I don't think
4 that argument - I don't remember having that conversation
5 myself with Mr. Brehmer. The only thing that I can tell you
6 is the way I operate in defending malpractice cases that the
7 insurance carrier for the doctor that I represent has sole
8 discretion and authority of whether or not to resolve a case
9 or not. Whenever I first talked to Mr. Brehmer about this
10 case it was my understanding that maybe he had some
11 preliminary conversations with the folks at the insurance
12 company. So, and again, I would go back to if he believed in
13 his mind that this was just a mere formality and that it could
14 be accomplished in five minutes then why couldn't we have done
15 it in one of the two days when it was set up in the 90 to 120-
16 day timeframe?

17 THE COURT: Well, his argument is that the Defendants
18 told him that they thought that it was just a mere formality
19 and that he shouldn't have to worry about it.

20 MR. SANDERS: Judge, I don't recall having that
21 conversation with Mr. Brehmer, and even if I did I don't think
22 that's it - and it has any bearing whatsoever on the fact that
23 a statute requires us in 90 to 120 days to actually go forward
24 and mediate the action.

25 THE COURT: Well, I mean, you do have some concern

1 here with his equitable argument. If he's calling saying,
2 "Look I've got this. Can we continue it," and you say, "Well,
3 yeah, don't worry about it. We're not concerned about that,
4 it's no big deal, it's not going to settle at mediation, go
5 ahead and do what you've got to do and we'll just reschedule
6 it later," then there is an equitable argument there.

7 MR. SANDERS: Candidly, Judge, I have no problem with
8 his equitable argument because it's not applicable to me. I
9 don't know what conversations Mr. Brehmer would represent to
10 the Court he ever had with me but the bottom line is this, I
11 received a letter saying that mediation was being set up for
12 May the 20th on May the 13th. I wrote a letter on May the
13 14th. So, the letter was dated from Mr. McCutcheon's office
14 May the 13th. I'm assuming that it got to me from Conway to
15 Charleston the next day. I immediately wrote the letter
16 that's a part of the information that I'm going to submit up
17 to you and I just, arguing some sort of equitable argument
18 that we were all just going to get along, I mean, I understand
19 that. I try to be as professional as I can with everybody,
20 but I don't think that has any bearing on what the statute
21 requires us to do, and all Mr. Brehmer had to do was look to
22 the statute in Subsection C and file the requisite motion with
23 the Court to extend for good cause under the statute for an
24 additional 60 days and all of this could have been solved.
25 So, I don't think that this equitable argument impacts what

1 I'm telling the Court because I don't think that -- I don't
2 think that those conversations and things happened either the
3 way they've been portrayed or I don't think they happened at
4 all with me. So, that would be my position on that, but I
5 would, Judge, if it's okay if I could put into the Court's
6 record and pass up to you this timeline of the filings as well
7 as some of the other correspondence I'd appreciate it.

8 Thank you, Judge.

9 THE COURT: All right, sir.

10 MR. SANDERS: So, it, the bottom line, Judge, is I
11 believe that this is squarely before the Court, the only way
12 that I know how to get it before the Court which is when the
13 statute is not complied with I suppose I could either sit
14 around and do nothing or I have to bring a motion before the
15 Court because there's no longer jurisdiction and that's
16 precisely what I did. I made three motions to dismiss based
17 upon all of these pleadings that were filed. I moved to
18 dismiss the original 08 notice of intent. After I made that
19 motion I received not only on May the 19th and May the 22nd
20 second notices of intent, I also received a summons and
21 complaint on May the 19th and I moved to dismiss all of it by
22 two other motions and they're all in the court's files. In
23 the 09 action that was filed on June the 26th. The first two
24 motions in both the 08 cases were filed on May the 20th and
25 June the 10th. So, I would submit to the Court that the order,

1 other than the technical issue of whether or not the mediation
2 was cancelled by consent of the parties, the order otherwise
3 is precisely in line with the statute and that the order ought
4 to stand as it is which the consequence of which is the Court
5 doesn't have jurisdiction for the action to be filed.

6 THE COURT: All right, yes, ma'am.

7 MS. THOMAS: Your Honor, at the outset, I'm not going
8 to plow old ground. I think that Mr. Sanders has very
9 eloquently put forth my position as well. I would like to
10 address a few specifics, however, and jumping to that would be
11 the equitable argument. Like Mr. Sanders, this is what I do
12 for a living. It's fairly easy to comply with the statute.
13 We routinely do these pre-suit mediations by telephone with
14 Judge Breeden and with various other mediators who are
15 available to do that. I've had two or three of them settle.
16 I've had several that we felt it was necessary to actually go
17 and be present physically in front of a mediator and they've
18 settled. The majority of these cases don't settle. That's a
19 well-known fact. It is, however, an opportunity for the
20 parties to set forth their positions to if nothing else make a
21 discovery plan, "This is what we need to do to move forward."
22 In all of these cases that I have handled since the
23 institution of this statute I have never represented to anyone
24 that I have the authority to disregard the rules of the
25 statute. This is the first time that I've ever had someone

1 | accuse me of misleading them by being nice. I've tried to be
2 | accommodating to Mr. Brehmer, as I've tried to be
3 | accommodating to any Plaintiff on the other side. It is
4 | relatively simple to comply with the statute; however, I do
5 | not have the authority to disregard this statute and I believe
6 | it would be malpractice for me not to bring this motion to
7 | dismiss based on a jurisdictional issue because it was not
8 | complied with, no disrespect to Mr. Brehmer whatsoever.

9 | So, Your Honor, I put forth to the Court that in no way
10 | have I implied or misled as far as I know Mr. Brehmer into
11 | thinking that we didn't have to do this and it's okay if we
12 | don't. I've done it in all of the rest of my cases. I'll do
13 | it the ones I get henceforth unless there's a problem doing
14 | that.

15 | As well, Your Honor, I believe that the ADR Rules do not
16 | apply, are not restrictive to your decision in this matter.
17 | Specifically, 15-79-125(B) states that the ADR Rules govern
18 | the process of mediation. That's the only where in this
19 | statute that the ADR Rules are mentioned. In other words,
20 | this mediation is to be conducted like any other mediation and
21 | the ADR Rules complied. If we look down to Section D it says
22 | the Circuit Court has jurisdiction to enforce the provisions
23 | of this section. There are no qualifiers to that. There are
24 | no restrictions to that. For that reason I think Your Honor's
25 | order is on point. I think the fact that these requirements

1 are here is the gateway to this cause of action coming
2 forward. I don't think that as Mr. Sanders stated simply re-
3 filing, now we're on our third one, corrects the failure to
4 follow the specific instructions in the first one. It's the
5 same case. He's not filed a new case. It's the same
6 allegations. Therefore, Your Honor, I would assert that your
7 order is directly on point in this case.

8 MR. SANDERS: Your Honor, if I might, I'm sorry, but
9 also I did want to point out that in the Alternative Dispute
10 Resolution Rules, Rule One talks about the scope of the rules,
11 and the rules govern the mediations under 15-79-125. So, in
12 other words if we're inside of mediation as Ms. Thomas just
13 referenced we've got to play by the rules according to the ADR
14 Rules, but what we're talking about is something very
15 different which is the failure to conduct mediation to begin
16 with and that is precisely why 15-79-125(D) says that the
17 Court has jurisdiction to deal with these issues. Otherwise,
18 as you - the first question you asked Mr. Brehmer was what are
19 the Defendants supposed to do if the mediation doesn't happen
20 in 90 to 120 days, and unless we stand on your order as
21 written with the one minor change that I've asked for I don't
22 know what else we're supposed to do other than just let these
23 things float out in space and never, never get attended to.

24 THE COURT: All right, all right, Mr. Brehmer,
25 anything in response?

1 MR. BREHMER: . Yes, sir, I'd like to just point out one
2 thing to the or several things that I think need to be
3 clarified. First, Mr. Sanders said the summons and complaint
4 was filed, that's not exactly correct and let me tell you just
5 the factual, won't tell you all the embarrassing details, but
6 whenever he filed this thing I was home that day preparing for
7 a colonoscopy myself the next day and I got this and I called
8 my office and had my secretary - I tried to explain to her
9 what to do over the phone and one of the associates signed it
10 but they did send another notice of intent and a filing with a
11 summons and complaint with \$150 check and I think that the
12 Georgetown Clerk's Office sent that back. So, there wasn't
13 one actually filed. That was a mistake and it was corrected
14 by the Georgetown County Clerk's Office that they sent it
15 back. So, that answers that question.

16 On the ---

17 THE COURT: No, there's a - there is a summons and
18 complaint.

19 MR. BREHMER: Yes, sir, but it's a summons and complaint
20 which is attached as an exhibit to the notice of intent.

21 THE COURT: I see, okay.

22 MR. BREHMER: And because the Rule 59 - 15-79-125
23 requires me to tell them what I'm complaining about I didn't
24 know of any better way to do it than a complaint.

25 THE COURT: I see, okay.

1 MR. BREHMER: Okay, so, that's the, that's the basis
2 behind that allegation.

3 The second thing is, is, is that in regard to the
4 equitable argument that Ms. Thomas made, Your Honor, there are
5 attachments in the exhibits that I have given to the Court
6 that one of which is an April 16, 2000 [sic], letter from Ms.
7 Thomas herself signed to the Veterans' Administration. The
8 Veterans' Administration has been providing the vast majority
9 of the medical care that my client has received and -
10 complaining about and Ms. Thomas had sent a subpoena to them
11 to get his medical records and the Veterans' Administration
12 had rejected that subpoena for some federal regs that they
13 have, I believe, and Ms. Thomas had asked me to get him to -
14 my client to sign a medical authorization and I enclosed a
15 letter of March 10, 2009, sending her that and then on April
16 the 16th, 2009, she sends this letter out to the Veterans'
17 Administration. If she was - the point that I'm trying to
18 make is she's operating out the time limit then, and, you
19 know, I'm receiving correspondence with this and that's part
20 of the basis, you know, for thinking, you know, we're going to
21 get this thing done and try to get this matter concluded, and
22 then on May the 13th Ms. Thomas' office is actually the one
23 that set the mediation up and sent the confirmation letter
24 out.

25 Your Honor, for the reasons that I've stated I don't

1 think a Rule 12(B) motion is the appropriate motion and Rule
2 12(B) actually says that there has to be a cause of action
3 pending. There was no cause of action pending. I think that
4 the rules, Alternative Dispute Resolution Rules are the rules
5 that govern this. Pursuant to those rules, which really
6 aren't before the Court, but if the Court were to apply them,
7 Rule 10, I believe, you may be able to dismiss my notice of
8 intent without prejudice and I think that that's the harshest
9 remedy that the Court can impose. I'd ask the Court to
10 respectfully consider, reconsider its position. I'd ask the
11 Court to look at the dates in the letters that Judge Breeden
12 was agreed upon, which was February '05. We were well within
13 that timeframe in the parameters and order the mediation to be
14 conducted pursuant to my motion to compel the mediation and
15 let us proceed forward.

16 THE COURT: I mean, how can I compel mediation when
17 it's outside the time period that I'm allowed by the statute?

18 MR. BREHMER: Well, the statute says that basically in
19 effect is, is that you have to have, that you have to have the
20 notice filed. You have to have a short plain statement of the
21 case against you and you have to have a mediator appointed and
22 that has to be served, okay.

23 THE COURT: Right.

24 MR. BREHMER: Those are four requirements, okay. The
25 fourth requirement, the fourth requirement wasn't done until

1 February of 2009, okay.

2 THE COURT: But you were within the time period. The
3 problem I'm got is in February you set it up for March. You
4 didn't have the mediation in March. You rescheduled it. I
5 can't recall when that was rescheduled for but you didn't have
6 it then. Now you're getting outside the 120-day or outside
7 the 90-day time limit or outside the 120-day time limit; and
8 so, the only way that you could have it outside that is if the
9 Court grants an extension of no more than 60 days. So, you're
10 saying that May mediation was within that ---

11 MR. BREHMER: Yes, sir.

12 THE COURT: --- would have been within that 60-day
13 extension period?

14 MR. BREHMER: Well, it would have been within the 120
15 days, and as I read that rule it says that the mediation -
16 you've got 120 days and then you can apply for an additional
17 60 days. We would have had it within the 120 days, okay, from
18 February to May we would have had it within that timeframe,
19 and the motion was filed within that timeframe and the Court
20 could construe my motion to compel as statement for good cause
21 to have it done beyond.

22 THE COURT: Wait a minute. Let me see.

23 All right, the pleadings were served or the notice of
24 intent - the notice of intent was served on November the 24th,
25 2008, was the date on Dr. Anderson. 120-day deadline was on

1 March the 24th, 2009.

2 MR. BREHMER: Well, what I'm trying to - the 15-79-
3 125(A) requires four things to occur, okay, filing of the
4 notice and a short plain statement, appointment of a mediator
5 and service, okay, those four things. I think that the Court
6 could, could construe those four things have to be completed
7 before the time starts running, okay. The fourth thing wasn't
8 ---

9 THE COURT: Before what time starts running?

10 MR. BREHMER: The time to have the mediation done.
11 Those are the precursors.

12 THE COURT: No, it says that within 90 days from the
13 service of the notice of intent to file suit.

14 MR. BREHMER: Yes, sir, but we should have gotten, we
15 should have gotten an appointment pursuant to Rule 4(C) of the
16 Alternative Dispute Resolutions from the Clerk's Office.

17 THE COURT: And you're saying you get those in all of
18 your cases and they're saying they haven't gotten theirs in
19 any of theirs.

20 MR. BREHMER: Your Honor, I'm saying that the rule
21 requires it.

22 THE COURT: Well, and I understand that.

23 MR. BREHMER: I mean ---

24 THE COURT: But my question is is I understand what
25 you're saying the rule says but you're arguing now - well,

1 never mind. Go ahead. Let me - finish your argument. Go
2 ahead.

3 MR. BREHMER: I think that the rule requires it, and you
4 know, I'm not trying to slough off on the Georgetown County
5 Clerk's Office, but that is a prejudice that we've been
6 created and the equitable thing seems to be to do this is go
7 from the date that those four preconditions were started, were
8 completed, and that the last thing completed would be Judge
9 Breeden being the mediator and start the time from, running
10 from that. If that was done we're well within the timeframe
11 and the Court is within its authority.

12 THE COURT: But it doesn't say it's within the
13 timeframe from when the mediator is appointed, it's saying
14 that you have to have it in 120 days of the date of notice of
15 intent to file suit is served.

16 MR. BREHMER: Yes, sir, but it also says that you have
17 to have the mediator served with the notice of intent. So, we
18 got the defect in the service corrected in February of '09.
19 So, it should be - go - date from effective service.

20 THE COURT: Okay.

21 MR. BREHMER: And the Courts could do it that way.

22 THE COURT: Okay, I understand your arguments. All
23 right, I'll take it under advisement.

24 MR. SANDERS: If I could just put one more thing on the
25 record, Your Honor.

1 THE COURT: No, we've - I've already - I've got
2 everybody's - I've heard everybody's argument. He argued ---

3 MR. SANDERS: It's just one small point, Judge, it's
4 only that 15-79-125 does not say anything at all about having
5 to have the appointment of the mediator with the notice of
6 intent, that's only in the ADR rules, it's not in the statute.

7 THE COURT: All right, Mr. Brehmer, I'll give you an
8 opportunity to go ahead and argue again in response to that.

9 MR. BREHMER: You have to read them together, Judge, and
10 it's the body of law that is governing it and the notice of
11 intent is an ADR statute.

12 THE COURT: All right.

13 All right, thank you very much.

14 (Adjourned.)

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

December 14, 2010



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2008-CP-22-1496
Case No. 2009-CP-22-810

John Thomas Ross,.....Appellant,

v.

Waccamaw Community Hospital, Dr. Webster N. Jones, III, and Dr. David R. Anderson,
OF WHOM Dr. Webster N. Jones, III and Dr. David R. Anderson are.....Respondents.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on Dr. Webster N. Jones, III by depositing a copy of it in the United States Mail, postage prepaid, on December 14, 2010, addressed to his attorneys of record, John B. McCutcheon, Jr. and Lisa A. Thomas, THOMPSON & HENRY, PA, Post Office Box 1740, Conway, South Carolina 29526, and Andrew F. Lindemann, DAVIDSON & LINDEMANN, P.A., Post Office Box 8568, Columbia, South Carolina 29202.

I certify that I have served the Record on Appeal on Dr. David R. Anderson by depositing a copy of it in the United States Mail, postage prepaid, on December 14, 2010, addressed to his attorney of record, Darren K. Sanders, BUYCK & SANDERS LAW FIRM, LLC, Post Office Box 2424, Mount Pleasant, South Carolina 29465.

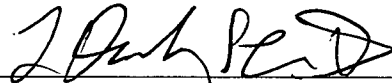
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SC Court of Appeals

December 14, 2010



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