

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC 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.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR BY APPLYING THE RULES OF CIVIL PROCEDURE INSTEAD OF THE ADR RULES TO RESOLVE THIS MEDICAL MALPRACTICE PRE-LITIGATION MEDIATION DISPUTE CONCERNING THE MEDIATION TIMEFRAME IN § 15-79-125(C)?
2. DOES THE TRIAL COURT'S SUBSTITUTE ORDER GRANTING THE DEFENDANTS' MOTIONS TO DISMISS IN THE 08 AND 09 CASES CONTAIN SEVERAL ADDITIONAL ERRORS OF LAW?
3. DID THE TRIAL COURT ERR BY NOT COMPORTING WITH THE SCOPE AND PURPOSE OF THE ADR RULES IN DENYING THE PLAINTIFF'S MOTION TO COMPEL MEDIAITON IN THE 08 CASE?
4. DID THE TRIAL COURT ERR BY REFUSING TO RULE ON SEVERAL ISSUES RAISED BY THE PARTIES IN THE 08 AND 09 CASES?

STATEMENT OF THE CASE

Plaintiff John Thomas Ross [plaintiff] filed a Notice of Intent to File Suit [Notice of Intent] on October 27, 2008 for his medical malpractice claim against the defendants pursuant to S.C. Code § 15-79-125 [the statute]. The Notice of Intent was given case number 2008-CP-22-01496 [the 08 case]. The plaintiff served defendants Dr. Webster N. Jones, III and Dr. David R. Anderson [the defendants] with the Notice of Intent on November 25, 2008.¹

The parties were required to participate in a mandatory pre-litigation mediation for this medical malpractice claim [the mediation] within one hundred twenty (120) days after the service of the Notice of Intent on the defendants pursuant to § 15-79-125(C). Based on the service date for the Notice of Intent in the 08 case, the parties were required to mediate the 08 case by March 24, 2009. The parties originally set the mediation for March 12, 2009. However, the original mediation was canceled. The parties rescheduled the mediation for

¹ Defendant Waccamaw Community Hospital was never served with the Notice of Intent and was never made a part of the underlying case and is not a part of this appeal.

March 18, 2009. The mediation was canceled a second time and was rescheduled again for May 20, 2009.

The defendants then refused to participate in the mediation set for May 20, 2009. 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. Defendant Anderson filed a Motion to Dismiss the Notice of Intent to File Suit [Motion to Dismiss] in the 08 case dated May 27, 2009 pursuant to Rule 12(b)(1), SCRPC and S.C. Code Ann. Sections 15-79-125(C) and (D). Defendant Jones filed a Motion to Dismiss the Notice of Intent to File Suit [Motion to Dismiss] in the 08 case dated June 5, 2009 pursuant to Rule 12(b)(1), SCRPC and S.C. Code Ann. Sections 15-79-125(C) and (D).

After it was clear the defendants were not going to participate in mediation and they were moving to dismiss the Notice of Intent for the 08 case, the plaintiff filed another Notice of Intent to File Suit [Notice of Intent] on June 2, 2009. This 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 Alternative Dispute Resolution Rule 4(c). The plaintiff served the attorneys for the defendants with the second Notice of Intent on June 9, 2009, but the defendants were never personally served with the second Notice of Intent. Defendant Jones filed a Motion to Dismiss the Notice of Intent [Motion to Dismiss] in the 09 case dated June 24, 2009 pursuant to Rule 12(b)(1), SCRPC and S.C. Code Ann. Sections 15-79-125(C) and (D). Defendant Anderson never filed a Motion to Dismiss the Notice of Intent in the 09 case.

The parties argued Defendant Jones' Motions to Dismiss in both the 08 and 09 cases, Defendant Anderson's Motion to Dismiss in the 08 case, and the plaintiff's Motion to Compel Mediation in the 08 case before the Honorable Benjamin H. Culbertson [Judge Culbertson] on July 16, 2009. Judge Culbertson signed his Order Granting Motion to Dismiss and Denying Motion to Compel Court Mandated Mediation in both the 08 and 09 cases [the First Order] on August 17, 2009. The First Order was filed with the Clerk of Court on August 24, 2009.

The plaintiff filed a Motion for Reconsideration and/or to Alter or Amend Judgment rendered by Judge Culbertson's first Order in the 08 and 09 cases dated September 1, 2009. The parties argued plaintiff's Motion for Reconsideration and/or to Alter or Amend Judgment before Judge Culbertson on October 8, 2009. Judge Culbertson issued a Substitute Order Granting Motion to Dismiss and Denying Motion to Compel Court Mandated Mediation in both the 08 and 09 cases [the Substitute Order] dated February 18, 2010.

The plaintiff received written notice of the Substitute Order on February 19, 2010. The plaintiff filed a Notice of Appeal for both the 08 case and the 09 case dated March 19, 2010. The plaintiff filed an Amended Notice of Appeal for both the 08 case and the 09 case dated March 26, 2010 to clarify that Waccamaw Community Hospital was not an Appellant in the 08 case or the 09 case. The Court of Appeals consolidated the appeals for the 08 and 09 cases via Order dated July 8, 2010.

FACTS

A. The Notice of Intent to File Suit for the 08 case.

The Notice of Intent in the 08 case for this medical malpractice claim was filed on October 27, 2008 and served on the defendants on November 25, 2008. Based on this service date for the Notice of Intent in the 08 case, the parties were required to participate in a mandatory pre-litigation mediation [the mediation] by March 24, 2009 pursuant to the one hundred twenty (120) day timeframe in § 15-79-125(C) [statutory timeframe]. Plaintiff's attorney informed the defendants' attorneys that the parties needed to have the mediation via letter dated January 19, 2009. (R. p. 65).

The mediation was originally scheduled for March 12, 2009, which was within the one hundred twenty (120) day statutory timeframe, with consent of all parties. (R. p. 61). Defendant Anderson's attorney confirmed the mediation with all parties via letter dated February 12, 2009. (R. p. 66). The original 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. (R. p. 61). Plaintiff's attorney notified the defendants' attorney of this conflict via letter dated February 19, 2009. (R. p. 67).

The mediation was rescheduled for March 18, 2009, which was within the one hundred twenty (120) day statutory timeframe, with consent of all the parties. (R. p. 61). Defendant Anderson's attorney confirmed the rescheduled mediation with all parties via letter dated February 24, 2009. (R. p. 68). However, the 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. (R. p. 61).

The mediation was rescheduled a second time for May 20, 2009 by consent of all parties. (R. p. 61). A mediation on May 20, 2009 would have occurred within the sixty (60) day extension of the one hundred twenty (120) day timeframe 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). (R. pp. 61-62). The defendants' attorneys initially consented to participating in mediation set for May 20, 2009, which was beyond the one hundred twenty (120) day deadline but within the extended sixty (60) day good cause deadline. (R. p. 62). Defendant Anderson's attorney confirmed the mediation with all parties via letter dated May 13, 2009. (R. p. 73).

Surprisingly, via letter dated May 14, 2009, Defendant Jones' attorney decided to object to the mediation that had just been set via consent of all parties and refused to attend the mediation as scheduled on May 20, 2009. (R. p. 74). The plaintiff filed a Motion to Compel Mediation in the 08 case dated May 19, 2009 in response to the defendants' refusal to attend the mediation. The Motion to Compel Mediation was filed within the sixty (60) day extension allowed for good cause by § 15-79-125(C).

Defendant Anderson filed a Motion to Dismiss the Notice of Intent to File Suit [Motion to Dismiss] in the 08 case dated May 27, 2009 pursuant to Rule 12(b)(1), SCRPC and S.C. Code Ann. Sections 15-79-125(C) and (D). Defendant Jones filed a Motion to Dismiss the Notice of Intent to File Suit [Motion to Dismiss] in the 08 case dated June 5, 2009 pursuant to Rule 12(b)(1), SCRPC and S.C. Code Ann. Sections 15-79-125(C) and (D).

After the Notice of Intent was filed and served on the defendants in November 2008, defendants' attorneys repeatedly told plaintiff's attorney that the mediation was a formality

and that settlement was unlikely. (R. pp. 62-63). Defendant Anderson's attorney called plaintiff's attorney in response to his January 19, 2009 letter and told him that her firm did their mediations informally via teleconference with Judge Breeden. (R. pp. 62-63). She informed plaintiff's attorney that she would get the 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. (R. pp. 62-63). Prior to May 14, 2009, it was counsel for the plaintiff's impression that all parties were working together to get the mediation completed so the malpractice action could get filed, served, and developed. (R. p. 63):

Notwithstanding the issues with scheduling the mediation, the defendants conducted discovery of the plaintiff's medical records after the Notice of Intent was filed and served in the 08 case in November 2008 as allowed by § 15-79-125(B). (R. p. 62). 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. (R. pp. 62, 64). 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. (R. p. 62). 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. (R. p. 69). 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. (R. pp. 70-72). 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 mediation. (R. p. 62).

Based upon the representations from the defendants' attorneys, plaintiff's attorney believed that the defendants would not object to conducting the mediation in the 08 case as scheduled beyond the one hundred twenty (120) day timeframe in § 15-79-125(C). (R. pp. 62-63). During this period of trying to set up the mediation and conducting discovery of the plaintiff's medical records, plaintiff's attorney was under the impression that the defendants would not require him to file a Motion to Extend the Mediation Deadline an extra sixty (60) days for good cause shown as allowed by § 15-79-125(C). (R. pp. 62-63). 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 mediation on May 20, 2009, which was after the one hundred twenty (120) day deadline had expired but was within the sixty day (60) extended deadline for good cause. (R. pp. 62-63).

B. The Notice of Intent to File Suit for the 09 case.

The Notice of Intent in the 09 case was filed on June 2, 2009 after it was clear that the defendants were not going to participate in mandatory pre-litigation mediation in the 08 case and they were moving to dismiss the Notice of Intent in 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 Alternative Dispute Resolution Rule 4(c).

The plaintiff served the attorneys for the defendants with the Notice of Intent in the 09 case on June 9, 2009. Counsel for Defendant Anderson refused to accept service of the second Notice of Intent and noted that her client has never been served with the Notice of Intent in the 09 case. (R. p. 103). The plaintiff never personally served either of the defendants with the second Notice of Intent. The one hundred twenty (120) day timeframe

in § 15-79-125(C) for the mandatory pre-litigation mediation has never begun in the 09 cases since all of the defendants have not been served.

Defendant Jones filed a Motion to Dismiss the Notice of Intent in the 09 case [Motion to Dismiss] dated June 24, 2009 pursuant to Rule 12(b)(1), SCRPC and S.C. Code Ann. Sections 15-79-125(C) and (D). Defendant Anderson never filed a Motion to Dismiss the Notice of Intent in the 09 case. Counsel for Defendant Anderson stated that she did not file a Motion to Dismiss the Notice of Intent in the 09 case because her client was never served with the Notice of Intent in the 09 case. (R. p. 103).

ARGUMENTS

S.C. Code § 15-79-125 [the statute] outlines several prerequisites² that must be met before a plaintiff can file a civil action against a defendant for a medical malpractice claim. First, § 15-79-125(A) requires the plaintiff to file a Notice of Intent to File Suit [Notice of Intent] against a proposed defendant. Second, § 15-79-125(A) compels the plaintiff to file an affidavit of an expert witness with the Notice of Intent supporting his claim. Third, § 15-79-125(C) requires the plaintiff and proposed defendant(s) to participate in a mandatory pre-litigation mediation [the mediation]. Finally, § 15-79-125(E) allows the plaintiff to file a

² 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.

civil action for medical malpractice if the pre-litigation mediation fails. The circuit court has jurisdiction to enforce the provisions of this statute pursuant to § 15-79-125(D).

The South Carolina Alternative Dispute Resolution Rules [ADR Rules] govern the medical malpractice pre-litigation mediation process under § 15-79-125. Rule 1, ADRR concerning the Scope of Rules states that “These rules shall also govern all mediations in Medical Malpractice actions required by S.C. Code § 15-79-120 and S.C. Code § 15-79-125(C).” Rule 3(a), ADRR regarding Actions Subject to ADR notes that “all cases in which a Notice of Intent to File Suit is filed pursuant to the provisions of S.C. Code § 15-79-125(A)...are subject to court-ordered mediation *under these rules.*” (emphasis added). Rule 1, ADRR notes that “[These rules] shall be construed to secure the just, speedy, inexpensive and collaborative resolution of every action.”

Rule 5(f), ADRR states that “Pre-suit medical malpractice mediations required by S.C. Code § 15-79-125 shall be held not later than 120 days *after all defendants are served with the Notice of Intent to File Suit* or as the Court directs.” (emphasis added). Rule 5(e), ADRR notes that “A party may file a motion to defer an ADR conference or exempt a case from ADR for case specific reasons. For good cause, the Chief Judge for Administrative Purposes of the circuit court may grant the motion.”

Rule 10(a), ADRR regarding Sanctions states

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

Rule 10(b), ADRR concerning Sanctions notes

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

The plaintiff contends that the Court of Appeals must reverse the Substitute Order entered for both the 08 and 09 cases because it contains several errors of law and inconsistencies as outlined in this brief. The underlying 08 case concerned a dispute between the plaintiff and defendants regarding the pre-litigation mediation process for a medical malpractice claim under § 15-79-125. The parties did not participate in a mediation in the 08 case within the one hundred twenty (120) day timeframe or the sixty (60) day extended timeframe for good cause shown [the statutory timeframe] as required by § 15-79-125(C).

The plaintiff filed a Motion to Compel Mediation when the defendants refused to mediate the 08 case after the one hundred twenty (120) day timeframe for mediation had passed. The plaintiff argued that the circuit court had jurisdiction to compel mediation at any point in time in the mediation process, including after the one hundred twenty (120) day, or extended sixty (60) day, timeframe, pursuant to § 15-79-125(D) and the ADR Rules. (R. pp. 85-92, 104-05). The plaintiff alleged that the proper remedy for this mediation process dispute was to compel mediation in the 08 case. The plaintiff also acknowledged that the trial court could follow Rule 10(a), ADRR and issue sanctions against the parties for failing to mediate within the statutory timeframe in the 08 case. However, the plaintiff argued that the Rules of Civil Procedure were not applicable to this mediation process dispute, and the trial court was not permitted to dismiss the 08 or

09 case pursuant to Rule 12(b)(1), SCRPC. (R. pp. 84-92, 97, 99-100, 104-08; pp. 110-30, 146-52; pp. 29-60).

The defendants filed Motions to Dismiss the Notice of Intent in the 08 case after the mediation timeframe elapsed. The defendants moved to dismiss the 08 case for a lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRPC after the mediation was not held within the statutory timeframe. Defendant Jones argued that the Notice of Intent in the 08 case was “stale” after the one hundred twenty (120) day mediation timeframe elapsed, that § 15-79-125(C) does not allow a mediation to occur outside of the one hundred twenty (120) day, or extended sixty (60) day, timeframe, that the circuit court does not have jurisdiction to compel mediation outside of the one hundred twenty (120) day and extended sixty (60) day timeframe under the statute, that the South Carolina Rules of Civil Procedure [Rules of Civil Procedure] and not the ADR Rules governed the dispute, and that the 08 case must be dismissed. (R. pp. 92-99, 101-02; pp. 131-43, 145). Defendant Anderson concurred with Defendant Jones’ arguments for dismissing the 08 case. (R. pp. 103-04; pp. 143-45).

The 09 case was filed after the defendants objected to participating in mediation in the 08 case. The plaintiff argued that the trial court did not have any valid legal basis for dismissing the 09 case since the defendants were never served with the Notice of Intent in the 09 case. (R. pp. 96-97; pp. 116-17; pp. 29-60). The defendants argued that the 09 case should be dismissed for the same reasons as the 08 case. (R. pp. 92-99, 101-04; pp. 118-29, 132-34, 143-45).

The plaintiff asserts that the trial court only had two options according to § 15-79-125 and the ADR Rules that it could use to resolve this medical malpractice mediation

process dispute between the parties in the 08 and 09 cases. First, the trial court could have denied the defendants' Motions to Dismiss in both the 08 and 09 cases and granted the plaintiff's Motion to Compel Mediation in the 08 case. Second, the trial court could have granted the defendants' Motions to Dismiss the 08 case *without* prejudice pursuant to Rule 10(a), ADRR since the statutory timeframe to mediate had passed, but denied the Motion to Dismiss in the 09 case since the defendants were never served with the Notice of Intent in the 09 case. However, the trial court chose a third, and improper option, by dismissing both the 08 and 09 cases with the Substitute Order. This third option was also the most unjust, time-consuming, expensive, and inefficient option to resolve the party's mediation process dispute in the 08 and 09 cases.

The trial court improperly dismissed the 08 case, improperly denied the plaintiff's Motion to Compel Mediation in the 08 case, and improperly dismissed the 09 case for the reasons stated in this brief with the Substitute Order. The trial court's decision in dismissing both the 08 and 09 cases and not compelling mediation in the 08 case was in direct contravention of the statute and the ADR Rules. Therefore, Substitute Order must be reversed.

- I. THE SUBSTITUTE ORDER MUST BE REVERSED SINCE TRIAL COURT APPLIED THE RULES OF CIVIL PROCEDURE INSTEAD OF THE ADR RULES TO RESOLVE THIS MEDICAL MALPRACTICE PRE-LITIGATION MEDIATION DISPUTE CONCERNING THE MEDIATION TIMEFRAME IN § 15-79-125(C).

The filing and serving of a Notice of Intent to File Suit for a medical malpractice claim pursuant to § 15-79-125 [the statute] starts the pre-litigation mediation process set forth in subsection (C) of the statute for medical malpractice claims [the mediation process]. The mediation process is governed by the ADR Rules according to § 15-79-

125(C) and Rule 1(c), ADRR. Section § 15-79-125(C) also sets for the one hundred twenty (120) day timeframe for the parties to hold the mediation as well as the extended sixty (60) day timeframe for the mediation for good cause show [the statutory timeframe]. Rule 4, ADRR sets forth the procedures for the appointment of the mediator by the circuit court or the selection of a mediator by the parties in the mediation process. Rule 5(f), ADRR reiterates the requirement in § 15-79-125(C) that all pre-litigation medical malpractice mediations shall be held not later than one hundred twenty (120) days after all defendants are served with the Notice of Intent to File Suit or as the Court directs.

Rule 10, ADRR outlines the sanctions the circuit court can impose on the parties if a Proof of ADR has not been filed with the Clerk of Court within the time limits required by the ADR Rules. If no Proof of ADR has been timely filed, the circuit court may issue a Rule to Show Cause why sanctions should not be imposed, including the dismissal of an action without prejudice or the striking of a pleading. Rule 10(a), ADRR. If a party subject to the ADR Rules violates any provision of the ADR Rules without good cause, the Court may, on its own motion or motion by any party, impose other lawful sanctions. Rule 10(b), ADRR.

The defendants argued that the dispute in this case concerning the § 15-79-125 medical malpractice claim mediation process was governed by the Rules of Civil Procedure and not the ADR Rules. (R. pp. 131-33, 143-45). The plaintiff argued that the ADR Rules controlled the dispute according to the statute and the ADR Rules. (R. pp. 112-14, 126-30, 147-48). The parties could not find any South Carolina case law addressing the issues in the defendants' Motions to Dismiss or the plaintiff's Motion to

Compel Mediation. As a result, the parties were unable to present any case law to aid the trial court in ruling on these motions.

A. There was no “action” or “civil action” pending before the trial court in the 08 or 09 cases.

As a preliminary matter, the plaintiff asserts that the language in the Substitute Order referring to “action” or “this action” is improper. (R. pp. 118-19, 121-22). Specifically, the language on page four holding that the “motion of the defendants to dismiss *this action* is granted” is improper. (R. p. 8) (emphasis added). The plaintiff has only filed a Notice of Intent in both the 08 and 09 cases as required by § 15-79-125. The only legal matter that was pending before the trial court was 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 because the parties have never completed the pre-litigation mediation in either 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.

The Substitute Order should have addressed the defendants’ Motions to Dismiss the Notice of Intent in the 08 and 09 cases. The trial court was improperly using the term “action” in the Substitute Order. The Substitute Order must be reversed because of this error at law.

B. Rule 10(a), ADRR provides the sole remedies for addressing the parties' failure to mediate a medical malpractice claim within the timeframe set forth in § 15-79-125(C).

The trial court improperly dismissed the 08 and 09 cases pursuant to Rule 12(b)(1), SCRPC for the parties' failure to mediate within the statutory timeframe. The trial court erred because the sole remedies for any disputes in the medical malpractice claim mediation process are found in the ADR Rules. Specifically, the proper remedies for the failure to mediate the case within the statutory timeframe are found in Rule 10(a), ADRR. The trial court in the instant case had the authority to impose various sanctions on the parties for failing to mediate the case within the statutory timeframe pursuant to Rule 10(a), ADRR. The trial court had the authority to dismiss the 08 case *without prejudice* or to strike the Notice of Intent in the 08 case pursuant to Rule 10(a), ADRR. However, the trial court did not have the authority to dismiss the 08 and 09 cases pursuant to Rule 12(b)(1), SCRPC for lack of subject matter jurisdiction. The Substitute Order is controlled by this error of law and must be reversed on appeal.

C. The Rules of Civil Procedure do not provide any remedies for the parties' failure to mediate a medical malpractice claim within the statutory timeframe.

The defendants' Motions to Dismiss in the 08 and 09 cases were made pursuant to Rule 12(b)(1), SCRPC on the basis that the trial court lacked jurisdiction to mandate mediation outside of the statutory timeframe. As noted in the prior paragraph, Rule 10(a), ADRR provides the sole remedies when the parties fail to mediate a case within the statutory timeframe. Additionally, § 15-79-125 and the ADR Rules do not specifically allow a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction for failure to mediate.

Rule 12(b), SCRCP itself illustrates a clear reason why it cannot apply to a Notice of Intent filed under the statute. Rule 12(b), SCRCP only provides for defenses and objections *to a cause of action in any pleading*. Rule 12(b), SCRCP notes, “Every defense, in law or fact, *to a cause of action in any pleading*, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required...” (emphasis added). A Rule 12(b)(1), SCRCP motion cannot apply to a Notice of Intent filed pursuant to § 15-79-125 because there is no “action” or “cause of action” pending before the trial court with the Notice of Intent as outlined in Subsection A. The only matter pending before the trial court in the instant case was a Notice of Intent in both the 08 and 09 cases. The Notice of Intent in a medical malpractice claim does not present any cause of action. The defendants are not required to file a pleading in response to the Notice of Intent.

The defendants’ Motions to Dismiss in the 08 and 09 cases were improper since they were based upon the Rules of Civil Procedure and were not based upon the ADR Rules as required by the statute and the ADR Rules. The Substitute Order dismissing the 08 and 09 cases according to the Rules of Civil Procedure was improper because it was not based upon the ADR Rules as required by the state and the ADR Rules. Therefore, the Substitute Order must be reversed for this error of law.

II. THE SUBSTITUTE ORDER GRANTING THE DEFENDANTS' MOTIONS TO DISMISS IN THE 08 AND 09 CASES MUST BE REVERSED SINCE IT CONTAINS SEVERAL ADDITIONAL ERRORS OF LAW.

A. Defendant Jones only moved to dismiss the Notice of Intent in both the 08 and 09 cases, and Defendant Anderson only moved to dismiss the Notice of Intent in the 08 case.

The language in the second paragraph on the first page of the Substitute Order noting that the defendants have moved “to dismiss the plaintiff’s *lawsuit*” is improper. (R. p. 5) (emphasis added). The first paragraph on the first page of defendant Jones Motion to Dismiss in the 08 case requests that the court dismiss the Notice of Intent (R. p. 21), and defendant Jones requests the same relief in his Motion to Dismiss in the 09 case (R. p. 24). Defendant Anderson’s Motion to Dismiss in the 08 case only requests that the court dismiss the Notice of Intent. (R. p. 16).

The defendants have not moved to dismiss any “lawsuit” in the 08 or 09 cases. In fact, there was no “lawsuit” pending before the trial court for the plaintiff’s medical malpractice claim, and there has never been any “lawsuit” before the trial court on this claim, because the parties have never completed the pre-litigation mediation. The Substitute Order would have been proper if it indicated that the defendants have moved to dismiss the plaintiff’s Notice of Intent in both the 08 and 09 cases. This Court must reverse the Substitute Order because of this error of law.

B. The Substitute 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 Substitute Order is improper since it is unclear whether it is dismissing just the 08 case or both the 08 and 09 cases. The caption area at the top of the first page of the Substitute Order does list both the 08 and 09 civil action numbers. (R. p. 5). However, the trial court used only singular terms in the body of the Substitute Order when discussing both

cases. In the second paragraph on the first page, the Substitute Order refers to “the plaintiff’s lawsuit” and not lawsuits. (R. p. 5). On the fourth page, the Substitute Order only dismisses “this action” and not these actions. (R. p. 8).

Most importantly, the Law and Discussion section of the Substitute Order³ only analyzes the failure of the parties to conduct the pre-litigation mediation in the 08 case within the statutory timeframe provided by 15-79-125(C). (R. pp. 6-8). The Substitute Order does not even discuss the mediation or mediation process for the 09 case. The Substitute Order should have been clear as to whether it dismissed just the 08 case or whether it dismissed both the 08 and 09 cases. This Court must reverse the Substitute Order because of this error of law.

C. The Substitute Order is unclear as to whether it is dismissing the 08 and/or the 09 case with or without prejudice.

The Substitute Order is improper because it is unclear whether it is dismissing the 08 and/or the 09 case with or without prejudice. As noted in Section I., Rule 10(a), SCADRR only gives the trial court the authority to dismiss the case *without* prejudice if the parties do not file Proof of ADR within the statutory timeframe in § 15-79-125(C). The trial court does not have the authority under the ADR Rules to dismiss the case *with* prejudice for the parties’ failure to mediate. Defendant Jones admitted to the trial court that Rule 41(b), SCRCPC regarding involuntary dismissal did not apply to his argument for the dismissal of the 08 or 09 cases. (R. p. 136). The plaintiff argued that the Substitute Order is unclear as to whether it was dismissing the 08 and/or the 09 case with or without prejudice. (R. pp. 121-22, 130). If the Substitute Order does in fact dismiss the 08 case and/or the 09 case *with*

³ The Substitute Order does refer to the 09 case in a footnote on page two. (R. p. 6).

prejudice, then the Substitute Order is improper. Regardless, the Substitute Order is unclear on this issue. This Court must reverse the Substitute Order because of this error of law.

D. The trial court had no valid legal basis to dismiss the 09 case.

The trial court had no valid legal basis to dismiss the 09 case if the trial court did in fact intend to dismiss the 09 case with the Substitute Order. In the Law and Discussion section on pages two, three, and four, the Substitute Order only analyzes the issue of conducting a mediation within the statutory timeframe in the 08 case. (R. pp. 6-8). The Substitute Order does not discuss any other issue or legal principle relating to the 09 case.

The defendants had not been served with the Notice of Intent in the 09 case at the time of the motion hearing. According to § 15-79-125(C) and Rule 5(f), ADRR, the statutory timeframe in which to conduct a pre-litigation mediation does not start until the service of the Notice of Intent on the defendants. The parties agreed that the statutory timeframe in which to conduct the mediation had not begun to run in the 09 case for this failure of service.

The plaintiff argued that the trial court had no valid legal basis to dismiss the 09 case for a failure to mediate within the statutory timeframe, or for any other reason. (R. pp. 122-26). The trial court provided no valid legal basis to dismiss the 09 case in the Substitute Order. If the trial court intended to dismiss the 09 case for failure to mediate within one hundred twenty (120) days, the Substitute Order is controlled by an error of law and must be reserved.

III. THE SUBSTITUTE ORDER MUST BE REVERSED SINCE THE TRIAL COURT'S DENIAL OF THE PLAINTIFF'S MOTION TO COMPEL MEDIATION IN THE 08 CASE DID NOT COMPORT WITH THE SCOPE AND PURPOSE OF THE ADR RULES.

A. The trial court had jurisdiction to address the plaintiff's Motion to Compel Mediation in the 08 case.

As an initial matter, neither § 15-79-125, nor the ADR Rules, support the defendants' arguments that the trial court did not have jurisdiction to address the plaintiff's Motion to Compel Mediation in the 08 case. The statute and the ADR Rules do not state that a Notice of Intent is "stale" if the case is not mediated within the statutory timeframe. The statute and the ADR Rules do not indicate that the trial court loses jurisdiction over a Notice of Intent if the case is not mediated within the statutory timeframe. In fact, § 15-79-125(D) clearly states that the circuit court has jurisdiction to enforce the provisions of this section. Subsection (D) does not put any limits on the circuit court's jurisdiction to enforce the mediation requirements in § 15-79-125(C). Therefore, the plaintiff's Motion to Compel Mediation in the 08 case was properly before the trial court.

B. The trial court did not follow the requirement of Rule 1, ADRR, that the ADR Rules be construed to secure the just, speedy, inexpensive, and collaborative resolution in every action to which they apply in denying the plaintiff's Motion to Compel Mediation and granting the defendants' Motions to Dismiss in the 08 case.

The trial court improperly denied the plaintiff's motion to compel the mandatory pre-litigation mediation in the 08 case [the mediation] by ignoring the requirement in Rule 1, ADRR that the ADR Rules "shall be construed to secure the just, speedy, inexpensive, and collaborative resolution in every action to which they apply." The more just, speedy, and inexpensive resolution, and the more judicially efficient remedy, for the motions

pending before the trial court in the 08 case would have been for the trial court to compel the parties participate in the mediation. This ruling would have been based upon the collaborative efforts of the parties, and the parties' conduct and representations, from the date the Notice of Intent was filed and served in the 08 case in November 2008 until the filing of the plaintiff's Motion to Compel Mediation in May 2009.

The parties worked together for nearly four (4) months from mid January 2009 through mid May 2009 to try and get the mediation scheduled at a mutually convenient time. Defendants' attorneys repeatedly insisted that the mediation was merely a formality and that the plaintiff's medical malpractice claim would not settle during the mediation process. The first mediation scheduled for March 12, 2009 would have taken place within the one hundred twenty (120) day timeframe. The second mediation scheduled for March 18, 2009 would have occurred within the one hundred twenty (120) day timeframe. Regardless, the first and second mediations were all canceled for valid reasons.

The parties all consented to a mediation on May 20, 2009 even though that date was beyond the one hundred twenty (120) day timeframe in § 15-79-125(C). The 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 the mediation expired. It was not until six (6) days before the mediation set for May 20, 2009 that the defendants decided to refuse to participate in the mediation based on the technicality that it was set greater than one hundred twenty (120) days from the service of the Notice of Intent in the 08 case, and the plaintiff did not have a court order allowing the 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 mediation that was set beyond the one hundred twenty (120) day deadline, but within the sixty (60) day good cause extended deadline. The defendants' attorneys should have been estopped from attempting to invoke the technical deadlines and limitations for conducting the mediation that are found in § 15-79-125(C) based upon their conduct during the prior four months leading up to the mediation process dispute in the 08 case. Accordingly, the Court should have granted the plaintiff's Motion to Compel Mediation in the 08 case. The Substitute Order must be reversed because of this error of law.

IV. THE SUBSTITUTE ORDER MUST BE REVERSED SINCE THE TRIAL COURT REFUSED TO RULE ON SEVERAL ISSUES RAISED BY THE PARTIES IN THE 08 AND 09 CASES.

A. The Substitute Order was silent on the arguments made by defendant Jones on the actual merits of the plaintiff's medical malpractice claim and Jones' Statute of Limitations defense in both the 08 and 09 cases.

On page two 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 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. This Statute of Limitations defense was never properly raised in the 08 or 09 case. Defendant Jones had never been asserted this defense in any responsive pleading because the plaintiff had not filed his medical malpractice action on the merits. As a result, the Court did not have the merits of the plaintiff's medical malpractice claim or defendant 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 Substitute Order is likely silent regarding both of those issues because they were not properly before the trial court. Regardless, the plaintiff tried to make certain with his Motion for Reconsideration and/or to Alter or Amend the Judgment 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 Substitute Order in light of the fact that Defendant Jones included them in his motions. The trial court did not address the plaintiff's request to clarify these issues in the Substitute Order. The Substitute Order should have noted that the trial court 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. The Substitute Order should be reversed on appeal for this error of law.

B. The Substitute Order was silent on the arguments made by defendant Jones that the plaintiff cannot file additional Notices of Intent if the first Notice fails to comply with the statute.

Defendant Jones asserted that § 15-79-125 [the statute] does not allow the plaintiff to file additional Notices of Intent if the first Notice fails to comply with the statute. (R. pp. 21, 24; pp. 132-33, 136). However, defendant Jones did not provide any valid legal basis in support of his assertion on this issue. The statute and the ADR Rules do not specifically address the filing of another Notice of Intent if the first Notice fails to comply with the statute. Notwithstanding defendant Jones' lack of legal authority for his position, the only motion brought by defendant Jones in the 08 and 09 cases was to dismiss the 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. Defendant Jones acknowledged that the Notice of Intent in the 09 case had not been served on the defendants so the statutory mediation timeframe had not begun to run on the 09 case.

The plaintiff argued that nothing in § 15-79-125 or the ADR Rules put any limitations on filing a second Notice of Intent for a medical malpractice claim if the first Notice of Intent fails to comply with the statute. (R. p. 116). The statute does not provide any specific 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 forth any such rule. The fact that Rule 10(a), ADRR allows the court to dismiss a case *without* prejudice if the parties do not participate in a mandatory mediation suggests by implication that a plaintiff can file a second Notice of Intent if the original Notice of Intent is dismissed without prejudice.

The issue of filing additional Notices of Intent if the first Notice failed to comply with the statute did come up briefly in the parties' arguments on these motions. The Substitute Order is silent regarding whether the statute allows for filing additional Notices of Intent if the first Notice fails to comply with the statute. The Substitute Order should have held that the statute allows for filing additional Notices of Intent if the first Notice fails to comply with the statute. Since the Substitute Order is silent on this issue, it must be reversed.

CONCLUSION

For the reasons stated herein, the plaintiff respectfully requests that the Court of Appeals reverse the trial court's Substitute Order granting the defendants' Motions to

Dismiss in the both 08 and 09 cases and denying the plaintiff's Motion to Compel Mediation in the 08 case.

Respectfully submitted,

December 30, 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

RECEIVED
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SC Court of Appeals

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.

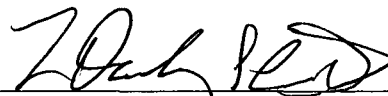
PROOF OF SERVICE

I certify that I have served the Brief of Appellant and Reply Brief of Appellant on Dr. Webster N. Jones, III by depositing a copy of it in the United States Mail, postage prepaid, on December 30, 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 Brief of Appellant and Reply Brief of Appellant on Dr. David R. Anderson by depositing a copy of it in the United States Mail, postage prepaid, on December 30, 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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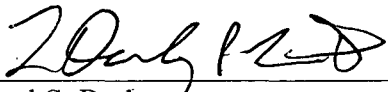
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CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Appellant and Reply Brief of Appellant
comply with Rule 211(b), SCACR.

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