

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

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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.

REPLY BRIEF OF APPELLANT

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v.

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

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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 MEDIATION 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?

The plaintiff contends that the Court of Appeals must reverse the Substitute Order entered for both the 08 and 09 medical malpractice pre-litigation mediation cases because it contains several errors of law and inconsistencies as outlined in his Initial Appeal Brief and 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 statute]. 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 and the extended sixty (60) day timeframe, pursuant to § 15-79-125(D) and the South Carolina Alternative Dispute Resolution Rules [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 South Carolina Rules of Civil Procedure [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), SCRCF. (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 [Motion to Dismiss] 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), SCRCF 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 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 § 15-79-125 and the ADR Rules give the trial court its only two options 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 with the Substitute Order for the reasons stated in these Briefs. The trial court's decision in dismissing both the 08 and 09 cases and not compelling mediation in the 08 case was an abuse of discretion and was in direct contravention of the statute and the ADR Rules. Therefore, the trial court's Substitute Order must be reversed.

ARGUMENTS

S.C. Code § 15-79-125 [the statute] outlines several prerequisites¹ that must be met before a plaintiff can file a civil action against a defendant for a medical malpractice claim. Section 15-79-125(C) requires the plaintiff and proposed defendant(s) to participate in a mandatory pre-litigation mediation [the mediation]. The 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),

¹ 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.

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), SCRCF.

I. THE SUBSTITUTE ORDER MUST BE REVERSED SINCE THE TRIAL COURT IMPROPERLY DISMISSED THE 08 AND 09 CASES PURSUANT TO RULE 12(b)(1), SCRCF.

The defendants requested that the trial court dismiss the 08 and 09 cases pursuant to Rule 12(b)(1), SCRCF and the statute in their Motions to Dismiss. (R. pp. 16-18; pp. 21-23; pp. 24-26). They argued for a dismissal on this ground at the motions hearings. (R. pp. 92-99, 101-04; pp. 131-45). The defendants did not request a dismissal on any other basis, including the ADR Rules generally, Rule 10(a), ADRR, Rule 10(b), ADRR, or Rule 37(b), SCRCF. The trial court granted the defendants’ motions to dismiss with its substitute Order of February 18, 2010. However, the trial court did not base its dismissal of both cases on the ADR Rules. While the order dismissing these cases does not specifically indicate they were dismissed pursuant to Rule 12(b)(1), SCRCF, the only logical conclusion for the basis

of the dismissal is that it was done pursuant to Rule 12(b)(1), SCRCPP and not the ADR Rules since the 12(b)(1) dismissal was the specific, and only, remedy requested by the defendants in their motions to dismiss.

The statute does not provide any remedies for noncompliance with the pre-litigation mediation process set forth in § 15-79-125(C) within the actual text of the legislation. The medical malpractice pre-litigation mediation process is governed by the ADR Rules according to § 15-79-125(C) and Rule 1(c), ADRR. The only remedies for failure to act according to the statute are found in the sanctions provisions in Rule 10, ADRR. Rule 10, ADRR does not provide for the dismissal of a pre-litigation mediation case filed under the statute pursuant to Rule 12(b)(1), SCRCPP. Therefore, the trial court did not have the authority under the ADR Rules or the statute to dismiss the 08 and 09 cases for lack of subject matter jurisdiction under Rule 12(b)(1), SCRCPP. The trial court acted beyond its legal authority and outside of its discretion in dismissing both cases for a lack of subject matter jurisdiction. Accordingly, the Order dismissing the 08 and 09 cases must be reversed.

The defendants seem to acknowledge in their Initial Appeal Brief that the trial court did in fact dismiss these cases for a lack of subject matter jurisdiction when they argue that the Notices of Intent became “stale” or invalid where mediation is not held within the statutory deadline. They also seem to argue that the trial court acted properly by dismissing both cases for a lack of subject matter jurisdiction. The defendants argue that a dismissal for failure to comply with the mediation deadline was akin to this Court’s dismissal of an appeal for failure to timely serve and file a Notice of Appeal. The defendants rely on Holroyd v. Requa, 361 S.C. 43, 603 S.E.2d 417 (Ct. App. 2004) and

Elam v. S.C. Dept. of Transportation, 361 S.C. 9, 602 S.E.2d 772 (2004) in support of this argument.

Notwithstanding the issue raised just above about the trial court not having the legal authority or discretion under the statute and ADR Rules to dispose of both cases in this manner, the defendants comparison of a failure to comply with the mediation deadline in the statute with a failure to timely file and serve a Notice of Appeal is logically and factually flawed and not supported by any legal authority. The issue in Holroyd and Elam is the timeliness of filing a Notice of Appeal to start an appeal of an unfavorable outcome in the trial court. Those cases do not mention anything about failing to meet a statutorily prescribed mediation deadline in a medical malpractice pre-litigation case. The issue, holding, and reasoning in those cases have absolutely no relationship to the issue in the instant case. In fact, those cases were decided before the medical malpractice pre-litigation mediation statute was enacted in 2005.

The issue in Holroyd and Elam concerned a service and jurisdictional problem. Those decisions noted that this Court does not have jurisdiction over an appeal until a Notice of Appeal is timely filed and served on an opposing party. The instant case does not have any service or initial jurisdiction issues that would make it analogous to Holroyd and Elam. In the instant case, the trial court had jurisdiction of and control over both cases with the filing of the Notices of Intent according to the statute and the ADR Rules. The plaintiff did not miss any service deadlines in the statute. The trial court never “lost” jurisdiction of both cases for any reason under the statute or ADR Rules. Contrary to the defendants’ argument, the statute does not say, explicitly or implicitly, that the trial court

loses jurisdiction of a Notice of Intent if the parties fail to mediate the case within the statutory timeframe.

II. THIS COURT SHOULD NOT DECIDE THIS APPEAL ON ANY ADDITIONAL SUSTAINING GROUND PROPOSED BY THE DEFENDANTS SINCE THEY NEVER PRESENTED ANY ADDITIONAL SUSTAINING GROUND TO THE LOWER COURT AND IT WOULD BE UNFAIR AND UNWISE TO DO SO.

This Court should not allow the defendants to obtain the dismissal of the 08 and 09 cases with prejudice pursuant to the ADR Rules with the use of the doctrine of additional sustaining grounds as the defendants request in their Initial Appeal Brief. The appellate court may review respondent's additional reasons, and, if convinced it is proper *and fair to do so*, rely on them or any other reason appearing in the record to affirm the lower court's judgment. I'ON, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (emphasis added).

In clarifying the law, we do not mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. I'ON, LLC, 338 S.C. at 421, 526 S.E.2d at 724. While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. Id. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Id. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it. Id.

The plaintiff contends that the defendants never presented the additional sustaining grounds that are relying on in this appeal to the trial court, and it would be unfair and unwise under the factual circumstances of these cases for this Court to use any additional sustaining grounds as a basis to affirm the trial court's Substitute Order. The defendants requested that the trial court dismiss the 08 and 09 cases pursuant to Rule 12(b)(1), SCRCP and the statute in their Motions to Dismiss. (R. pp. 16-18; pp. 21-23; pp. 24-26). They argued for a dismissal on this ground at the motions hearings. (R. pp. 92-99, 101-04; pp. 131-45). The defendants did not request a dismissal on any other basis, including the ADR Rules generally, Rule 10(a), ADRR, Rule 10(b), ADRR, or Rule 37(b), SCRCP. Therefore, the defendants never argued in the lower court that the cases should be dismissed with prejudice pursuant to the ADR Rules. Since this additional sustaining ground was not presented to the lower court, this Court should ignore it.

Additionally, the defendants explicitly and implicitly gave defendant's attorney the impression that the mediation called for in the statute was just a formality and that they would not have a problem with conducting the mediation outside of the statutory timeframe. The defendants asked the trial court to dismiss these cases on an improper basis, and they convinced the trial court to do just that in the Substitute Order. This Court should not allow the defendants to be awarded with the harsh remedy of the dismissal of these cases with prejudice after this course of conduct in the case.

III. THE SUBSTITUTE ORDER MUST BE REVERSED BECAUSE IT IS UNCLEAR AS TO WHETHER IT IS DISMISSING JUST THE 08 CASE, OR WHETHER IT IS DIMISSING BOTH THE 08 AND 09 CASES.

As an initial matter, 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). Therefore, even if this Court finds that the trial court acted properly by dismissing the plaintiff's Notice of Intent in the 09 case against Defendant Jones, this Court must find that the trial court improperly dismissed plaintiff's Notice of Intent in the 09 case against Defendant Anderson since he never requested that relief in the underlying 09 case.

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 plaintiff raised this exact issue on pages 9-10 in his Motions for Reconsideration and/or to Alter or Amend Judgment in the 08 and 09 cases dated September 1, 2009, which was filed after the trial court issued its original Order dismissing both cases. The trial court refused to make a determination on that issue in the original Order and in the Substitute Order after the plaintiff's Motions for Reconsideration of the original Order.² Therefore, the trial court essentially prohibited the plaintiff from obtaining a ruling on this issue after all of these procedural attempts prior to this appeal.

As for the substantive issue at hand, the caption area at the top of the first page of the Substitute Order lists 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).

² The plaintiff thus found himself in between the proverbial rock and a hard place noted in *Elam*, 361 S.C. at 25, 602 S.E.2d at 780-81 as the trial court refused to rule on this issue in the Substitute Order after refusing to rule on it in the original Order and after plaintiff's Motions for Reconsideration of the original Order.

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.

IV. THE SUBSTITUTE ORDER MUST BE REVERSED SINCE IT 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. The plaintiff raised this issue on page 12 in his Motions for Reconsideration and/or to Alter or Amend Judgment in the 08 and 09 cases dated September 1, 2009 after the trial court issued its original Order dismissing both cases. The trial court refused to make a determination on that issue in the original Order and in the Substitute Order after the plaintiff's Motions for Reconsideration of the original order. Therefore, the trial court essentially prohibited the plaintiff from obtaining a ruling on this issue after all of these procedural attempts prior to this appeal.

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), SCRCF 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

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

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* 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.

V. THE SUBSTITUTE ORDER MUST BE REVERSED BECAUSE THE TRIAL COURT'S DENIAL OF THE PLAINTIFF'S MOTION TO COMPEL MEDIATION IN THE 08 CASE AND ITS DISMISSAL OF THE 08 AND 09 CASES WAS AN ABUSE OF DISCRETION THAT DID NOT COMPORT WITH THE SCOPE AND PURPOSE OF THE ADR RULES.

The trial court abused its discretion and acted improperly by denying the plaintiff's Motion to Compel Mediation in the 08 case and dismissing the 08 and 09 cases since it ignored 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 to participate in the mediation. This ruling would have been based upon the collaborative efforts of the parties and on 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 trial court should have granted the plaintiff's Motion to Compel Mediation in the 08 case. Instead, the trial court chose the extremely harsh and improper remedy of dismissing both the 08 and 09 cases. The Substitute Order must be reversed because of this abuse of discretion and error of law.

VI. THE SUBSTITUTE ORDER MUST BE REVERSED SINCE THE TRIAL COURT REFUSED TO RULE ON WHETHER THE STATUTE ALLOWS FOR THE FILING OF AN ADDITIONAL NOTICE OF INTENT TO FILE SUIT 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; 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 plaintiff raised this exact issue on pages 13-14 in his Motions for Reconsideration and/or to Alter or Amend Judgment in the 08 and 09 cases dated September 1, 2009 after the trial court issued its original Order dismissing both cases. The trial court refused to make a determination on that issue in the original Order and in the Substitute Order after the plaintiff's Motions for Reconsideration of the original Order. Therefore, the trial court essentially prohibited the plaintiff from obtaining a ruling on this issue after all of these procedural attempts prior to this appeal.

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.

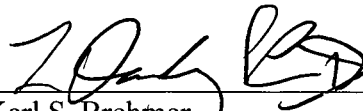
CONCLUSION

For the reasons stated herein and in the plaintiff's Appeal Brief, 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.

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Respectfully submitted,

December 30, 2010



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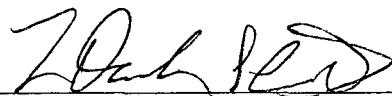
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I certify that I have served the Brief of Appellant and Reply Brief of Appellant on Dr. Webster N. Jones, III by depositing a copy of it in the United States Mail, postage prepaid, on December 30, 2010, addressed to his attorneys of record, John B. 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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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

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SC Court of Appeals

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

John Thomas Ross,.....Appellant,

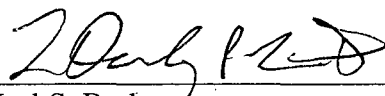
v.

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.

CERTIFICATE OF COUNSEL

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

December 30, 2010


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