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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Judge
Case No. 2012-CP-26-3859

Thomas Rickerson

Appellant,

vs.

John Karl, M.D. and Virginia Bell, CS, FSP

Respondents

FINAL BRIEF OF APPELLANT

LAW OFFICES OF WILLIAM ISAAC DIGGS

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Court commit error and an abuse of discretion with the imposition of dismissal with prejudice when the sanction imposed pursuant to ADR 10(b) and S.C.R.C.P. 36(b) was excessive and extreme in its consequence and the statutory time frame of S.C. Code § 15-79-125 was not jurisdictional?

II. Did the Court commit error by dismissing Appellant's case when ADR 4 imposes an obligation on both parties to contact the mediator regarding the mediation conference, not merely the Plaintiff, and the trial Court's order erroneously relieved the defendant from any such responsibility even after defendants refused to mediate?

III. Did the Court commit error and abuse its discretion by dismissing Plaintiff's action with prejudice when the Plaintiff was lulled into a false sense of security and cooperation by defendants when Defendants sought and received authorization regarding satisfactory assurance from plaintiff regarding release of plaintiff's medical records to the defendants pursuant to subpoena and 45 CFR 164.512(e)(1)(ii)?

IV. Did the Court commit error by dismissing Appellant's case when On January 31, 2013, the Court appointed mediator (Mr. Pearce) wrote the parties indicating that mediation was not feasible due to the positions of the parties in the matter (and a finding find that mediation is not feasible pursuant to § 15-79-125 (E) was reasonable).

V. Did the Court commit error by dismissing Appellant's case when there is no prohibition against filing an Amended Notice of Intent to File Suit pursuant to S.C. Code Ann § 15-79-125 as the statute of limitations had not run in this case?

STATEMENT OF THE CASE

On May 15, 2012, Plaintiff filed a notice of intent to file suit in keeping with S.C. Code Ann 15-79-125. The case was not mediated within the time frames included in the statute. A mediator was court appointed on December 13, 2012, by the Horry County Clerk of Court, and Appellant received notice of that appointment on December 19, 2012. On December 20, 2012, Appellant attempted to schedule mediation with that mediator. On December 20, 2012, defendants filed a motion to dismiss with prejudice in reliance on ADR 10 and S.C.R.C.P. 37(b), and defendants thereafter wholly refused to mediate. Appellant filed an Amended Notice to File Suit on January 4, 2013, and again attempted to schedule mediation. Defendants continuously refused to mediate the case. Defendants' motion to dismiss was heard on April 22, 2013, by the Honorable Benjamin H. Culbertson, Judge, and on even date therewith, Judge Culbertson granted defendants' motion to dismiss with prejudice. Appellants timely filed a motion to reconsider and Judge Culbertson asked the parties to brief the issues argued in the motion to reconsider. On June 27, 2013, Judge Culbertson mailed the parties a letter notifying them that a Form 4 Order was being entered denying Appellants' motion for reconsideration. This appeal follows.

INTRODUCTION

This is a medical malpractice case. In 2007, Plaintiff underwent coronary bypass surgery, not performed by these defendants. Thereafter, in connection with that surgery, Plaintiff was prescribed Coumadin and aspirin, both of which are known to cause serious bleeding. **R. 8.** Appellant's cardiology team also prescribed Lasix for presumed congestive organ failure. Subsequently, in July 2011, Appellant developed a series of

skin lesions. He saw defendants, Dr. John Karl and nurse practitioner and clinical specialist, Virginia Bell, who prescribed Bactrim to treat the skin lesions. **Id.** Appellant became extremely ill from a toxic combination of the prescribed medications and had to be hospitalized. This set the Appellant on a path of disastrous complications, including, bleeding and renal failure, that almost claimed his life. **R. 9.** Appellant recovered, and then sought to bring an action against defendants for negligence and medical malpractice with the filing of this Notice of Intent to File Suit pursuant to S.C. Code Ann § 15-79-125.

Procedural History

On May 15, 2012, Appellant filed a Notice of Intent to File Suit, 2012-CP-26-3859, in keeping with S.C. Code Ann. § 15-79-125. **R. 6.** However, Plaintiff did not file the specific blank form required by ADR 4(c).[1] In early July, 2012, attorneys Lydia Magee and Marian Scalise entered a joint notice of appearance on behalf of the defendants, but they did not object to the form as filed by the Plaintiff, and they never raised this omission by the Plaintiff as an issue. Defendants did ask Appellant's counsel to agree to allow them to collect medical records from Appellant's medical providers, however, and he did so. Defendants sought authorization from Appellant regarding the release of medical records by subpoena to providers via Satisfactory Assurance, pursuant to HIPPA's subpoena procedure set out at 45 CFR 164.512(e).[2] **R. 101.** This satisfactory

[1] This portion of the ADR rule reads, "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.* Emphasis added. Thus no mediator was appointed at that time.

[2] 45 CFR 164.512(e)(1)(ii) states: (e) ***Standard: Disclosures for judicial and administrative proceedings.*****(1)** ***Permitted disclosures.*** A covered entity may disclose protected health information in the course of any judicial or administrative proceeding: . . . (ii) In response to a

assurance was provided by plaintiff to counsel for the defendants, which subpoenas bore notice of satisfactory assurance to the medical providers who received these subpoenas from defendants. **R. 109 – R. 260.**

On September 19, 2012, at Appellant's request, defendants provided copies of medical records received by them to that date to Appellant. On December 6, 2012, defendants provided the remaining copies of medical records to the plaintiff. On September 6, 2012, plaintiff received a letter from Attorney, Magee, stating that she had received an order for court protection for the dates of December 10, 2012 through February 22, 2013. **R. 93 – R. 97.** Defendants never notified the plaintiff that they had concluded their gathering of medical records and they never informed Appellant's counsel that Attorney Scalise would pursue a different course without Attorney Magee and require the Appellant to adhere to the time line for mediation contained in S.C. Code Ann § 15-79-125.

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subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if: (A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or (B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section."

Section 164.512(e)(1)(iii) states, "(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that: (A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address); (B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and (*1*) No objections were filed; or (*2*) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.

The Office of the Clerk of Court filed a Notice of ADR on December 13, 2012, within the 180 day period of time prescribed by S.C. Code Ann § 15-79-125(C) (including allowed extensions). **R. 89.** Appellant received that notice on December 19, 2012. On that date, representatives from the office of Appellant's counsel called the court appointed mediator and defendants' counsel, and attempted to schedule the mediation. Dates of availability were received from the mediator, including January 22, 2013, but defendants' counsel ignored plaintiff's request. **R. 75, lines 23 – 25; Tr. 76, lines 11 - 16.**

On December 20, 2012, plaintiff's counsel sent a letter to the mediator and defense counsel scheduling mediation for the January 22, 2013, date. **R. 102 .** On that same date, however, defendants' counsel filed a motion to dismiss in case 2012-CP-26-3859. **R. 24.** The motion argued that dismissal with prejudice was an appropriate sanction as a result of the parties inability to mediate the case within the statutory time frame of S.C. Code Ann. § 15-79-125, and based the argument by application of ADR 10(b) and S.C.R.C.P. 37(b), dismissal would be an appropriate discretionary sanction. The argument was not based on jurisdictional time limits, remarkably, but alleged misconduct by Appellant's counsel.

On December 24, 2012, Appellant's counsel mailed for filing a Return to the motion to dismiss pointing out that the statute of limitations was still years away. **R. 26.** On January 4, 2013, plaintiff's counsel received a letter of introduction from the Court appointed mediator dated January 2, 2013, discussing the mediation process. **R. 103 .** On January 4, 2013, Appellant filed an Amended Notice of Intent to File Suit curing the defect in the initial notice filing. **R. 10** . Likewise on the same date, Appellant's mailing was transmitted to the mediator along with a letter offering to mediate the case on the

date of January 22, 2013, as initially suggested by the mediator's assistant. **R. 104**. However, shortly thereafter, on January 8, 2013, Mr. Pearce sent a letter to the parties stating he couldn't mediate the case on January 22, 2013, due to scheduling conflict which had arisen. **R. 105.** Plaintiff's counsel responded on January 10, 2013, stating that plaintiff would mediate as mediator's schedule allowed. **R. 106.** However, defendants refused to mediate the case. **R. 107** . Mr. Pearce thereupon withdrew any effort to pursue mediation. **R. 108**. There the case sat for almost three (3) more months waiting for defendants' motion to dismiss to be heard.

Defendants' motion to dismiss was heard on April 22, 2013, the same day the parties were to attend the sanctions roster meeting which dealt with cases which had not been mediated. **R. 90**. Defendants' counsel argued that the case had to be mediated within 90 days and that under the statute no later than 120 days. **R 71, lines 7-12.** Because the case had not been mediated within that specific timeframe, defendants argued that the case should be dismissed with prejudice by application of ADR 10(b) used in conjunction with S.C.R.C.P. 37 (b)! **R. 71, line 19 – R 72, line 4**. Plaintiff argued that as long as discovery was proceeding and neither party made an issue of the time frame included in the statute, which was the circumstances here, that the parties could mediate the case at any time, **R. 72, line 7 – R. 73, line 10**, because the statutory timeframes were not jurisdictional. **R. 73, lines 7 – 10; R. 77, lines 6-20**. Apparently, however, the Court felt that the time limit was jurisdictional. **R. 73, lines 11 – 14; R. 9, line 21 – R. 10, line 3**. Plaintiff's counsel argued that ADR 4 placed a responsibility on both parties to contact the mediator. **R. 6, lines 4 – 19**. The trial Court rejected Appellant's argument relating to the Amended filing and defendants' refusal to mediate

because that activity occurred outside the time frame set forth in the statutory complex. **R. 18, lines 4 – 15.**

We submit the information gathering and notification of protection to medical providers reasonably signaled a good faith intention by defendants, through attorney Magee, to prepare to mediate the case. Indeed, even as of December 6, 2012, defendants had never communicated with the plaintiff about mediation but was still receiving medical records gathered by subpoena. Therefore, Plaintiff was not concerned specifically about the statutory time frame because counsel thought defendants were investigating and preparing to mediate the case on its merits, and that defendants themselves were not making time limitations an issue for mediation because they themselves had never attempted to contact a mediator.

Argument I

The Court committed error and an abuse of discretion with the imposition of dismissal with prejudice when the sanction imposed pursuant to ADR 10(b) and S.C.R.C.P. 37(b) was excessive and extreme in its consequence and the statutory time frame of S.C. Code Ann. § 15-79-125 was not jurisdictional. (Question I).

Since the entry of the trial court's order of April 24, 2013, the case of *Ross v. Waccamaw Community Hospital,* 404 S.C. 56, 744 S.E.2d 547 (2013), was decided. In Ross, the Court held that the statute S.C. Code Ann. § 15-79-125 does not state that the time frames set out in the statute are jurisdictional with respect to failing to complete the required mediation, that the defendants' argument means that a defendant could control jurisdiction in a medical malpractice case by unilaterally delaying mediation; and the statute grants courts the power to excuse noncompliance with the time limits because it

actually gives circuit courts' jurisdiction to enforce the time limits.[3] Defendants led Appellant to believe the time limitations contained within the statute were not going to be interposed in Appellant's case during acquisition of medical records[4] and the Ross opinion says they may not be allowed to manipulate the system and deny Appellant access to the Courts.

ADR 10 and S.C.R.C.P. 37(b)

Dismissal with prejudice is not an appropriate sanction in this instance. Defendants gathered voluminous medical records with the consent of plaintiff as defendants' requests covered a number of years over which plaintiff had received medical treatment from a good number of health care providers. Defendants sought authorization from plaintiff regarding the release of plaintiff's medical records by subpoena to providers via Satisfactory Assurance, pursuant to HIPPA's subpoena procedure set out at 45 CFR 164.512(e). This satisfactory assurance was provided by plaintiff to counsel for the defendants, which subpoenas bore notice of *satisfactory assurance* to the medical providers who received these subpoenas from defendants. **R. 109 – R. 260** .

"[When] the effect will be ... granting judgment by default or dismissal, a preclusion order may be made *only if there is some showing of willful disobedience or gross indifference to the rights of the adverse party.*" *Orlando v. Boyd,* 320 S.C. 509, 512, 466 S.E.2d 353, 355 (1996), emphasis added; citing, *Dunn v. Dunn*, 298 S.C. 499,

[3] Defendants have maintained the position that Appellant's counsel made no effort to schedule mediation and that defendants had no responsibility to comply with the S.C. Code Ann. § 15-79-125 or ADR rules. Appellant understands that it is simply going to take an order from this Court to either compel defendants to mediate or allow Appellant to proceed to trial.

[4] As discussed infra, defendants served forty-five (45) subpoenas on Appellant's medical providers. **R. 109 – R. 260.**

381 S.E.2d 734 (1989); and *Kershaw Co. Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990). Thus, "a sanction of dismissal is too severe if there is no evidence of any intentional misconduct." *Barnette v. Adams Brothers Logging, Inc*, 355 S.C. 588, 592, 586 S.E.2d 572 (2003); *Bryson v. Bryson*, 378 S.C. 502, 662 S.E.2d 611 (Ct.App. 2008). Even abuses of discovery ***orders*** require discretion before dismissing an action. See *McNair v. Fairfield County*, 379 S.C. 462, 466, 665 S.E.2d 830 (Ct.App. 2008)(". . . [S]severe sanctions, such as the dismissal of an action, should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights." (And Cases collected and cited therein).

In those cases where our Supreme Court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases ***in the face of repeated warnings*** to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect. *See Small v. Mungo,* 254 S.C. 438, 443, 175 S.E.2d 802, 804 (1970) (finding no abuse of discretion where counsel was in his office and plaintiff and witnesses were at work when the case was called for trial, and counsel informed the court that he could not appear for hours); citing *Bond v. Corbin,* 68 S.C. 294, 294-95, 47 S.E. 374, 374 (1904)(upholding a dismissal after plaintiff failed to appear for trial even though he was first up for trial on the docket at a regular term of court and the case was twice continued first until the afternoon, and then again until the next morning at which time plaintiff still failed to appear). There must be some showing of indifference to the rights of the defendant. *E.g., McComas v. Ross*, 368 S.C. 59, 626 S.E.2d 901 (Ct.App. 2006)(the dismissals were, "imposed to maintain the orderly disposition of cases in the face of repeated warnings to

the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect." 368 S.C. at 62).

Therefore, the sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case. *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct.App. 1990). This is especially so when no inquiry into the merits of plaintiff's case was made. *cf* ("[T]he court never made an inquiry into the content of the evidence [the expert witness] would offer. By not getting *any* information about the proposed witness' testimony, the court did not meet its duty of discovering and evaluating the content of the potential evidence.") (Emphasis in original). *Bryson v. Bryson*, 378 S.C. 502, 508, 662 S.E.2d 611 (Ct.App. 2008). In the instant case, Plaintiff nearly died from toxicity caused by a negligent mixing of prescriptive medications as prescribed by the defendants. We respectfully request this Court to reverse the dismissal with prejudice and remand the case to allow the matter to proceed on the merits.

Argument II

The Court committed error when it dismissed Appellant's case with prejudice when ADR 4 imposes an obligation on both of the parties to contact the mediator regarding the mediation conference and the Defendant was completely relieved of this responsibility and rewarded for their neglect.

ADR 4(f) states, "***The parties*** shall notify the selected or appointed neutral to initiate scheduling of the ADR Conference." Emphasis added. Thus, the responsibility to contact the mediator for the mediation scheduling is shared by both parties. We submit it is error to (1) relieve the defendant from any responsibility under this rule, and (2) wholly

shift the burden to the plaintiff to schedule the mediation conference, and (3) impose the sanction of dismissal with prejudice against the plaintiff *after the fact* of shifting the burden. This is especially so given the fact that defendants never contacted the plaintiff about the mediation conference, if for no other reason just to let plaintiff know that the defendants were ready to mediate. No mediation conference was ever scheduled, defendants made no contact with a mediator, and indeed, no mediator was even appointed in this case until the clerk of court appointed Christopher Pearce, Esquire, on December 13, 2012, pursuant to the ADR rules.

Moreover, because defendants failed to mediate within the statutory timeframe, we submit it is equally plausible that defendants have waived the right to mediate and thus, plaintiff is entitled to proceed with litigation having done all it could do in the pre-suit mediation process. This is so because (1) defendants were provided notice of intent to file suit; (2) defendants made no effort to schedule a mediation conference; and (3) defendants offered no theory of defense on the merits to plaintiff's allegations of malpractice or medical negligence.

It is important to note that when the plaintiff filed its initial Notice of Intent to File Suit, no mediator was appointed. Thus, when the Clerk of Court appointed Christopher Pearce, on December 13, 2012, just one week after defendants had finished gathering medical information, that order introduced the first involvement of a mediator in this case. Plaintiff attempted to schedule the mediation at that time but defendants refused to mediate arguing that the statutory time frame had run. We submit that defendants may not run out the clock in the face of their obligations under ADR 4, and then affirmatively use their conduct as a sword to block plaintiff's claim altogether. *Ross*

v. Waccamaw Community Hospital, et al. supra. Moreover, Appellant attempted to mediate the case with the court appointed mediator but the defendants refused to participate. Therefore, we submit it is reasonable to argue that defendants themselves should suffer judgment with prejudice against them as to liability and the matter referred for a damages hearing.

Argument III

Plaintiff was lulled into a false sense of security and cooperation by defendants because Defendants sought and received authorization from plaintiff regarding release of plaintiff's medical records to the defendants pursuant to subpoena then essentially switched attorneys and interposed the statutory timeframe as a bar to access the Courts. (Question III).

Plaintiff was lulled into a false sense of security by the defendants. One defense attorney appeared to engage in a good faith effort to collect evidence in preparation of mediation conference then when that attorney sought and received court protection, a second attorney sought dismissal of the matter as a result of the time accorded to defendants to gather that information.

Defendants sought and received authorization from plaintiff for release of plaintiff's medical records by subpoena. Defendants were permitted to offer Satisfactory Assurance to medical providers in their subpoenas which was based upon plaintiff's co-operation. As noted in the Motion for Reconsideration, approximately forty five (45) subpoenas were sent by the defendants to Appellant's medical providers, and witnesses, on the dates indicated below. **R. 106 - 261.**

On September 18, 2012, plaintiff's counsel wrote defendants' attorney, Lydia Magee, Esquire, and asked that plaintiff be provided with copies of materials received from medical providers in response to the subpoenas listed above, **R. 101**; and on September 19, 2012, Attorney Magee provided 4 CD's containing the medical records received as of that date by defendants pursuant to subpoena. As of that date, neither party had scheduled a mediation conference nor had either party sought the appointment of a mediator. Defendants had not informed plaintiff that they were ready to mediate the case and neither party had indicated they had concluded collecting and reviewing materials received via the subpoena process. S.C. Code Ann. § 15-79-125(B) states,

> All named parties may subpoena medical records and other documents potentially related to the medical malpractice claim pursuant to the rules governing the service and enforcement of subpoenas outlined in the South Carolina Rules of Civil Procedure. Upon leave of court, the named parties also may take depositions pursuant to the rules governing discovery outlined in the South Carolina Rules of Civil Procedure.

Plaintiff anticipated that defendants were preparing for mediation by use of this statutory provision.

As noted earlier in this Brief, on or about September 6, 2012, plaintiff received a copy of a letter from Attorney, Magee, to Judge Steven H. John, asking for an order of protection from December 10, 2012 through February 22, 2013, due to maternity leave. **R. 93 .** And on or about December 11, 2012, plaintiff's counsel received a letter and order of protection from co-counsel for the defendants, Miriam Scalise for the dates of February 15 through February 25, 2013. On December 6, 2012, attorney Magee provided a CD with medical records received from an additional provider, Amedisys. One week later, on December 13, 2012, the Clerk of Court appointed Christopher H. Pearce,

Esquire, as mediator in the case. Plaintiff received that notice on December 19, 2012. In response thereto, plaintiff's counsel wrote to Mr. Pearce on December 20, 2012, and scheduled mediation for January 22, 2013. **R. 104.** Also, on December 20, 2012, defendants' attorney, Miriam Scalise, Esquire, filed her Motion to Dismiss based on the fact that the plaintiff had not mediated the case by October 17, 2012. Defendants' counsel had never spoken with the plaintiff's attorney regarding mediation and had never indicated that even though the parties were co-operating regarding the subpoena process called for by S.C. Code Ann. § 15-79-125(B), defendants had no intention of doing anything other than filing a motion to dismiss.

Plaintiff respectfully submits he was lulled into a false sense of security that defendants would let him know when they were ready to mediate the case after their collection of evidence pursuant to S.C. Code Ann. § 15-79-125(B). *Cf Moore v. Pilot Life Insurance Co.,* 205 S.C. 474, 488, 32 S.E.2d 757 (1945) (Statement to the insured .... that [company agent] would procure the blanks for the filing of proofs and would let the insured know when he received them . . . was sufficient to warrant the inference that the insured was lulled into a sense of security and led to believe that no further action on his part was necessary until the agent communicated further with him)." We respectfully submit the trial court committed error when it dismissed Appellant's case with prejudice.

Argument IV

The trial Court committed error when it neglected to find that find that mediation was not feasible pursuant to § 15-79-125 (E), and failed to conclude that plaintiff may continue with the suit as against the defendants.

Christopher Mr. Pearce, Esquire, wrote to the parties on January 2, 2013,

acknowledging that he had been appointed mediator. **R. 103** . On January 4, 2012, plaintiff's counsel forwarded a copy of the amended notice of intent to file suit to the mediator and defendants. **R. 104**. However, defendants refused to participate in the mediation process. Mr. Pearce wrote the parties on January 8, 2013, advising that he had to cancel the mediation of January 22, 2013, due to an unforeseen scheduling conflict. **R. 105.** Then on January 31, 2013, Mr. Pearce wrote the parties indicating that in effect mediation was not feasible due to the positions of the parties in the matter. **R. 108**.

The statute of limitations would not run in this case until July, 2014, as the negligence occurred in this case in July, 2011. *Ranucci v. Crain*, 397 S.C. 168, 179, 723 S.E.2d 242 (Ct.App. 2012), Few, C. J., concurring. ("The statute of limitations on a medical malpractice action is three years. S.C. Code Ann. § 15-3-545(A) (2005))." Therefore, the Clerk of Court's ADR notice is not inconsistent with the provisions of S.C. Code Ann. § 15-79-125. Subsection "C" of this statute states,

> Unless inconsistent with this section, the Circuit Court Alternative Dispute Resolution Rules in effect at the time of the mediation conference for all or any part of the State ***shall govern the mediation process***, including compensation of the mediator and payment of the fees and expenses of the mediation conference.

Emphasis added. The Clerk of Court appointed a mediator and the matter had actually been scheduled for mediation on January 22, 2013. The statute of limitations has not passed in this case and will not until July, 2014, at the earliest. S.C. Code Ann § 15-79-125 (E) states,

> 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. The action must be filed: (1) within sixty days after the mediator determines that the mediation is not

> viable, that an impasse exists, or that the mediation should end; ***or (2) prior to expiration of the statute of limitations, whichever is later.***

Emphasis added. Defendants did not make themselves available for mediation and the time for mediation passed with no effort by defendants to use the statutory mediation process to avoid formal civil litigation. Thus, we submit that the mediator declared this matter could not be resolved through mediation and the plaintiff should be permitted to file suit pursuant to S.C. Code Ann § 15-79-125 (E) (1). We submit the trial court erred by not allowing the litigation to proceed.

V.

The Court erred when it dismissed Appellant's case and failed to reconsider the filing of Appellant's Amended Notice when there is no prohibition against filing an Amended Notice of Intent to File Suit pursuant to S.C. Code Ann § 15-79-125.

Because the matter had not been mediated as of January 4, 2013, plaintiff filed an *Amended Notice of Intent to File Suit* and Christopher Pearce, Esquire, had been appointed as the mediator in the case as of December, 2012. **R. 10; R. 89,** respectively. Defendants never responded to that amended notice and took the position they would mediate this case. **R. 107**. We respectfully submit that the statute S.C. Code Ann § 15-79-125 does not prohibit the filing of an Amended Notice of Intent to File Suit especially if the statute of limitations has not run as was the case here, and the clerk of court had appointed a mediator. Therefore, we submit that the defendants again waived any right to mediate the case by not responding to the Amended filing.

The bottom line is that the defendants chose not mediate the malpractice allegations on the merits. However, that attitude should not be used to prejudice the right

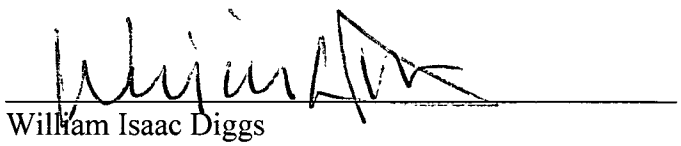
of the Appellant to bring an action against them for negligence. On February 7, 2013, plaintiff filed civil action 2013-CP-26-788, alleging the medical malpractice cause of action in negligence set forth previously in the notice of intent to file suit. We submit this was necessary under S.C. Code Ann § 15-79-125 (E). Of course, the defendants have again filed motions to dismiss due to their failure to mediate this matter. That action remains pending at this time.

CONCLUSION

Plaintiff would respectfully ask this Court to reverse the Order of Dismissal and allow this case to proceed on the merits by declaring that mediation resolution was not possible in this case.

Respectfully submitted,

LAW OFFICES OF WILLIAM ISAAC DIGGS



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ATTORNEY FOR THE APPELLANT THOMAS RICKERSON

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

This is to certify that I have this 30th day of December, 2013, deposited one copy of the Final Brief of Appellant and Final Reply Brief of Appellant in the U.S. Postal Service with proper postage affixed thereto and addressed to opposing counsel as follows:

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