# The South Carolina Court of Appeals

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April 20, 2015

The Honorable Melanie Huggins-Ward
PO Box 677
Conway SC 29528-0677

**REMITTITUR**

Re: Thomas Rickerson v. John Karl
Lower Court Case No. 2012CP2603859
Appellate Case No. 2013-001478

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

Jenya A. Kitchings

CLERK

Enclosure

cc: Marian Williams Scalise, Esquire
Sheila Marlouvon Bias, Esquire
Lydia Lewis Magee, Esquire

John S. Nichols, Esquire
Blake Alexander Hewitt, Esquire
The Honorable Benjamin H. Culbertson

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Rickerson, Appellant,

v.

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

Appellate Case No. 2013-001478

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Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

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Opinion No. 5310
Heard January 6, 2015 – Filed April 1, 2015

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**REVERSED AND REMANDED**

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John S. Nichols and Blake Alexander Hewitt, both of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, for Appellant.

Marian Williams Scalise and Lydia Lewis Magee, both of Myrtle Beach, and Sheila Marlouvon Bias, of Columbia, all of Richardson Plowden & Robinson, PA, for Respondents.

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**GEATHERS, J.:** Appellant Thomas Rickerson appeals the trial court's dismissal of his notice of intent to file suit (NOI) with prejudice after Rickerson failed to comply with the mandatory mediation requirement of section 15-79-125 of the South Carolina Code (Supp. 2014). We reverse the trial court's decision and remand this case.

the notice, he contacted Respondents to set a date and time for mediation, but Respondents did not respond to the scheduling inquiry. Rickerson subsequently contacted the court-appointed mediator and requested that the mediator schedule the mediation for January 22, 2013.

Rickerson mailed a letter to Respondents on December 20, 2012, notifying them that he had scheduled a mediation conference with the court-appointed mediator; however, that same day, Respondents filed a motion to dismiss. In the motion, they contended the case should be dismissed with prejudice because the mediation conference had not been held within the 120-day statutory time frame.[3]

Because the statute of limitations had not yet run,[4] Rickerson filed an amended NOI on January 4, 2013, notwithstanding the pending motion to dismiss. Unlike the initial NOI, the amended NOI contained the name of the court-appointed mediator and the required statement that the case was subject to presuit mediation pursuant to section 15-79-125(C).

The court-appointed mediator later contacted the parties to reschedule the mediation. Rickerson agreed to mediate the case at a later date, but Respondents refused. In a letter to the mediator, Respondents stated that Rickerson failed to propose dates for presuit mediation within the statutory time frame and did not request an extension from the trial court. They further asserted that because the NOI should be dismissed, "no authority exist[ed] statutorily for the holding of the pre-suit mediation." In a subsequent letter, the mediator stated that because of the "conflicting positions regarding the intent of the parties to mediate [the] case," he thought it would be inappropriate for him to issue a mediation results report to the court. Instead, he recommended the parties direct the dispute to the trial court for adjudication.

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[3] Rickerson served the last defendant with the NOI on June 19, 2012; thus, to comply with the 120-day statutory deadline, mediation should have occurred by October 17, 2012.

[4] The statute of limitations for medical malpractice actions is three years "from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered." S.C. Code Ann. § 15-3-545(A) (2005). Rickerson's complications arose in July 2011; therefore, the statute of limitations would have run in July 2014.

plaintiff file and serve the NOI before the plaintiff may initiate a civil action. § 15-79-125(A). After the plaintiff serves the NOI, the parties are required to participate in a mediation conference. Specifically, subsection (C) provides:

> Within ninety days and no later than one hundred twenty days from the service of the [NOI], 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.

§ 15-79-125(C).

Subsection (C) does not list any consequences for failing to timely comply with the mediation conference requirement. It does, however, provide that the mediation process is governed by the ADR rules,[5] unless the rules are inconsistent with the statute. § 15-79-125(C).

Rule 10(b), SCADRR, provides that if a party fails to comply with the ADR rules, "the court may . . . 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 persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCP." Under Rule 37(b)(2)(C), SCRCP, the trial court may impose sanctions such as striking pleadings, rendering a default judgment, or, as it did in the instant matter, dismissing the action.

"A dismissal under Rule 37(b)(2)(C) is not mandatory; rather, the trial court is allowed to make such orders as it deems just under the circumstances, and the selection of a sanction is within the court's discretion." *Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). "When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). A sanction that results in a default or dismissal is a severe punishment that should be imposed only if there is some showing of *bad faith, willful disobedience, or gross indifference* to the rights of the

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[5] Rule 1(c), SCADRR, also provides that the ADR rules "shall govern all mediations in [m]edical [m]alpractice actions as required by S.C. Code Ann. § 15-79-120 and S.C. Code Ann. § 15-79-125(C)."

and there was no evidence of intentional misconduct by the plaintiff. *Id.* at 395, 396 S.E.2d at 372; *see also Orlando v. Boyd*, 320 S.C. 509, 511-12, 466 S.E.2d 353, 355 (1996) (holding that precluding a witness from testifying was an abuse of discretion without a showing of intentional misconduct when exclusion amounted to a judgment of default or dismissal); *Baughman v. Am. Tel. & Tel. Co.*, 298 S.C. 127, 129-30, 378 S.E.2d 599, 601 (1989) (holding a $100 fine, not dismissal with prejudice, was the appropriate sanction for the eight plaintiffs' failure to answer interrogatories even despite warnings from the trial court and prior sanctions because the requesting party had not been prejudiced by not receiving formal responses to the interrogatories).

Moreover, in several recent decisions, our supreme court has chosen to reverse dismissals based on a technical application of the requirements of section 15-79-125 in favor of allowing cases to proceed on the merits. In *Ross v. Waccamaw Community Hospital*, our supreme court addressed the consequences of failing to comply with the prelitigation mediation requirement of section 15-79-125. 404 S.C. 56, 59, 744 S.E.2d 547, 548 (2013). The court rejected the argument that noncompliance mandated a penalty of dismissal for lack of subject matter jurisdiction, determining the mediation time period set forth in section 15-79-125 was not intended to place limitations on the trial court's subject matter jurisdiction. *Id.* at 63-64, 744 S.E.2d at 550-51. Instead, it held that "failing to comply with the 120-day statutory time period is a non-jurisdictional procedural defect." *Id.* at 64, 744 S.E.2d at 551. It further found the trial court "retains discretion to permit the mediation process to continue beyond the 120-day time period and may consider principles of estoppel and waiver to excuse noncompliance." *Id.*

The *Ross* court clarified that the 120-day time period for mediation was not meaningless and could result in dismissal; however, it emphasized that a dismissal is "a function of the court's discretion based on the facts and circumstances," not "a mandated one-size-fits-all result." *Id.* It explained that "the Legislature enacted section 15-79-125 to provide an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims." *Id.* at 63, 744 S.E.2d at 550. Consequently, the court expressly declined to "construe section 15-79-125 as a trap for plaintiffs with potentially meritorious claims"; instead, it stated that courts should "avoid dismissal of cases on technical grounds and . . . allow adjudication on the merits." *Id.* at 63, 65, 744 S.E.2d at 550-51 (quoting *Schulz v. Nienhuis*, 448 N.W.2d 655, 658-59 (Wis. 1989)); *see also Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, 410 S.C. 163, 174, 763 S.E.2d 426, 432 (2014) (discussing the supreme court's intent "to permit medical malpractice cases to proceed on the

Although Respondents did not reply to Rickerson's scheduling inquiry, Rickerson scheduled the conference for January 22, 2013. Later, he was willing to reschedule after being notified that the mediator had a conflict.

The *Ross* court acknowledged that, under certain circumstances, dismissal may be an appropriate response to the failure to comply with the 120-day deadline. 404 S.C. at 64, 744 S.E.2d at 551. However, we do not find this to be a case in which a dismissal *with prejudice* is warranted. The purpose of the mandatory mediation requirement of section 15-79-125 is to foster the settlement of potentially meritorious claims and to discourage the filing of frivolous claims; therefore, a technical noncompliance with this statute, without bad faith, should not result in the dismissal of the case. *See id.* at 63, 65, 744 S.E.2d at 550-51. We reverse the trial court's dismissal of Rickerson's NOI with prejudice.[6]

## CONCLUSION

Based on the foregoing reasons, we reverse the trial court's order dismissing Rickerson's NOI with prejudice and remand the case to the trial court.

**REVERSED AND REMANDED.**

**WILLIAMS and McDONALD, JJ., concur.**

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[6] In his brief, Rickerson raises several additional reasons why he believes the trial court erred in dismissing his NOI with prejudice. In light of our decision above, we need not address these arguments. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that appellate courts need not address remaining issues when the resolution of a prior issue is dispositive).