

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

2011-190146

Marquette Johnson, as Mother and Natural
Guardian of D'Andre G., an infant under the age
of 14 years,

APPELLANT / RESPONDENT

v.

Anu Chaudhry, M.D., McLeod Regional
Medical Center, and Florence Women's Health,

DEFENDANTS

Of whom Anu Chaudhry, M.D. and Florence
Women's Health are the,

RESPONDENTS / APPELLANTS

APPELLANT'S BRIEF OF
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TABLE OF CONTENTS

Table of Authorities-----	i
I. Statement of Issue on Appeal-----	1
II. Statement of the Case-----	1
III. Argument-----	4
A. Summary of Argument-----	4
B. Pertinent Facts-----	6
C. Law/Analysis-----	16
IV. Conclusion -----	24

TABLE OF AUTHORITIES

I. CASES

<i>Baird v. Charleston County</i> , 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999);	16
<i>Balloon Plantation v. Head Balloons</i> , 3030 S.C. 152, 399 S.E.2d 439 (Ct.App. 1990)	25
<i>Barnette v. Adams Bros. Logging, Inc.</i> , 586 S.E.2d 572 (2003)	25
<i>Baughman v. American Tel. & Tel. Co.</i> , 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)	18
<i>Cunningham v. Helping Hands, Inc.</i> , 352 S.C. 485 575 S.E.2d 549 (2003)	16
<i>Dawkins v. Filelds</i> , 354 S.C. 58, 69, 580 S.E.2d 433 439 (2003)	16
<i>Doe v. Batson</i> , 345 S.C. 316 322, 548 S.E.2d 854, 857 (2001)	16
<i>Dunn v. Dunn</i> , 298 S.C. 499, 381 S.E.2d 734 (1989)	20
<i>Elam v. South Carolina Dept. of Transp.</i> , 361 S.C. 9, 602 S.E.2d 772 (2004)	11
<i>Griffin Grading and Clearing, Inc. v. Tire Service Equipment Mfg. Co., Inc.</i> , 334 S.C. 193, 198-99, 511 S.E.2d 716 (Ct. App. 1999).	22-23
<i>Jumper v. Hawkins</i> , 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001)	15
<i>Karppi v. Geenville Terrazzo Co., Inc.</i> , 327 S.C. 538, 489 S.E.2d 679 (Ct.App. 1997)	23
<i>Kershaw Co. Bd. Of Educ. v. U.S. Gypsum Co.</i> , 302, S.C. 390, 396 S.E.2d 369 (1990)	20
<i>Knight v. Waggoner</i> , 359 S.C. 492, 597 S.E.2d 894 (Ct.App. 2004)	18
<i>Lanham v. Blue Cross & Blue Shield</i> , 349 S.C. 356, 563 S.E.2d 331 (2002)	16
<i>McComas v. Ross</i> , 626 S.E.2d 902 (Ct.App. 2006)	23
<i>Orlando v. Boyd</i> , 320 S.C. 509, 466 S.E.2d 353 (1995)	19- 22;24

II. RULES

<i>Rule 40(j), SCRCF</i>	5, 8
<i>Rule 37, SCRCF</i>	17
<i>Rule 402(k), SCACR</i>	17
<i>Rule 11, SCRCF</i>	18; 21
<i>Rule 56, SCRCF</i>	17

I STATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion by denying Appellant's motion to extend the scheduling order and limiting the appellant to the use of a single expert witness on the issue of liability as a sanction for appellant's failure to identify expert witnesses by the deadline stated in the initial scheduling order, where such failure was inadvertent and where no prior warnings for discovery violations had been raised to, or ruled upon by the trial court?

III STATEMENT OF THE CASE

This is a medical malpractice action. Appellant's complaint alleges that as a result of the negligence of the Defendants, "the infant Appellant sustained severe and permanent injuries including a left Erbs Palsy and brachial plexus injury." Complaint, ¶ 16. Appellants seek "to recover a sum to compensate Appellants for actual, special, and consequential damages, including medical expenses, disfigurement, pain and suffering, mental anguish, loss of earnings capacity, loss of enjoyment of life, and other damages." Complaint ¶ 20. Appellants have also asserted a claim for punitive damages. *Id.*

D'Andre G. was born on February 3, 2004. The current action was instituted by Appellant Johnson, Appellant Green's mother and natural guardian, on or about December 8, 2008. **(R. p. 28)** The defendants, including the Respondents, filed answers denying liability. By consent order, the individual claims originally asserted by the Appellant as D'Andre's mother were voluntarily dismissed as being barred by the statute of limitations. **(R. p. 13)** Defendant McLeod Regional Medical Center was ultimately granted summary judgment, and that judgment is not on appeal.

The present appeal is the result of a series of motions and hearings upon such motions, beginning with Respondents' Motion for Summary Judgment, which was filed March 24, 2009. A hearing upon such motion was first held on April 30, 2009, at which time the trial Court initially granted summary judgment based upon Appellant's failure to name an expert witness by the date indicated in the initial consent scheduling Order, which had been

entered in August of 2008. On the date of this hearing, Defendant McLeod also moved for summary judgment, and given the court's ruling, the Appellant objected to the lack of advance notice, and so that motion was scheduled to be heard at a later date.

At the same hearing on April 30th, 2010, Appellant moved in open court for an extension of the scheduling Order by ninety days in order to identify expert witnesses and substitute new counsel, which was denied, and an Order to that effect was entered on May 7, 2010. Thereafter, Appellant moved for reconsideration of the May 7, 2010 Order on May 24, 2010, and submitted an extensive brief in support. **(R . p. 141)** This motion sought not only to reverse the grant of summary judgment, but also to obtain a written ruling on the denial of Appellant's motion to extend the scheduling order, in order to preserve that issue for appellate review. *Id.* p. 2. Thereafter, on June 23, 2010, Appellant filed a Supplement to her Motion for Reconsideration, which included the affidavit of Gary Oaks, M.D.--an expert retained by would-be substitute counsel. **(R. p. 106)**

A motions hearing on Appellant's motion for reconsideration was scheduled to be heard on July 26, 2010, at which time the court was also scheduled to hear Defendant McLeod's Motion for Summary Judgment. On July 6, prior to the scheduled hearing, the parties were informed by e-mail from the judge's clerk that the motion for reconsideration was to be summarily denied, and that the hearing on that motion was thus cancelled. However, on July 26, 2010, the Court did hear Defendant McLeod's Motion for Summary Judgment, which was granted at that time. See generally **(R. p. 166)**. However, the court invited Appellant at that time to renew her motion for reconsideration as to Respondents, and to move for reconsideration of the newly granted summary judgment as to Defendant McLeod. The Court further ordered an expedited hearing to be held upon such motions on that Friday, July 30, 2010, due to the impending deadline in which Appellant had to appeal

the original grant of summary judgment to the Respondents. The Appellant filed these motions for reconsideration of the orders granting summary judgment on July 26, 2009, shortly after the hearing.

At the hearing on July 30, 2010, the Appellant reiterated his position and again asked the court to vacate the original grants of summary judgment, and to extend the scheduling order. See generally, **(R. p. 181)**. At this hearing, the trial court orally granted the motion for reconsideration, ordered certain discovery to take place within an expedited time frame, held the summary judgment motions in abeyance pending the completion of such discovery, and ordered the Appellant to pay attorneys fees and travel costs associated with the hearings on all motions from the date the original summary judgment motion was heard. At that time, the Court ordered counsel for the Respondents to prepare an order to that effect. A Form 4 Order “granting” Appellant's motion for reconsideration was prepared and entered on July 30, 2010, indicating that a more formal order would be forthcoming. **(R. p. 19)**

Counsel for the Respondents did not prepare a more formal order as instructed, and instead filed a Motion for Reconsideration or in the Alternative, Motion to Compel on August 6, 2010. See **(R. p. 123)**. A hearing on Respondents Motion for Reconsideration was heard on September 17, 2009, at which time the court reaffirmed its decision to vacate the grants of summary judgment, granted certain portions of Respondents motion to compel, and clarified its oral ruling of July 30, 2010. As outlined more fully below, the Court specified that the Appellant was to be limited to the use of a single expert witness, Dr. Oaks, to establish all elements of liability not only for purposes of the summary judgment motions (which were still to be held in abeyance), but also for purposes of trial. The Court further ordered the undersigned counsel personally remain as counsel of record, and invited the parties again to file motions for reconsideration. **(R. p. 300, 307)**

This time the Court ordered Appellant's counsel to prepare the order, and an Order to this effect was entered on October 12, 2010, and is one of the orders on appeal.

(R. p. 306, 307) Appellant timely moved for reconsideration of this order to the extent that it precluded the use of additional expert witnesses as a sanction for the failure to name expert witnesses by the date outlined in the initial scheduling order. **(R. p. 141)** A hearing on that motion to reconsider was held on January 5, 2011, at which time the court reaffirmed its decision to preclude the Appellant from naming additional expert witnesses, as a sanction for discovery violations. **(R. p. 330, 338)**

At this hearing, undersigned counsel also informed the court that he was no longer associated with his old firm, and moved to be relieved as counsel of record. The court initially denied the motion to be relieved, but after hearing additional arguments, and with the consent of all counsel, subsequently granted the motion to be relieved. A formal Order outlining these rulings was prepared by Respondent's counsel at the court's instruction, and was entered on March 25, 2011. **(R. p. 338)** This latter order denying Appellant's motion for reconsideration of the preclusion order is the second order under appeal.

Appellant received written notice of the entry of the March 25, 2011 Order on March 29, 2011, and served his Notice of Appeal on Respondents on April 14, 2011.

III. ARGUMENT

A. Summary of Argument

By all accounts, this is a complex medical malpractice case involving a brachial plexus birth injury. In short, the Appellant alleges that her son was injured during the delivery due to the force that exerted by Dr. Chaudry on D'Andre. For reasons unknown, the Appellant first sought the assistance of a New York attorney, Daniel Buttafucco, to explore the possibility of filing a claim. At some point thereafter, Mr. Buttafucco asked Appellant's

current counsel to serve as “local counsel.” Fearing that the statute of limitations was about to run on any claim the Appellant might have individually as the mother of D'Andre¹, Appellant's counsel quickly filed suit.

Thereafter, the New York lawyer, Mr. Buttafuccho, indicated that he did not wish to serve as lead counsel, and asked Appellant's counsel to assume the lead. As such, the file was transferred to two other attorneys in the same firm, who began to conduct their due diligence on this short-filed claim. As a result of this due diligence, Appellant's counsel came to certain conclusions about the case, and communicated those to both the client and to the New York lawyer. The New York lawyer became non-responsive. The client indicated a desire to have another local firm review the file, and after many requests, finally asked Appellant's counsel to send a copy of the file to this other firm for review.

While this was going on, the Respondents had served initial discovery, including Requests to Admit, Interrogatories, and Requests for Production. Appellant's counsel answered the Requests to Admit. In addition, Appellant's counsel was granted and extension, and as late as June 3, 2009, Respondent's counsel consented to a further extension, provided it received “meaningful responses.” Thereafter, Appellant's requested that the case be stricken from the docket pursuant to Rule 40(j), SCRCP so that they could complete there due diligence. Counsel for the Respondents refused. Thus, a scheduling order was entered into by consent on August 9, 2009. From the date of that Order, until the filing of their Motion for Summary Judgment on March 25, 2010, Respondents not once complained about discovery.

¹ As noted elsewhere, after further investigation, and when faced with a motion to dismiss by Respondents', Appellant was forced to concede that any claim she might have had individually was in fact barred by the statute of limitations, and thus such claims were voluntarily dismissed by the Appellant through consent order.

In the meantime, a paralegal for Appellant's counsel, reading the contents of letters drafted both to the New York attorney and to the client, mistakenly believed that the firm's involvement with the case had ended, placed the file in the "declined" file drawer, and removed the dates of the Scheduling Order from undersigned counsel's calendar. Undersigned counsel has always accepted full responsibility for this mistake.

However, given the fact that Respondents not once voice any concern about delays in discovery nor filed a single motion to compel discovery during the entire seven month time period from the date of the issuance of the scheduling order until the filing of their motion for summary judgment, Appellant respectfully submits that an order precluding the Appellant from naming additional expert witnesses serves not as a proper sanction for the mistake of Appellant's counsel, but instead operates as a de facto grant of summary judgment—robbing the innocent D'Andre of his one chance to have his claim decided on its merits. Such a sanction is too harsh, is not narrowly tailored to address the specific discovery violation, and thus constitutes an abuse of discretion.

B. Statement Of Pertinent Facts

This case has a tortured and convoluted history. However, the issues on appeal stem primarily from the Appellant's inadvertent failure to identify expert witnesses by the November 30, 2009 deadline contained in the initial scheduling Order entered in this case in August of 2009. Thereafter on March 24, 2010, without *any* communication during the preceding seven months from the date of the entry of the scheduling Order and prior to the close of discovery, Respondents filed a motion for summary judgment, asserting that such judgment was proper due to the failure of Appellant to identify an expert witness by the date indicated in the scheduling Order. Respondents' Motion for Summary Judgment. On April 29th, a hearing was held on Respondent's Motion for Summary Judgment, at which time

Appellant objected to the motion, and sought to enlarge the deadlines in the original Scheduling Order. See generally, **(R. p. 158-163)**.

At this hearing, counsel for the Appellant's explained to the Court certain facts regarding the posture of this case. Specifically, the Respondent noted that this case was originally brought to the Appellant's counsel's law firm through an attorney in New York, Mr. Daniel Buttafuoco, who sought Appellant's firm to serve as local counsel.

(R. p. 159 ll. 22-24) At that time, Appellant's counsel in Rock Hill noted that any potential claim on behalf of the child's mother may be at risk of having the statute of limitations expire, and thus promptly filed suit on behalf of both the mother and the minor Appellant in order to preserve any such claim by the mother. **(R. p. 159 ll. 19-25)** The Defendant subsequently answered the complaint, and sought to dismiss the claims on behalf of the mother due to the statute of limitations.

Thereafter, the Attorney from New York, Mr. Buttafuoco, indicated that he did not intend to serve as lead counsel on the case, and indicated his wish for local counsel to assume the lead. See e.g. **(R. p. 160 ll. 1-2)**. At this point in time, the original attorney within Appellant's counsel's office who had been contacted by Mr. Buttafuoco indicated that due to his location in Rock Hill, South Carolina, and his lack of prior experience with this specific type of medical malpractice claim (brachial plexus injury), that perhaps someone in the firm's Columbia office should assume the lead with the file. As a result, two attorneys from Appellant's counsel's Columbia office assumed lead on the file (including the undersigned), and began conducting their own due diligence. **(R. p. 160 ll. 2-9)**

In response to the Respondents' motion to dismiss the claims of the Mother, and after further investigation of the facts and law pertinent to such a claim, Appellant's new counsel consented to the dismissal. **(R. p. 13)** In addition, Appellant's new counsel answered

certain Requests to Admit served by Respondent's counsel, and began preparing written responses to Respondents' Interrogatories and Requests for Production of Documents. See e.g. (R. p. 170 ll. 3-5). Furthermore, Appellants' new counsel sent the minor for follow-up treatment and evaluation with a local neurologist to gauge the severity of the injuries, and consulted with a legal nurse consultant. (R. p. 254 ll. 15-18; p. 254 l. 24 and p. 255 l. 5) During this time period, a status conference was held before Judge Russo, at which time Appellant's counsel sought consent to remove the case from the docket pursuant to Rule 40(j), SCRPC, such that it could complete its investigation of the file. (R. p. 254 ll. 19-24). Counsel for Defendant McLeod Regional Hospital consented, but counsel for Respondents would not consent. (R. p. 160 ll. 3-7). As a result, Judge Russo requested the parties to submit a proposed scheduling Order for approval by the Court. The parties prepared a proposed scheduling Order, which was signed by Judge Russo and entered by the Court on August 9, 2009. (R. p. 1) The Scheduling Order contained a deadline for the Appellant to name expert witnesses by November 30, 2009. Id.

Thereafter, Appellant's counsel received the report from the local neurologist, and again consulted with Appellant's in-house legal nurse consultant about the claim. (R. p. 255 Hearing Transcript of April 29 (R. p. 154); Hrg. Trans. Sept. 17, (R. p. 255). Appellant's counsel came to certain conclusions about the claim, and communicated those to both the client and to the referring attorney in New York. (R. p. 160, 161) One of the two attorney's in Appellant's counsel's Columbia office then sent a letter to opposing counsel stating that he would no longer be working on the file, and asking that all future correspondence be directed to the remaining attorney, the undersigned. (R. p. 255 ll. 8-11) At this point in time, the attorney from New York ceased responding. Upon being informed of the forgoing, the Appellant's mother asked to have another South Carolina attorney review the file.

Appellant's counsel obviously consented, and asked the Appellant for the name and address of another attorney to whom she wished them to provide a copy of the file. The Appellant finally provided the name of another attorney in April, 2010, shortly after the Respondents had filed the motion for Summary Judgment. **(R. p. 160 ll. 11-13)** Sometime after the letters to the New York attorney and the client were sent concerning the conclusions of Appellant's counsel, the paralegal for Appellant's remaining attorney mistakenly placed the file in the "declined" file drawer, and removed all of the Scheduling Order dates from Appellant's counsel's calendar. **(R. p. 161 ll. 2-11)** Affidavit of Kevin Hayne Sitnik (Exhibit C to Plaintiff's Motion for Reconsideration dated July 16, 2010).

Respondent's counsel did not attempt any written communication with Appellant's counsel either in response to the letter withdrawing as counsel issued by the other attorney in Columbia, nor, in fact, since the date of the entry of the scheduling Order.

(R. p. 162) Affidavit of Kevin Hayne Sitnik (Exhibit C to Plaintiff's Motion for Reconsideration dated July 16, 2010). Respondent's counsel further did not communicate in any way with Appellant's remaining counsel, the undersigned, from the date of the entry of the Scheduling Order, until Appellant was served with a copy of the Motion for Summary Judgment, seven months later. These preceding events were explained to the Court at the hearing on Respondents' Motion for Summary Judgment, held on April 29, 2010, at which time Appellant's counsel took full responsibility for the actions of the paralegal, and orally moved the Court to extend the scheduling Order deadlines by ninety days, in order for the local attorneys now reviewing the file to have an opportunity to finish their review, be substituted as counsel of record, and provide the name of an expert. **(R. p. 160, 162)** That motion was summarily denied from the bench. **Id. (R. p. 164).**

Instead, the Court initially granted Defendant's motion for summary judgment. Thereafter, Appellant filed a motion for Reconsideration, and an extensive brief outlining the applicable South Carolina law on the sanctions available to a Court for the failure of a party to name an expert according to a deadline in a scheduling order. Plaintiff's Motion for Reconsideration dated July 16, 2010. During the pendency of this motion, the local attorneys reviewing the file indicated a willingness to assume prosecution of the case, and procured an affidavit of an expert, Dr. Oaks, outlining a breach of the standard of care. Appellant's counsel promptly submitted this affidavit to the Court and opposing counsel as a Supplement to his Motion for Reconsideration. **(R. p. 106)** A hearing was originally scheduled on this motion for July 26, 2010—the same day as the hearing on Defendant McLeod's Motion for Summary Judgment was to be heard. However, by e-mail dated July 6, 2010, the judge's clerk informed the parties that the hearing was cancelled, and the motion for Reconsideration was to be summarily denied by Form Order. Appellant received written notice of the entry of this Order on July 16, 2010. **(R. p. 17)**

Thereafter, a hearing was scheduled on co-defendant's McLeod's motion for Summary Judgment on July 26, 2010, at which time the Court summarily granted co-Defendant McLeod's nearly identical Motion for Summary Judgment, and invited Appellant to renew her motions for reconsideration as to all Defendants. **(R. p. 166)** On that same day, Appellant filed a written motion to that effect, requesting again reconsideration of the Court's denial of the previous motion for reconsideration, as well as the newly issued oral ruling dismissing the claims against McLeod Regional Medical Center. Plaintiff's Second Motion for Reconsideration, dated July 26, 2010. At the instruction of the Court, an expedited hearing was subsequently held on the afternoon of Friday, July 30, 2010², where

² Appellant's counsel requested such an expedited hearing due to the fact that Appellant's time to Appeal the Order granting summary judgment as to Respondents was about to expire, since a renewed or second

the Court granted Appellant's renewed motion for reconsideration, made certain rulings regarding discovery including timing of the deposition of Appellant's newly identified expert Dr. Oaks, agreed to hold the motions for summary judgment in abeyance pending such discovery, awarded as a sanction for missing the deadline attorneys fees and costs associated with Respondents motion for Summary Judgment and attendance at the hearings thereon, and on Appellants' two motions for reconsideration. **(R. p. 218-220)** The Court further instructed Appellants' counsel to prepare an order to that effect, and a Form 4 order which simply "granted" the motions for reconsideration and indicated that a more formal order was to follow was entered on July 30, 2010. **(R. p. 19)** Respondents counsel failed to follow the Court's instructions and prepare a more formal Order, despite multiple requests by Appellant's counsel. **(R. p. 239 ll. 9-10)** As a result, no written Order specifically granting Appellant's new and renewed motions for reconsideration was entered at this time.

Instead, on or about August 6, 2010, Defendant Chaudhry filed a motion, seeking reconsideration of this Court's Form 4 Order which had granted the Appellant's motion for reconsideration. **(R. p. 123)** This motion of the Respondents alternatively sought, for the first time, to compel certain discovery responses from the Appellant. *Id.* During this interval, Appellant's counsel had diligently attempted to move discovery forward, as instructed by the court, and had filed supplemental responses to Respondents' requests to admit and interrogatories. See generally, **(R. p. 257, 272 ll. 8-11; p. 274-275)**. Appellant's would-be substitute counsel nonetheless scheduled and took certain depositions of Defendant McLeod's employees, pursuant to the Court's prior instructions, during which undersigned counsel was present, as ordered by the court.³

motion for reconsideration does not toll the time to appeal. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004).

3 During the July 30, 2010 hearing, the Court had ordered that undersigned counsel, Mr. Sitnik, personally appear at such depositions, even if they were to be conducted by Appellant's new and would-be substitute

Id. (R. p. 235 ll. 5-11) During this time, the Appellant expressed her desire to substitute attorneys with the local attorneys who had completed their review, and obtained the affidavit of Dr. Oaks. These local attorneys submitted a notice of appearance on September 8, 2010, and indicated a willingness to assume representation of the Appellant—*provided* that the Court did not preclude the Appellant's from naming expert witnesses in addition to Dr. Oaks. (R. p. 266-269, 273-276, 309-310) (R. p. 323-326)

Thereafter, a hearing on Respondent's Motion for Reconsideration, and Alternatively Motion to Compel was held. At this hearing on September 17, 2010, for the first time, now realizing the required “intentional misconduct” standard, Counsel for the Respondents first argued that the preceding facts amounted to “intentional misconduct” through “gross indifference.” At no time during any of the prior hearings had Respondents counsel even alluded to an allegation of “intentional misconduct.” See Motion for Summary Judgment, and the Hearing Transcripts of April 29 and July 30.

After arguments were heard at this September 17, 2010 hearing, at which most of of the forgoing was re-hashed before the Court, the Court indicated that it had been previously unaware of the details surrounding the posture of this case (despite the fact that they had been explicated both in written form and in the arguments of counsel on at least five prior occasions), and indicated that it had perhaps been hasty in granting summary judgment. (R. p. 257-259) The Court, finding no intentional misconduct, thus once again agreed to hold the Summary Judgment motions in abeyance until the completion of certain discovery (including the deposition of Dr. Oaks).

At the hearing on Respondents' Motion for Reconsideration of the Order granting Plaintiff's motion to restore, the Court stated, unequivocally, that a resolution *of this case* on

counsel.

the merits is preferable to a procedural dismissal. **(R. p. 259 ll. 21-22)** Furthermore, the Court specifically stated that the intent of its oral ruling at the July 30th hearing was “to give the Defence as long as they want to get prepared, if you follow what I'm saying. That was the intent of the previous order.” *Id.* ll. 4-5. Thereafter, after Mr. Buyck complains that the sanctions don't go far enough, does the Court add the following statement:

“All right. The other thing that I think is going to expedite the thing, which I think works to your [Respondent's] advantage is that we've limited the Plaintiff's experts, which –I mean, quite often, there are doctors upon doctors that are getting named on up until trial. But because of the predicament that the Plaintiff has put us in, we've restricted the number of experts. I don't think you need two years to prepare it.I think that was the ruling, Mr. Sitnik?”

(R. p. Hrg. Trans. Sept. 17, p. 33 l. 21-p. 34 l. 3).

At which point in time, the Court addressed the limitation on Appellant's use of experts, throughout the trial. Appellant's counsel argued that that was not his understanding of the Court's prior oral ruling—the ruling which Respondent's counsel failed to reduce into writing. Rather, Appellant contended, and still contends, that the original ruling only limited the Appellant's use of Dr. Oak's for purposes of overcoming the summary judgment motions, which were being held in abeyance pending the completion of certain discovery, including the deposition of Dr. Oaks.

Nonetheless, upon questioning by Appellant's would-be substitute counsel, the Court further clarified that it believed this to be its prior ruling from the bench, and that 'liability' was to be defined as including both breach of the standard of care, as well as causation. **(R. p. 271 ll. 8-12)** Appellant's counsel objected, and would-be counsel indicated that such a complex medical malpractice case would likely require more than one expert to establish both breach (an ob-gyn) and causation (a neurologist), and further indicated that he could likely not undertake representation under such circumstances. **(R. p. 268-270)** After some discussion, the Court requested a copy of the transcript of the prior hearing be obtained,

confirmed that as a sanction the Appellant would be limited to the use of Dr. Oaks as an expert for 'liability' as previously defined, and once again invited a motion for reconsideration of this sanction. **(R. p. 270, 307)** Since Respondents' counsel had failed to draft the Order in accordance with the Court's instructions at the July 30th, 2010 hearing, the Court now Court instructed Appellants counsel to prepare an Order to this effect. **(R. p. 259 ll. 8-22)** This Order which simultaneously denied Respondent's Motion for Reconsideration of the Form 4 Order of July 30th, 2010, and granted Plaintiff's New and Renewed Motions for Reconsideration of the Order Granting Respondent's (and Defendant McLeod's) Motions for Summary Judgment, but imposing sanctions on the Appellant, is thus one of the Orders which (finally) is currently under appeal. **(R. p. 23)**

As the Court anticipated at the hearing on September 17, 2010, Appellant timely served a motion seeking reconsideration of this Order (Appellant's third Motion for Reconsideration, in total, but first Motion for Reconsideration of the Order dated October 12, 2009), insofar as this Order, for the first time, imposed the sanction limiting Appellant's use of experts to Dr. Oaks for all issues of 'liability' including both breach of the standard of care and causation, not only for purposes of the Summary Judgment motions (which are still pending), but also for purposes of establishing liability of the Respondents' at trial of this action.⁴ **(R. p. 23)** In support thereof, Appellant again filed a brief outlining the standard for imposing sanctions as a result of missing a deadline in a first scheduling order, and for witness preclusion as a sanction for discovery violations. **(R. p. 141)**

On January 5, 2011, the Court heard Appellant's new and third Motion for Reconsideration. At this hearing, undersigned Counsel also informed the Court of his departure from the law firm of Appellant's counsel, and moved to be relieved as counsel of

⁴ The claims against McLeod have been dismissed by Order dated January 24, 2011.

record. At this hearing Appellant's counsel and would-be substitute counsel argued that such a limitation as to experts was tantamount to granting summary judgment. **(R. p. 326-327; 332-333)** After arguments by counsel were heard, the Court, without explication, denied the motion for reconsideration, stating only that, "Well, I'll stand by the ruling....". **(R. p. 338)**

The Court also initially denied undersigned counsel's motion to be relieved as counsel of record. *Id.* at 29. At which point, undersigned counsel asked to be heard, and pointed out to the Court that he had no contract with the Appellant, no access to the client file (which had remained with Appellant's counsel's firm), was then self-employed and maintained no malpractice insurance. *Id.* at 30. At which point in time, Respondent's counsel interjected "we have no objection with Mr. Sitnik being relieved as counsel, Mr. Phillips signed the complaint." *Id.* Thus, having obtained the consent of Respondent's counsel Mr. Buyck, the Court granted undersigned counsel's motion to be relieved a counsel of record, and asked Respondents' counsel to draft an order to the effect of the oral ruling. *Id.* Despite Respondents prior protestations about timeliness, it would be over two months before an Order to this effect was entered, on March 25, 2011. This is the second Order currently under appeal. The Order cites as a basis for the sanctions the following:

"[T]he multiple procedural and factual issues relative to the prior granting of the Motion for Summary Judgment, the Court has exercised its discretion and hereby reconfirms the limitation of the Plaintiff's expert witness as to both standard of care and causation to Dr. Oaks. The Court has considered the [Appellant's] arguments on the record and the various factors enumerated in *Jumper v. Hawkins*, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001) and finds that the Plaintiff has failed to provide the Court with the appropriate considerations to evaluate any additional proposed witnesses. Furthermore, the record is replete with egregious discovery abuses prejudicial to the [Respondents'] attempts to conduct meaningful and timely discovery justifying this Court's limitation of the expert witnesses."
(R. p. 5)

No mention of attorney's fees or costs was raised by Respondent's counsel at any time, nor was such a sanction included in the proposed Order drafted by Respondents' counsel, and

ultimately signed and entered by the Court. The only sanction thus imposed by the Court is a limitation on Appellant's right to employ expert testimony to establish 'liability.' Thereafter, the Appellant timely served his Notice of Appeal on April 14, 2010.

C. Law / Analysis

The issue in this case may properly be summarized as follows: did the trial Court abuse its discretion by limiting Appellant to the use of a single expert on issues of causation and damages as a sanction for Appellant's failure to identify an expert by the date stated in an initial Scheduling Order, where neither party had engaged in any discovery since the issuance of the scheduling Order, and where the missing of the deadline was the result of inadvertence, and where the result of such a sanction deprives the Appellant of his choice of counsel, and effectively grants summary judgment to the Respondents?

As previously noted, "Summary judgment is a "drastic remedy" which should be cautiously invoked so no person will be improperly deprived of a trial on the disputed factual issues. *Cunningham v. Helping Hands, Inc.* 352 S.C. 485, 575 S.E.2d 549 (2003); *Lanham v. Blue Cross & Blue Shield*, 349 S.C. 356, 563 S.E.2d 331 (2002). "Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433 439 (2003); *Lanham*, 349, S.C. At 363, 536 S.E.2d at 334; *Doe v. Batson*, 345 S.C. 316 322, 548 S.E.2d 854, 857 (2001); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Despite this wealth of authority, in the present case, the Court initially granted summary judgment, based upon the failure to name an expert witness by the time scheduled in the initial scheduling order, but well before the close of discovery. Specifically, the initial

Order notes certain scheduling Order deadlines, and then concludes that the failure to comply with such deadlines is evidence of “gross indifference to these Defendants.” (**R. p. 8**) However, where Respondents counsel has not attempted to procure such discovery, through either courtesy phone call, a letter, or through a single motion to compel-- Respondents have not, and cannot show, gross indifference, or prejudice as a matter of law.

In the Order, the basis of the motion is a violation of Rule 37 (violation of a discovery Order), despite its reference to Rule 56. As pointed out during the hearing on Respondents' Motion for Summary Judgment, a violation of Rule 37 (in this case, an initial scheduling order), results in a death knell for a child's claim. Respectfully, such a dismissal is unwarranted under the circumstances, and constitutes an abuse of discretion. As the trial Court presumably noted, the motion was based upon a initial objection to timeliness of discovery responses. That objection would normally be made first and foremost through a communication to opposing counsel, as required not only by Rule 11, SCRCP, but also through any fair reading of the Lawyers' Oath. Rule 402(k), SCACR (“To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;....”).

If and only if such a courtesy communication were to fail to resolve the discovery issue would counsel for the party seeking the discovery be permitted to file a motion to compel discovery, pursuant to Rule 37, SCRCP, at which time counsel for the party seeking the discovery would again have to serve notice of the motion to compel on the non-compliant party's counsel. Again, communication regarding the discovery dispute would occur. In the present case, Respondents' counsel neither adhered to the fundamental fairness and civility mandated by the Lawyers Oath, nor followed the clearly outlined procedures for resolving discovery disputes as set forth in the Rules of Civil Procedure.

Instead, Respondents' counsel, after nearly seven months of abject silence, during which time he complained not once of any issue regarding discovery, filed a Motion for Summary Judgment, which—according to the letter of Rule 11, SCRCF—is one of the few motions which does not require a “*an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion.*” Rule 11, SCRCF (emphasis added).⁵

If there is legal prejudice in the present case, the record before the Court is devoid of evidence to that effect. Mere delay, under the facts of this case, simply cannot constitute legal prejudice.⁶ Instead, the trial Court's contends, in direct contravention to the controlling authority of both this Court and our state's Supreme Court, that summary judgment and dismissal of a minor child's medical malpractice claim is the appropriate remedy for an initial failure to comply with an initial Scheduling Order. Or at the very least, that D'Andre should be precluded from presenting the full merits of his claim. No warnings. No lesser sanctions. An original, and uncontrovetedly accidental mistake, brought on in large part by the removal of calendar dates by a paralegal,⁷ warrants the drastic remedy of the preclusion

5 The full applicable portion of Rule 11, SCRCF provides as follows: “All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held. *There is no duty of consultation on motions to dismiss, for summary judgment, for new trial, or judgment NOV, or on motions in Family Court for temporary relief pursuant to Family Court Rule 21, or in real estate foreclosure cases, or with pro se litigants.*” Id. (italics added).

6 Had the Respondents filed a motion to compel, rather than a motion for summary judgment, the Appellant would have been entitled to a voluntary non-suit without prejudice, as a matter of law. See *Knight v. Waggoner*, 359 S.C. 492, 597 S.E.2d 894 (Ct.App. 2004) (“Ordinarily, a plaintiff is entitled to a voluntary dismissal without prejudice as a matter of right, unless there is a showing of legal prejudice to the defendant.”).

7 As stated at the initial hearing on Respondents' Motion for Summary Judgment, Appellants counsel discovered in preparation for the hearing on Defendant's Motion for Summary Judgment that although initial responses to Respondents Requests for Production of Documents and Interrogatories and had been drafted, they had not been served. In addition, at tis time Appellant's counsel (the undersigned) also discovered that the deadlines of the scheduling Order had been removed from his calendar by his paralegal, due to a mistaken assumption on her part that the case had been declined and the firm had been relieved.

of experts, and ultimately dismissal of the case, in the eyes of the trial Court. Respectfully, Appellant submits that such a sanction, whether couched in terms of the granting of summary judgment, or through the limitation of Appellant to a single expert witness on the issue of liability in an admittedly “complex medical malpractice case,” is an abuse of discretion.

As noted above, there are several similar cases referenced in the appellate decisions of this state. In each one of those instances, the offending party was given an opportunity by the court to cure the discovery deficiencies; either by the appellate court on review of dismissal, or by the trial court prior to such a drastic sanction. One such case, *Orlando v. Boyd*, is nearly on all fours with the present case. 320 S.C. 509, 466 S.E.2d 353 (1995). In *Orlando*, the trial court excluded plaintiff's expert witness for failure to comply with a scheduling order. In that case, the defendant moved to dismiss the action for failure to prosecute because the plaintiff had not identified an expert by the date stated in the scheduling Order. Approximately one month after the filing of that motion, plaintiff moved to extend the scheduling order (again, similarly to the case at bar). The trial court denied the motion to extend the scheduling order as a sanction for the failure to identify the expert pursuant to the scheduling order, excluded the use of an expert plaintiff had belatedly obtained, and then granted summary judgment.

On appeal, this Court vacated the exclusion of the late named witness, and remanded the case for a determination of whether the failure to comply with the scheduling order was the result of 'willful disobedience or gross indifference' to the rights of the defendant. On remand, the trial court found (without noting any facts) that the plaintiffs were “willfully indifferent of the [scheduling] order and grossly indifferent to the [defendants'] rights.” *Id* at

See e.g. Affidavit of Kevin Sitnik, attached as Exhibit D to Appellant's original Motion for Reconsideration; Transcript of April 29th, 2009 hearing, p. 8.

Once again, the plaintiffs in *Orlando* appealed. This time our Supreme Court reversed the trial court's order excluding the late named witness and granting summary judgment even in the face of the trial court's [unexplicated] finding of 'willful disobedience and gross indifference' on the part of the plaintiffs. In so doing, the Supreme Court instituted a yet higher standard, noting "[t]he exclusion of a witness is a sanction under rule 37, SCRPC, which should never be lightly invoked." *Id.* "Furthermore, "[w]here the effect will be the same as 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 the rights of the adverse party." *Id.* (quoting *Baughman*, 306, S.C. At 108) (emphasis added). The Supreme Court then went further, stating "[w]hatever sanction is imposed would serve to protect the rights of discovery provided by the rules. ***A sanction of dismissal is too severe if there is no evidence of any intentional misconduct.***" *Id.* (citing *Dunn v. Dunn*, 298 S.c. 499, 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) (emphasis added).

Respondent respectfully submits that the present case is nearly identical to *Orlando v. Boyd*, and thus submits that the preclusion order in this case, which limits the Appellant to the use of a single expert witness on the issue of liability—i.e. breach of the standard of care and causation—is tantamount to summary judgment and dismissal. In fact, the Order of October 12, 2010 specifically finds there was no evidence of either intentional misconduct, gross indifference, or willful disobedience of any court order on behalf of the Appellant's counsel. Rather, that Order, consistently with the trial Court's statements at the hearing on September 17, 2010, states that "Defendant made no showing of intentional misconduct, and even defense counsel for the defendant hospital has admitted as such." (**R. p. 23**). The Court

further noted that “[w]hile the defendants argue that the plaintiff’s failure to name an expert witness by the date set forth in the original scheduling order should be fatal, the Court finds that adjudication on the merits is more appropriate.” *Id.* And yet, despite these holdings, the Court inexplicably imposed a sanction specifically designed to prevent an adjudication on the merits—by limiting expert witness testimony necessary to prove a malpractice claim.

Again, as noted above, the appropriate sanction should “serve to protect the rights of discovery provided by the rules.” *Orlando, supra.* Where, as in the present case, the Respondents failed to file a single motion to compel discovery prior to filing their motion for summary judgment, the sanction of limiting the Appellant to a single expert witness on liability issues in a complex medical malpractice action does not serve to protect the rights of the Respondents afforded under the rules to obtain discovery, but rather serves as a windfall by which a defendant can secure a dismissal through gamesmanship and ambush.

Appellant respectfully submits that had these Respondents moved to compel discovery at any time prior to filing their motion for summary judgment, the required pre-filing consultation required by Rule 11 would have uncovered the calendaring error, and would have led to resolution of many, if not all of the supposed discovery issues subsequently raised when Respondents finally did get around to moving to compel responses, some months later. Given that neither party communicated with one another during the seven months from the filing of the scheduling order until the filing of the Respondents’ Motion for Summary Judgment, Appellant respectfully submits that no sanction for discovery abuse is warranted, much less a sanction of dismissal, summary judgment, or preclusion of expert witnesses.

And even if some lesser sanction is warranted, Appellant respectfully submits that it must be targeted to cure the error or neglect which occurred, but not impair the wholly

innocent Appellant's ability to present fully the merits of her son's claim. In other words, if need be, punish the Appellant's lawyers by awarding some costs or fees if you must—but for heaven's sake don't punish the D'Andre G.. There is simply no justice in such a sanction.

Orlando v. Boyd, however, is not the only South Carolina authority on point. In *Griffin Grading and Clearing, Inc. v. Tire Service Equipment Mfg. Co., Inc.*, the plaintiff first filed a motion to compel discovery, and a hearing on its motion was repeatedly continued at the request of the offending defendant. 334 S.C. 193, 198-99, 511 S.E.2d 716 (Ct. App. 199). The parties, nearly a year after the motion to compel was filed, entered into a consent order concerning the disputed discovery. Again, the defendant failed to comply, and a second motion to compel was filed by the plaintiff. At the hearing on this second motion to compel, the court ordered compliance with the consent order within thirty days. Even after that ruling, in direct defiance of the court's order, defendant did not comply, and the court (on a third motion to compel), ordered the the defendant to produce a witness, and specifically warned the defendant that any further failure to comply might result in the striking of the defendant's answer. Again the defendant did not comply, and yet again, the court heard yet another motion to compel, and ordered compliance within a certain time. In short, by the time the court finally imposed the sanction of striking the defendant's answer (akin to granting summary judgment), six motions to compel had been filed, and four orders compelling discovery had been entered. In the present case, Respondents did not file a single motion to compel until after they had lost their ambush summary judgment motion—not a single one.

In *Griffin*, this court stated, “[i]n determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice.” *Griffin Grading & Clearing, Inc.*,

334 S.C. At 199, 511 S.E.2d at 719. See also, *McComas v. Ross*, 626 S.E.2d 902 (Ct.App. 2006) (noting that "[i]n those cases where our supreme court has affirmed dismissal of actions based on failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party...."). Where, as here, there have not been numerous motions to compel, and absolutely no warnings given by the trial court for failure to comply with discovery requests or the scheduling order, an order precluding the Appellant from using more than a single expert witness to establish liability is tantamount to dismissal, and an abuse of the trial court's discretion.

One other case is worthy of note. In *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 489 S.E.2d 679 (Ct.App. 1997), the trial court struck the pleadings of the a defendant for discovery violations. As in the other cases cited above, the plaintiff had filed two motions to compel, the court had issued an order compelling discovery, and then discussed compliance with the order during a status conference, prior to striking the defendant's answer. Yet once again, this Court reversed, finding that even in the face of such violations, dismissal of the defenses was too harsh a sanction for violation of a discovery order. In so doing, this Court stated, "the court should not go beyond the necessities of the situation to foreclose a decision on the merits of the a case." *Id.* At 543 (citing *Balloon Plantation v. Head Balloons*, 3030 S.C. 152, 399 S.E.2d 439 (Ct.App. 1990). Thus, even where this Court has found "willful disobedience and gross indifference,...the harsh sanction that was imposed was not commensurate with [defendant's] disobedience, and any number of lesser, more narrowly tailored sanctions would have sufficed to protect [plaintiff's] rights while adequately punishing the wrongdoing...." *Id.*

Finally, in *Barnette v. Adams*, the Supreme court held;

In determining the appropriate sanction for late disclosure of an expert witness, this

Court has stated, "it lies within the discretion of the trial judge to decide what sanction, if any, should be imposed. The rule is designed to promote decisions on the merits after a full and fair hearing, and the sanction of exclusion of a witness should never be lightly invoked."

Barnette v. Adams Bros. Logging, Inc., 586 S.E.2d 572 (2003)(citations omitted) (emphasis added).

In the present case, the sanction imposed is specifically designed to preclude the possibility of "a full and fair hearing." Rather, the *Barnette* court, quoting *Orlando*, again reiterated that "[w]hatever sanction is imposed should serve to protect the rights of discovery provided by the rules. A sanction of dismissal is too severe if there is no evidence of any intentional misconduct." *Id.*

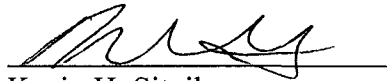
In the present case, there has admittedly been no intentional misconduct either by D'Andre Green, nor his counsel. See e.g. (R. p. 200 ll. 13-16) Nor is there any evidence to support a finding of willful disobedience or gross indifference to the rights of Respondents by either D'Andre G., nor his counsel. Nor have Respondents made any showing of prejudice accompanied by the failure of Appellant to name expert witnesses within the deadline set-forth in this initial scheduling order, as indicated by Respondents complete silence and inaction during the seven months following the issuance of the Scheduling Order and prior to their filing of a motion for summary judgment. Indeed, at the time that motion was filed, discovery had not closed and a trial was still months away, at the earliest. See Scheduling Order, Exhibit A to Appellant's first Motion for Reconsideration. And in the words of Respondents' own counsel, "[u]sually, a case takes a couple of years to get to trial." (R. p. 262)

IV. Conclusion

Appellant submits that the trial Court's Orders of October 12, 2010 and March 25, 2011, which impose a sanction upon D'Andre G., by limiting his ability to name any experts

on liability except Dr. Oaks in his complex medical malpractice claim is an abuse of discretion. Appellant respectfully submits that under the facts of this case, such a sanction is too harsh and severe, and is not narrowly tailored to address the specific wrongdoing of Appellant's counsel—if in fact there was any wrongdoing warranting a sanction at all. Wherefore the Appellant respectfully prays that this honorable Court reverse the Orders of the trial Court dated October 12, 2010 and March 25, 2011, insofar as they impose sanctions on the Appellant, and remand this case to the trial court with the instruction that the court enter a new scheduling order permitting the Appellant to name expert witnesses under such terms as are just and commensurate with the facts this case.

Respectfully submitted,



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This 1st day of October, 2012
Lexington, South Carolina

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

2011-190146

Marquette Johnson, as Mother and Natural
Guardian of D'Andre G., an infant under the age
of 14 years,

Appellant,

v.

Anu Chaudhry, M.D., McLeod Regional
Medical Center, and Florence Women's Health,

Of whom Anu Chaudhry, M.D. and Florence
Women's Health are the,

Respondents.

CERTIFICATE OF COUNSEL

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



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APPEAL FROM FLORENCE COUNTY
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Anu Chaudhry, M.D., McLeod Regional
Medical Center, and Florence Women's Health,

Of whom Anu Chaudhry, M.D. and Florence
Women's Health are the,

Respondents.

CERTIFICATE OF SERVICE

I, Catherine Jordan, legal assistant at The South Carolina Law Firm, P.C., attorney for the Appellant in the above mentioned case, 2011-190146, hereby certify that I have served Appellant's Motion to Permit Out of Time Filing of Final Briefs and Record on Appeal, along with the Briefs and Record on Appeal, by mailing a copy of the same, with prepaid postage, by US Mail, on 10/01/12, to the person's addressed below:

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