

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from Florence County
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

Case No. 2008-CP-21-2326

RECEIVED

AUG 02 2012

SC Court of Appeals

Marquette Johnson, as Mother 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

Respondents/Appellants.

Appellants' Final Brief of Respondents/Appellants

BUYCK & SANDERS, LLC

Hugh W. Buyck
G. Wade Cooper
Post Office Box 2424
Mount Pleasant, S.C. 29465-2424
(843) 377-1400 (843) 377-1403 (fax)
hwb@buyckfirm.com

Deborah Harrison Sheffield, *Special Counsel*
117 Brook Valley Rd.
Columbia, South Carolina 29223
(803) 419-7837 (803) 419-3519 FAX
dhsheffieldatty@aol.com

Counsel for the Respondents/Appellants

TABLE OF CONTENTS

	Page
Statement of the Issues on Appeal	1
Statement of the Case.....	2
Argument	6
Applicable Law -- Summary Judgment and Discovery Deadlines	6
Introduction and Summary of Argument	7
I. The Trial Court properly granted summary judgment to the Defendants Physician and her medical practice in this medical malpractice action, because the Plaintiff did not present the requisite expert evidence to establish a standard of care or a breach of that standard by the Defendants.	8
II. The trial court properly denied the Plaintiff's motion for reconsideration when the Plaintiff still did not timely present the requisite expert evidence, and did not even proffer the identity of any prospective expert.	11
III. The trial court erred in granting the Plaintiff's second motion for reconsideration after the Plaintiff belatedly presented an expert's affidavit.	12
Conclusion	17
Certification of Counsel	18

TABLE OF AUTHORITIES

CASES

<i>Baughman v. Am. Tel. & Tel. Co.</i> , 306 S.C. 101, 410 S.E.2d 537 (1991)	6, 9, 13
<i>Botehlo v. Bycura</i> , 282 S.C. 578, 320 S.E.2d 59, 62-63 (Ct. App. 1984)	9
<i>Coward Hund Const. Co., Inc. v. Ball Corp.</i> , 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999).....	12
<i>David v. McLeod Reg'l Med. Ctr.</i> , 367 S.C. 242, 626 S.E.2d 1 (2006)	6, 9
<i>Dawkins v. Fields</i> , 354 S.C. 58, 580 S.E.2d 433 (2003)	6
<i>Humana Hosp.-Bayside v. Lightle</i> , 305 S.C. 214, 407 S.E.2d 637 (1991)	6
<i>Jumper v. Hawkins</i> , 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001).....	7
<i>Nelson v. QHG of S. Carolina Inc.</i> , 354 S.C. 290, 580 S.E.2d 171 (Ct. App. 2003), <i>aff'd in part, rev'd in part sub nom.</i> <i>Nelson v. QHG of S. Carolina, Inc.</i> , 362 S.C. 421, 608 S.E.2d 855 (2005)	9
<i>Orlando v. Boyd</i> , 320 S.C. 509, 466 S.E.2d 353 (1996)	6, 12, 13
<i>S.C. Dep't of Soc. Servs. v. Lisa C.</i> , 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008).....	12
<i>Spreeuw v. Barker</i> , 385 S.C. 45, 682 S.E.2d 843 (Ct. App. 2009).....	12

STATUTES AND RULES

S.C. Code Ann. §15-36-100.....	16
S.C. Code Ann. §15-79-125.....	16
Rule 11(a), SCRPC	15
Rule 37, SCRPC.....	7, 17
Rule 56(c), SCRPC	6, 15

STATEMENT OF THE ISSUES ON APPEAL

In this cross appeal, the Defendants Dr. Chaudhry and her medical practice challenge the trial court's decision to deny their motion for summary judgment, which presents the issues as follows:

- I. Did the trial court properly grant summary judgment to the Defendants Physician and her medical practice, in this medical malpractice action, on the ground that the Plaintiff did not present the requisite expert evidence to establish a standard of care or a breach of that standard by the Defendants?
- II. Did the trial court properly deny the Plaintiff's motion for reconsideration when the Plaintiff still did not timely present the requisite expert evidence, and did not even proffer the identity of any prospective expert?
- III. Did the trial court err in granting the Plaintiff's second motion for reconsideration after the Plaintiff belatedly presented an expert's affidavit?

STATEMENT OF THE CASE

This is a medical malpractice case in which the Plaintiff Marquette Johnson, as mother of D'Andre G., alleges that Anu Chaudhry, M.D. was negligent in the care of the infant during a course of treatment from his delivery on June 17, 2003, through February 3, 2004. The Plaintiff commenced the action with the filing of the complaint on December 8, 2008, in which she named as defendants, Dr. Chaudhry, her practice Florence Women's Health, and McLeod Regional Health Center.¹ During delivery, the baby presented with a complication known as "shoulder dysotcia." Plaintiff alleges that Dr. Chaudhry was negligent in managing the delivery and birth of the infant, and as a result, the infant has suffered a brachial plexus injury and a left Erbs Palsy. [ROA 34-35; Complaint ¶¶ 16-17.] Attorney Robert Phillips of McGowan, Hood & Felder, LLC filed and served the summons and complaint as counsel of record for the Plaintiff.

The Defendants Dr. Chaudhry and Florence Women's Health served their answer on February 12, 2009, denying the allegations of negligence. [ROA 37; Answer, filed February 13, 2009.] The Defendants also served interrogatories and request for production contemporaneously with their answer. [ROA 42, 50; Defendant's First Set of Interrogatories to the Plaintiffs; Defendant's First Set of Request for Production to the Plaintiffs.] These discovery contained a number of questions directed to the standard of care and alleged deviations, i.e. Interrogatory No. 7 and 8 asked the Plaintiff to provide information regarding every expert the Plaintiff planned to call at the trial of the case, and Request No. 8 was for expert reports. [ROA 43, 51.]

¹ The Plaintiff's personal, individual claim was dismissed by consent. McLeod Regional Medical Center is not a party to the appeal, and all references to "Defendants" herein refer to Dr. Chaudhry and her practice, collectively.

On August 27, 2009, a scheduling order was filed which ordered that: “Plaintiffs shall name expert witnesses by November 30, 2009,” and “[t]he depositions of the Plaintiffs’ experts shall be completed by February 26, 2010.” [ROA 1; Consent Scheduling Order.] Attorneys W. Jones Andrews, Jr., and Kevin H. Sitnik, both of McGowan, Hood & Felder, were listed as attorneys for the Plaintiff on the consent scheduling order, which Attorney Andrews signed evidencing consent on behalf of the Plaintiff.

As of March 24, 2010, the Plaintiff had not named any expert witnesses, and the Defendants served a motion for summary judgment on the ground that the Plaintiff did not have an expert to establish her case. [ROA 54; Motion for Summary Judgment, filed March 25, 2010.] The Defendants’ motion for summary judgment came for hearing on April 29, 2010. [ROA 154; Transcript.] Attorney Sitnik appeared at the hearing as counsel for Plaintiff.² He hand delivered responses to the outstanding discovery requests, but the responses did not identify any expert; and they were nonresponsive to the pertinent issue of expert opinion: “This interrogatory requires the opinion of medical experts, which have not yet been identified by the plaintiff. Plaintiff reserves the right to supplement their answer once responsive information becomes available.” [ROA 204-205; 7/30/10 Tr. 24:16 -25:3.]

During the course of the hearing, Plaintiff’s Counsel acknowledged to the trial court that no expert had been named. [ROA 159-161; 4/29/10Tr. 6:14-15, 7:14-16, 8:12-13.] However, Plaintiff’s Attorney explained to the trial court that the case was being

² Attorney Sitnik complained that he did not receive notice of the hearing because the Clerk’s office notice was sent to an old post office box for Mr. Phillips, but Mr. Sitnik does not deny that the Plaintiff’s firm was served with the motion. [ROA159, 209; 4/29/10 Tr. 6; see also 7/30/10 Tr. 29:22-25.]

reviewed by new counsel and moved to extend the scheduling order for 90 days to identify an expert. [ROA 160; 4/29/10 Tr. 7:17-19.] The trial court ruled from the bench refusing to extend the scheduling order, and issued a written order granting summary judgment to the Defendants on the ground that the Plaintiff had failed to produce any expert testimony as to the standard of care or a breach thereof. [ROA 164, 7; 4/29/10 Tr. 11; Order, filed May 7, 2010.]

The Plaintiff served a motion for reconsideration on May 24, 2010, arguing that denial of her motion to extend the scheduling order to identify an expert, and the grant of summary was too severe a sanction for the failure to identify an expert under the standard set forth in *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996). [ROA 84-85; Motion, p. 7-8.] The Plaintiff did not identify any expert in his motion for reconsideration; however, the Plaintiff did subsequently submit an expert's affidavit with a Supplement to her motion for reconsideration, which were mailed and faxed to the trial judge and Defense Counsel on June 23, 2010. [ROA 106, 108; Supplement with cover letter, June 23, 2010, and Affidavit of Dr. Oakes, dated June 4, 2010.] The trial court issued a Form 4 order denying the motion for reconsideration without holding a hearing. [ROA 17; Form 4 Order, filed July 6, 2010.] The Plaintiff then filed a second motion for reconsideration of the order denying her previous motion to reconsider. [ROA 116; Motion, filed July 26, 2010.]

The Plaintiff's second motion for reconsideration came for hearing on July 30, 2010. [ROA 181; Transcript.] The trial court granted the motion, but imposed certain deadlines and sanctions, including limiting the Plaintiff's use of testimony of Dr. Oakes as expert as to all issues of liability and requiring the Plaintiff to reimburse Defendants

for costs and fees related to the hearing on the motion for summary judgment and the motion to reconsider. [ROA 19, 21; Form 4 order, July 30, 2010; Order granting Plaintiff's motion to reconsider, filed August 12, 2010.]

The Defendants filed a motion for reconsideration or in the alternative motion to compel complete responses to their discovery requests regarding the expert's opinion. [ROA 123; Motion, filed August 9, 2010.] The motion came for hearing on September 17, 2010. [ROA 231; Transcript.] The trial court issued its order denying the Defendants' motion for reconsideration on the ground that there was no showing of intentional misconduct, citing *Orlando v. Boyd*.³ [ROA 23; Order, filed October 12, 2010.] The trial court's order again limited the Plaintiff's expert witnesses as to liability to Dr. Oakes but further clarified that the Plaintiff's expert witnesses as to damages are not limited.

The Plaintiff made yet another motion for reconsideration, dated October 25, 2010, seeking reconsideration of that portion of the trial court's order which limits the Plaintiff's liability experts to Dr. Oakes and requesting that new counsel be allowed to identify new witnesses. [ROA 141; Motion with supporting memorandum.] The motion came for hearing before the trial court on January 5, 2011, at which time, Plaintiff's counsel argued that limiting to just Dr. Oakes will effectively end the case because they will not be able to prosecute the case with only one liability expert. [ROA 313; 1/5/11 Tr. 5:17-21.] The trial court denied the motion in its order, filed March 25, 2011. [ROA 5; Order.]

³ As to the motion to compel, the trial court noted that many of the interrogatories were fully answered in open court, and the Plaintiff was directed to fully respond to all interrogatories regarding "maneuvers" which should have been employed by Dr. Chaudhry. [ROA 27; 10/12/10 Order, p. 5.]

The Plaintiff served and filed a notice of appeal from the trial court's orders of October 12, 2010, and March 25, 2011. The Defendants served and filed a notice of cross appeal from the trial court's order filed August 12, 2010, and October 12, 2010.

ARGUMENT

Applicable Law -- Summary Judgment & Discovery Deadlines

Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 626 S.E.2d 1, 3 (2006). "Where a plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law." *Humana Hosp.-Bayside v. Lightle*, 305 S.C. 214, 407 S.E.2d 637, 638 (1991), quoted in *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433, 439 (2003).

As a corollary principle, the courts have held that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537, 543 (1991). Issues related to the question of "a full and fair opportunity" for discovery, in the context of discovery deadlines and scheduling orders, have been addressed in several opinions cited and relied upon in this case. Namely, in *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d

353, 355 (1996), the Court held that a witness cannot be excluded as a sanction for a discovery violation under Rule 37, SCRPC, if the exclusion will result in a grant of summary judgment, unless there is intentional misconduct. And, in *Jumper v. Hawkins*, 348 S.C. 142, 558 S.E.2d 911, 916 (Ct. App. 2001), the Court of Appeals held that: “[I]n the face of a pre-trial order mandating the disclosure of a witness by a certain date, a trial judge is required to consider and evaluate the following factors before imposing the sanction of exclusion of a witness:

- (1) the type of witness involved;
- (2) the content of the evidence emanating from the proffered witness;
- (3) the nature of the failure or neglect or refusal to furnish the witness' name;
- (4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and
- (5) the prejudice to the opposing party.

Introduction & Summary of Argument

As described in the above recitation of the procedural history, the trial court has issued five orders in connection with the Defendants' motion for summary judgment. Both parties have appealed. The Plaintiff has appealed from the orders that limit her to using Dr. Oakes as the only expert on liability and the issues to be raised by the Plaintiff will, in accordance with the Appellate Rules, be separately briefed. In this brief, the Defendants raise the issues related to their cross appeal from the orders granting reconsideration and denying their motion for summary judgment. However, to the extent that the issues in both appeals overlap, the arguments may appear repetitive and incongruous.

The essence of Defendants' position is that summary judgment for failure to name any expert is not the equivalent of imposing a sanction for failure to abide by the scheduling order or untimely discovery responses. The trial court acted in accordance with well-established precedent by granting summary judgment to the Defendants when the Plaintiff did not present the requisite expert evidence to establish her burden of proof in this medical malpractice action, and the trial court found that the Plaintiff's failure to name experts in compliance with the scheduling order amounted to gross indifference. The Defendants further contend that the trial court properly denied the Plaintiff's first motion for reconsideration because she still did not present any expert affidavit or even name a prospective expert when she filed the motion. However, the Defendants maintain that the trial court should not have granted the Plaintiff's second motion for reconsideration when Plaintiff belatedly retained an expert and proffered an expert's affidavit.⁴

I. The Trial Court properly granted summary judgment to the Defendants Physician and her medical practice in this medical malpractice action, because the Plaintiff did not present the requisite expert evidence to establish a standard of care or a breach of that standard by the Defendants.

It is well settled, as general rule, that a plaintiff in a medical malpractice action cannot withstand a motion for summary judgment without the requisite expert testimony to meet the burden of proof as to the standard of care and a breach of that standard:

A plaintiff must show the physician failed to exercise the degree of care and skill which is ordinarily employed by the profession under similar conditions and in like circumstances. *Keaton v. Greenville Hosp. Sys.*, 334

⁴ In the alternative, the Defendants anticipate that in response to the Plaintiff's primary appeal, they will submit that, at least, the trial court acted within its discretion in limiting the Plaintiff to use of Dr. Oakes.

S.C. 488, 514 S.E.2d 570 (1999). In South Carolina, to sustain a cause of action in a medical malpractice case, the plaintiff is required to establish the relevant standard of care and a breach of the standard of care by expert witness testimony. *Pederson v. Gould*, 288 S.C. 141, 341 S.E.2d 633 (1986); *Botelho v. Bycura*, 282 S.C. 578, 320 S.E.2d 59 (Ct.App.1984).

Nelson v. QHG of S. Carolina Inc., 354 S.C. 290, 580 S.E.2d 171, 181-82 (Ct. App. 2003), *aff'd in part, rev'd in part sub nom. Nelson v. QHG of S. Carolina, Inc.*, 362 S.C. 421, 608 S.E.2d 855 (2005); see also *David v. McLeod*, 626 S.E.2d at 3-4 (affirming grant of summary judgment where proffered expert affidavit did not state the standard of care he alleged was breached, nor did it provide that he was familiar the standard of care). Thus, a defendant is entitled to summary judgment if the plaintiff fails to present the requisite expert testimony on the standard of care and its breach by the defendant:

In a medical malpractice action the plaintiff must establish by expert testimony both the required standard of care and the defendant's failure to conform to that standard, unless the subject matter lies within the ambit of common knowledge or experience, so that no special learning is needed to evaluate the defendant's conduct. Thus, on a defendant's motion for summary judgment, there will usually be no genuine issue of material fact unless the plaintiff presents expert testimony on the standard of care and its breach by the defendant.

Botelho v. Bycura, 282 S.C. 578, 320 S.E.2d 59, 62-63 (Ct. App. 1984) (citations omitted).

At the hearing on April 29, 2010, Attorney Sitnik appeared as Counsel for the Plaintiff. He did not contend that this is one of those rare cases where expert testimony is not necessary, and he acknowledged that he had not obtained any expert. Instead, he complained that he did not receive timely notice of the hearing from the Clerk's office because it was sent to an old address for Attorney Phillips⁵; however, he did not deny that

⁵ Attorney Sitnik evidently learned of the hearing when the Clerk's office called him regarding a schedule change. [ROA 209; 7/30/10 Tr. 29:18-22.]

he received the motion when it was served by the Defense counsel.⁶ [ROA 159; 4/29/10 Tr. 6.] Attorney Sitnik also made excuses for the failure to obtain an expert and requested an extension of the scheduling order. Attorney Sitnik explained that his co-counsel, Attorney Phillips had agreed to be local counsel in the case on referral from a New York attorney, and he filed the Complaint on a short statute of limitations. [ROA 159-60; 4/29/10 Tr. 6-7.] He further explained that the client had requested a “second opinion” and a copy of the file has been sent to another attorney for review, and he requested a 90-day extension of the scheduling order to identify an expert. Plaintiff’s counsel also finally hand-served answers to discovery along with the explanation that the delay in responding to discovery was due to an internal miscommunication with his paralegal, but Plaintiff’s counsel also inexplicably attempted to blame Defendants’ counsel for not asking for responses since the filing of the scheduling order. [ROA 161-62; 4/29/10 Tr. 8-9.]

Ultimately, however, the record is indisputable that the Plaintiff had neither obtained any expert at the time the Defendants served their motion for summary judgment nor did the Plaintiff have any expert when the motion for summary judgment came for hearing. The Plaintiff did not offer any evidence that they were even trying to retain an expert; instead, excuses were made that the Plaintiff was seeking another attorney and blame was directed towards the Defendants that evidenced the gross indifference as found by the trial court. In accordance with precedent, the trial court properly granted the Defendants’ motion for summary judgment, stating:

⁶Defense counsel did consent to the motion being rescheduled [See ROA 82; Motion for Reconsideration, p. 5.]

As of the date of the hearing on Defendant's Motion for Summary Judgment, Plaintiff failed to present for a deposition, name experts or depose any parties or treating medical providers in accordance with this Consent Order. As such there had been a gross indifference to these Defendants rights to defend the case and failure to set forth issues for a jury.

.... The plaintiff filed this suit on December 8, 2008, and despite the case pending for over 17 months, Plaintiff failed to name an expert to testify as to any deviation of the standard of care. The plaintiff also failed to comply with a scheduling order....

....
The case at bar concerns complicated issues surrounding the birthing process of a child. The type of testimony required and expected to be rendered at trial is not within the layperson's knowledge and experience. As Plaintiff has failed to produce any testimony as to the standard of care or breach thereof by expert testimony or otherwise, Plaintiff cannot overcome the Defendants' motion for summary judgment.

....
Plaintiff has failed to make a showing sufficient to establish the essential elements of her case, specifically expert testimony establishing the standard of care and breach of that standard by Dr. Chaudhry. Failure to name an expert in this regard is fatal to the pursuit of her claims. Therefore, under Rule 56(c) there is no genuine issue of material fact and these Defendants are entitled to judgment as a matter of law.

[ROA 10-11; 5/7/10 Order, p.3-4.].

II. The trial court properly denied the Plaintiff's motion for reconsideration when the Plaintiff still did not timely present the requisite expert evidence, and did not even proffer the identity of any prospective expert.

The Plaintiff moved for reconsideration of the order granting summary judgment, but she did not present an expert affidavit or even name a prospective expert with the filing of her motion. Rather, Attorney Sitnik submitted his own affidavit again explaining that Plaintiff desired to seek new counsel and had located an attorney willing to be substituted as counsel, and that such substitute counsel could produce an expert

affidavit within a short time.⁷ [ROA 103; Motion Ex. D.] The Plaintiff also continued to shift the blame to Defendants' counsel for not contacting him about his failure to meet the deadlines in the scheduling order. Although the Plaintiff did finally submit an affidavit with a supplement to her motion, it was not timely. Thus, in the face of essentially the same arguments presented at the April 29th hearing and an untimely affidavit, the trial court properly rejected the Plaintiff's motion to reconsider the grant of summary judgment.

III. The trial court erred in granting the Plaintiff's second motion for reconsideration after the Plaintiff belatedly presented an expert's affidavit.

The Plaintiff did not appeal from the trial court's order denying her first motion to reconsideration; instead, the Plaintiff filed a second motion for reconsideration and was able to persuade the trial court to accept her untimely affidavit from Dr. Oakes and to set aside the prior order on the ground that the failure to timely name an expert was not intentional misconduct to justify the sanction of dismissal of her claim under *Orlando v. Boyd*.

On a preliminary point, the Defendants maintain that a repetitive/second motion for reconsideration was not appropriate. "[A] second motion for reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration." *Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56, 58 (Ct. App. 1999). Defendants also maintain that new evidence cannot be submitted on a motion for reconsideration. *Spreeuw v. Barker*, 385 S.C. 45, 682 S.E.2d 843, 855 (Ct. App. 2009)(An issue may not be raised for the first

⁷ The "new counsel" was later identified as Ed Graham at the July 30, 2010 hearing on the second motion for reconsideration. [ROA 196; 7/30/10 Tr. 16:1-6.]

time in a motion to reconsider.); *S.C. Dep't of Soc. Servs. v. Lisa C.*, 380 S.C. 406, 669 S.E.2d 647, 652 (Ct. App. 2008). New evidence must be submitted under Rule 60(b), SCRCP, which requires a more particularized showing of mistake, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or “other misconduct of an adverse party.” More specifically, Rule 60(b) refers to “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial.” See *Southeastern Hous. Found. v. Smith*, 380 S.C. 621, 670 S.E.2d 680, 689 (Ct. App. 2008) (enumerating five requisite elements). The record would not support any finding that the Plaintiff, if she had used reasonable diligence, could not have discovered an expert in time to meet the scheduling order deadline or to respond to the motion for summary judgment or to submit with the first motion for reconsideration.

Defendants also submit that the trial court erred in focusing on the intentional misconduct component of the Court’s ruling in *Orlando v. Boyd*, because this is not a situation where summary judgment was granted because the Plaintiff’s expert was excluded. In *Orlando v. Boyd*, the plaintiff had named an expert but he was not deposed by the deadline in the scheduling order, so the trial judge excluded him as an expert, and then granted summary judgment. Here, summary judgment properly was granted because the Plaintiff never named any expert; accordingly, the trial court correctly held in the prior order that the Plaintiff’s failure to meet the deadline amounted to gross indifference which justified denying the Plaintiff any further extension of time to develop the evidence essential to her case. Nothing the Plaintiff presented on her second motion for reconsideration changed the facts which show that the Plaintiff’s counsel did not meet the deadline because they had not even attempted to locate an expert; rather, they were

still evaluating the case and consulting new counsel. The fact that Attorney Graham did locate an expert and obtain an affidavit demonstrates that it could have been done before the deadline expired, or at least when the Defendants moved for summary judgment.

As discussed above, the Plaintiff's actions and attitude in attempting to shift the blame to the Defendants evidence the gross indifference that justified refusing to allow the Plaintiff more time to attempt to build her case. Plaintiff's counsel complained that there would not have been a scheduling order in the first place if Defense counsel would have agreed to a Rule 41 dismissal to allow them more time to build their case. [ROA 213; 7/30/10 Tr. 33:21-25.] Plaintiff's counsel also complained that the Defense counsel did not contact him about his failure to respond to discovery, and argued that the Defendants' counsel should have made a motion to compel instead of moving for summary judgment. Plaintiff argues that the "proper" course would have been for the Defendant to make a motion to compel to alert the Plaintiff to the problem before moving under Rule 56. [ROA 192, 193; 7/30/10 Tr.12:9-18; 13:6-16.] Plaintiff's counsel even went so far as accusing the Defendants of using the motion for summary judgment as an ambush, [ROA 256-57; 9/17/10 Tr. 26:21 – 27:2], and making the accusation that: "[T]he Defendant laid in wait. They stood back, from the time the initial scheduling order was entered, and did nothing." [ROA 146; Memorandum in support of [third] motion for reconsideration, October 25, 2010, p. 4.]

The Plaintiff's argument that Defense counsel did not demand responses after entry of the scheduling order is a disingenuous attempt to avoid the fact that Defendants' attorney had been in communication with several of Plaintiff's various counsel about discovery. As the Court will note, at least three attorneys with McGowan Hood have

appeared for the Plaintiff, namely --Attorney Phillips initiated the action with filing the summons and complaint, Attorney Andrews signed the consent scheduling order, and Attorney Sitnik appeared at the hearings. Attorney Phillips initially asked for additional time to respond to the discovery requests. During the period of time when they were circulating the consent scheduling order, there were communications with Attorney Andrews, and as of July 13, 2009, Defense counsel specifically requested Plaintiff's responses within 30 days; Attorney Sitnik was copied on that communication.⁸ [ROA 202-03; 7/30/10 Tr. 22-23].

First, why should the defendant have to make a motion to compel when there was an order already in place setting a deadline for naming an expert? Second, there was no obligation on the Defendants to consult with Plaintiff before making a motion for summary judgment. Rule 11(a), SCRCP ("There is no duty of consultation on motions to dismiss, for summary judgment,...."). And, Rule 56, SCRCP, does not require the Defendants to make a motion to compel to name an expert prior to moving for summary judgment. Notably, the trial court warned the Plaintiff's counsel for being sanctimonious and "getting on his high horse" about Defendants not filing a motion to compel because it is the Plaintiff's obligation to meet his burden of proof. [ROA 257; 9/17/10 Tr. 27:17-20.]

⁸Attorney Sitnik filed the motions and appeared at the hearings until January 5, 2011, when Attorney Phillips appeared and Attorney Sitnik was relieved as counsel. In addition, Attorney Ed Graham appeared at the July 30, 2010 hearing on Plaintiff's second motion for reconsideration, and he sent an associate from his office to the January 5, 2011 hearing, on the Plaintiff's third motion for reconsideration. Attorney Graham contended that his full participation was conditioned on the trial court granting the motion for reconsideration; and he is not counsel of record on appeal. Although he was relieved as counsel, Attorney Sitnik, who is no longer with McGowan Hood, has made an appearance as counsel of record on appeal.

As the trial court commented during the hearing on the Plaintiff's second motion for reconsideration, in such a complex medical malpractice case, Plaintiff's counsel should have lined up the necessary expert opinion evidence before filing the complaint. The Plaintiff acknowledged the wisdom of that proposition and noted that new legislation specifically requires that a plaintiff obtain an expert opinion prior to filing suit. [ROA 190; 7/3010 Tr.10:14-21.]

The Noneconomic Damages Awards Act of 2005, 2005 S.C. Laws Act 32 (S.B. 83), effectively requires that a medical malpractice case obtain an expert opinion prior to filing suit. S.C. Code Ann. §15-79-125 (filing requirements for notice of intent to file suit); S.C. Code Ann. §15-36-100(Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission). While the statute does provide options for the plaintiff to obtain an extension to obtain an expert affidavit, the burden is on the plaintiff to apply for the extension and show good cause. If a timely affidavit is not filed, the defendant can file a motion to dismiss for failure to state a claim. S.C. Code Ann. § 15-36-100(C). As the Plaintiff pointed out, these reforms only apply to causes of action arising after July 1, 2005, and are not applicable in this case. However, the law has long been clear on the burden of proof in medical malpractice actions, and this Plaintiff well knew that an expert opinion was necessary to make a claim.

Whatever Plaintiff's excuse for not obtaining an expert's opinion prior to filing suit, there was no good excuse offered for the failure to obtain one after entering into a consent scheduling order setting a deadline to name an expert. Nor were her excuses

good enough to justify her failure to obtain an expert when she was served with a motion for summary judgment, and judgment was granted against her.

Neither the fact that the Defendants did not demand that the Plaintiff name an expert prior to moving for summary judgment nor the fact that the Plaintiff wanted a second opinion from another attorney justifies or excuses her tardiness in waiting until after filing her first motion for reconsideration to locate and present an expert affidavit, and accordingly, the summary judgment should not have been vacated.

CONCLUSION

This is not a dismissal under Rule 37, as a sanction for not timely responding to discovery or violating the scheduling order. This is not a summary judgment predicated on exclusion of an expert witness' affidavit because it was late or insufficient. The crux of the matter is that regardless of the tardy discovery requests or the noncompliance with the scheduling order, the Plaintiff has a burden of proof that requires expert testimony. When Defendants moved for summary judgment, Plaintiff had to present an expert's opinion to meet that burden and avoid summary judgment.

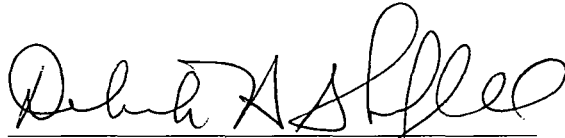
The trial court properly granted summary judgment when the Plaintiff did not present any expert affidavit, and properly denied the Plaintiff's first motion for reconsideration where the expert affidavit of Dr. Oakes had not been timely submitted. However, the trial court should not have granted the Plaintiff's second motion for reconsideration when the Plaintiff had belatedly presented Dr. Oakes' affidavit.

WEHREFORE, based on the foregoing, the Defendants request that the Court reverse the trial court's order granting reconsideration and reinstate the order granting summary judgment.

Respectfully submitted,

BUYCK & SANDERS,LLC

Hugh W. Buyck
G. Wade Cooper
Post Office Box 2424
Mount Pleasant, S.C. 29465-2424
(843) 377-1400 (843) 377-1403 (fax)
hwb@buyckfirm.com



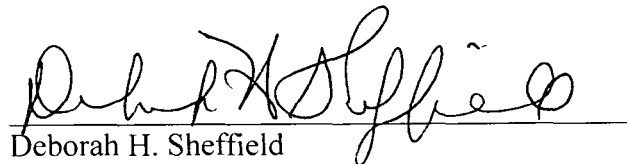
Deborah Harrison Sheffield, *Special Counsel*
117 Brook Valley Rd.
Columbia, South Carolina 29223
(803) 419-7837 (803) 419-3519 FAX
dhsheffieldatty@aol.com

July 31, 2012

Counsel for the Respondents/Appellants

Certification of Counsel

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



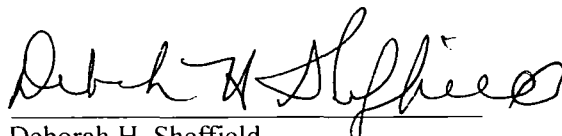
Deborah H. Sheffield

Certificate of Service

I, Deborah Sheffield, attorney for the Respondents/Appellants, do hereby certify that on July 31, 2012, I served a copy of the Appellants' Final Brief of Respondents/Appellants on Counsel for Appellants/Respondents, via U.S. Mail, first class, postage prepaid to the following address:

Kevin Hayne Sitnik
The South Carolina Law Firm, P.C.
Post Office Box 389
Irmo, South Carolina 29063

Robert Verner Phillips
McGowan, Hood & Felder, LLC
1539 Health Care Dr.
Rock Hill, SC 29732


Deborah H. Sheffield