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

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

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.

Respondents' Final Brief of Respondents/Appellants

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STATEMENT OF THE ISSUE ON APPEAL[1]

The Defendants, as Respondents/Appellants, would restate the issues on the Plaintiff's primary appeal as:

I. Did the Trial Court act within its discretion in refusing the Plaintiff's motion to extend the scheduling order for naming expert witnesses where the Plaintiff did not timely present any expert affidavit, or even proffer the name of a prospective expert(s), that could offer the requisite opinions to sustain her burden of proof on her medical malpractice claim?

II. When the Trial Court accepted the Plaintiff's belatedly submitted expert affidavit and granted her motion for reconsideration of the summary judgment order, did the Trial Court act within its discretion limiting the Plaintiff to use of only that expert on the issues of standard of care and proximate cause?

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[1] In the Defendants' cross appeal, they challenge the Trial Court's decision to grant the Plaintiff's motion for reconsideration, and present the issues as follows:

I. Did the trial court properly grant summary judgment to the Defendant 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.[2] During delivery the baby presented with a complication, know as "shoulder dystocia." 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 requests 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 plans to call at the trial of the case, and Request No. 8 was for expert reports. [ROA 43, 51.]

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[2] 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: "The 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.

Plaintiff's counsel had initially asked for additional time to respond to the discovery requests that was granted on February 18, 2009; the Defendants indicated, "we have no objection as to the proposed extension as long as we receive 'meaningful responses'." [See ROA 202, 125; 7/30/10 Tr. p. 22:8-14; Defendants' motion for reconsideration, p.3 n.1, filed August 9, 2010.] During the period of time when they were circulating the consent scheduling order, there were further communications with Attorney Andrews regarding the discovery responses, and as of July 13, 2009, Defense counsel specifically requested Plaintiff's responses within 30 days; Attorney Sitnik was copied on that communication. [ROA 202-03, 210; 7/30/10 Tr. 22:18 – 23:22; 30:4-7.]

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.[3] He hand delivered responses to the outstanding discovery requests at the hearing, 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 204-05; 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; 4/29/10 Tr. 6:14-15, 7:14-16, 8:12-13.] However, Plaintiff's Attorney explained to the trial court that the case was being reviewed by new counsel and orally 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, 11; 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 his motion to extend the scheduling order to identify an expert, and the grant of summary judgment 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 subsequently submitted an expert's affidavit (Dr. Oakes) to the trial judge and trial counsel by mail and facsimile on June 23, 2010, with a

[3] 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 Attorney Sitnik does not deny that the Plaintiff's firm was served with the motion. [ROA 159, 209; 4/29/10 Tr. 6; see also 7/30/10 Tr. 29:22-25.]

Supplement to his motion for reconsideration. [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 his previous motion to reconsider.[4] [ROA 116; Motion, filed July 26, 2010.] The Plaintiff's second motion for reconsideration came for hearing on July 30, 2010.[5] [ROA 181; Transcript.] The trial court granted the motion, but imposed certain deadlines for discovery 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 220, 19, 21; 7/30/10 Tr. p. 40; Form 4 order, July 30, 2010; see also Order granting Plaintiff's motion to reconsider, filed August 12, 2010.][6]

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[4] The Plaintiff has referenced a hearing held on July 26, 2010, on Defendant McLeod's motion for summary judgment, at which the trial judge supposedly "invited" Plaintiff's counsel to renew her motion for reconsideration. However, it should be noted that Counsel for these Defendants was not present at that hearing.

[5] Although the motion had only been filed on July 26th, the trial judge ordered that the Plaintiff's second/renewed motion for reconsideration be expedited and heard on Friday, July 30th. That decision was made at the hearing on the Defendant McLeod's motion for summary judgment held July 26th, at which Counsel for these Defendants was not even present. [ROA 176; 7/26/10 Tr. 11:17-21.] Mr. Buyck was on vacation and his associate had to appear in his place.

[6]Although the Trial Court had directed Counsel for these Defendants to draft a proposed order, Mr. Buyck did not submit a proposed order because he had not been at the 7/30/10 hearing and he was not sure of the basis for the ruling, which was against Defendants' own interest, but instead filed a motion for reconsideration of the Form 4 order. [ROA 236-37; 9/17/10 Tr. 6:20 – 7:10.] It appears that the order of August 12, 2010 was prepared by counsel for Defendant McLeod. [ROA 238; 9/17/10 Tr. 8:21-23.]

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, served August 6, 2010 and 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.* [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.[7]

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 them to Dr. Oakes, as their only expert, 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.]

The Plaintiff timely served and filed a notice of appeal, and the Defendants thereafter, timely served and filed a notice of cross appeal.

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[7]As to the motion to compel, the trial court noted that many of the interrogatories had been fully answered in open court at the 9/17/10 hearing, 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.]

INTRODUCTION & SUMMARY OF ARGUMENT

As described in the above recitation of the confusing and convoluted 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 denied her motion to amend the scheduling order to name additional experts and limit her to using Dr. Oakes as the only expert on standard of care and proximate cause. The Defendants have cross-appealed from the orders granting the Plaintiff's second motion for reconsideration and thereby effectively denying their motion for summary judgment.

In accordance with the Appellate Rules, the issues raised by the Defendants in their cross appeal are being separately briefed. However, to the extent that the issues in both appeals overlap, and to provide clarity as to the Defendants' position and argument in the primary appeal, the Defendants would draw the Court's attention to the essence of Defendants' position as a whole.

Defendants maintain 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 for untimely discovery responses, and 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. However, the Defendants maintain that the trial court should not have granted the Plaintiff's second motion for reconsideration when Plaintiff's counsel had belatedly retained an expert and proffered an expert.

Subject to preserving those arguments, the Defendants submit that in light of the fact that the Trial Court ultimately accepted the Plaintiff's untimely affidavit of Dr. Oakes, the Trial Court did not abuse its discretion in limiting the Plaintiff to use of only Dr. Oakes on the issues of standard of care and proximate cause and refusing to amend the scheduling order to allow her to name any additional experts except as to damages.

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), SCRCP. 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).

In medical malpractice actions, it is well settled, as general rule, that a plaintiff 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. *Pederson v. Gould,* 288 S.C. 141, 341 S.E.2d 633 (1986). 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. *Botehlo v. Bycura*, 282 S.C. 578, 320 S.E.2d 59, 62-63 (Ct. App. 1984)(citations omitted).

As a general 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, SCRCP, 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.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING THE PLAINTIFF'S MOTION TO EXTEND THE SCHEDULING ORDER DEADLINE FOR NAMING EXPERT WITNESSES.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE PLAINTIFF TO USE OF ONLY DR. OAKES ON THE ISSUES OF STANDARD OF CARE AND PROXIMATE CAUSE.

Plaintiff argues that "the issues on appeal stem primarily from [her] inadvertent failure to identify expert witnesses by the November 30, 2009, deadline contained in the initial scheduling order." [Initial primary Appellant's brief, p. 6.] She also summarizes her issue as: "[D]id the trial court abuse its discretion by limiting Appellant to use of a single expert on issues of causation and damages as a sanction for Appellant's failure to identify any expert by the dates stated in the scheduling order, where neither party had engaged in any discovery since 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." [Initial primary Appellant's Brief, p. 17.]

First, to clarify the procedural posture of the issues on appeal, the Defendants did not move for sanctions under Rule 37; rather, the Defendants made a motion for summary judgment. When the Plaintiff did not present any expert affidavit or proffer the name of any expert at the summary judgment motion hearing, the Trial Court granted summary judgment, not because the Plaintiff missed the scheduling order deadline, but on the ground the Plaintiff did not present any expert to make a prima facie case of medical malpractice. The Trial Court also denied the Plaintiff's motion to extend the scheduling order to allow her additional time to name experts. Yet, when the Plaintiff moved for reconsideration and finally, although belatedly, submitted Dr. Oakes' affidavit

as a supplement *after* filing her motion, the Trial Court eventually granted the Plaintiff's renewed/second motion for reconsideration and accepted the affidavit as sufficient to preclude summary judgment. However, the Trial Court also decided that the Plaintiff's discovery violations did justify limiting her to use of only Dr. Oakes as to standard of care and proximate cause. Ultimately, the Plaintiff's arguments coalesce into the single issue of whether the Trial Court abused its discretion in precluding her from naming other experts on the standard of care and/or proximate cause. Subject to the issues raised in their cross-appeal, the Defendants submit that the Trial Court acted within its discretion under all the circumstances appearing in the record.

A. The Plaintiff's failure to timely name an expert was not mere inadvertence.

Plaintiff's primary explanation for not naming an expert has been that the dates from the consent scheduling order were removed from Attorney Sitnik's calendar by his paralegal because of confusion regarding communications with New York counsel and Plaintiff/Client. However, the record shows that Plaintiff's failure to locate and name an expert predated that point. As noted above, the Plaintiff's attorney had not retained an expert prior to filing the complaint.[8] The Plaintiff's counsel, Attorney Sitnik, maintains

[8] 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.] [See The Noneconomic Damages Awards Act of 2005, 2005 S.C. Laws Act 32 (S.B. 83); 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).] 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 prove her claim.

that when he took the lead[9] on the file, at some point after the complaint was filed and before the consent scheduling order was entered, he began to conduct "due diligence".[10] However, it is undisputed that his diligence did not include finding an expert to meet his burden of proving the standard of care or a deviation therefrom.

Plaintiff's counsel has offered a litany of excuses to explain why they did not have an expert. He explained that the case originated with New York counsel, and that Mr. Phillips quickly filed a complaint because of statute of limitations concerns, and then there were problems with lack of cooperation/coordination with the originating New York counsel. He complains that the Defendants refused to consent to dismissal and they had to consent to a scheduling order,[11] after which his co-counsel (Attorney Andrews) quit working on the file, and at some point, the Plaintiff asked for the file to be reviewed by another firm. Meanwhile, his paralegal inadvertently took the scheduling order deadlines off his calendar. What is undisputed, however, is the fact that the Plaintiff was served with the motion for summary judgment, yet the Plaintiff still did not retain an expert.[12]

When Attorney Sitnik appeared at the summary judgment motion hearing, he did not contend that this is one of those rare cases where expert testimony is not necessary,

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[9] Initially his co-lead was Attorney Jones Andrews, but at some point after entry of the consent scheduling order, Attorney Andrews later notified defense counsel that he would no longer be working on the case and directed that all communications be directed to Attorney Sitnik. [ROA 255; 9/17/10 Tr. 25:8-11.]

[10] Plaintiff's attorney sent the child for follow-up treatment and to a neurologist for evaluation and consulted a legal nurse consultant. [ROA 254; 9/17/10 Tr. 24:15-18.]

[11] ROA 213; 7/30/10 Tr. 33:21-25.

[12] Nor did the Plaintiff's attorney advise Defendants' Counsel that the Plaintiff had requested that the file be sent to another attorney for review. [See Initial brief, p. 9.]

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 Phillips[13]; however, he did not deny that he received the motion when it was served by the Defense counsel.[14] [ROA 159; 4/29/10 Tr. 6.] Defendants maintain that since the Plaintiff had received the motion for summary judgment, the Plaintiff's failure to retain an expert could no longer be considered as the consequence of mere inadvertence from missing the scheduling order deadline because the paralegal was confused. It is also worthy of note that the new counsel (Attorney Graham) quickly found Dr. Oakes and procured his affidavit by June 3, 2010.

B. Neither the South Carolina Rules of Civil Procedure nor the Lawyers' Oath of Civility imposed any obligation on Defendants' Counsel to consult with Plaintiff's Counsel prior to making the motion for summary judgment.

Plaintiff has admitted that he did not have an expert and missed the deadline set by the scheduling order, and while he nominally has accepted responsibility for his mistake, he has repeatedly attempted to shift the blame to the Defendants' attorney. Plaintiff has made repeated and strident complaints that Defendants' counsel did not contact him about the late discovery, and that the Defendants' counsel should have made a motion to compel instead of moving for summary judgment. Plaintiff argued 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; 7/30/10 Tr.12:9-18; 13:6-16.] Plaintiff's counsel even went so far as accusing the Defendants of using

[13] 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.]

[14]Defense counsel did consent to the motion being rescheduled. [See ROA 82; 5/24/10 Motion for Reconsideration, p. 5.]

the motion for summary judgment as an ambush, [ROA 256; 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,[15] and did nothing."[16] [ROA 146; Memorandum in support of (third) motion for reconsideration, October 25, 2010, p. 4.]

Plaintiff claims that Rule 11, SCRCP and the Lawyer's Oath of Civility, Rule 402(k), SCACR, required the Defendants' attorney to consult with him about the discovery issues and to make a Rule 37 motion to compel before filing the motion for summary judgment. First, the record will show that Defense counsel had consulted about the discovery responses several times prior to entry of the scheduling order. Second, there is no rule that imposed any duty on the Defendants to consult or move to compel before filing the motion for summary judgment.

As the Plaintiff grudgingly acknowledges, "the letter of Rule 11, SCRCP..." does do not require an affirmation of consultation on motions for summary judgment. [Initial primary Appellant's brief, p. 19; see Rule 11(a), SCRCP ("There is no duty of consultation on motions to dismiss, for summary judgment,....").] Nor is there any rule imposing a duty on a Defendants to make a motion to compel compliance with a scheduling order to name experts before moving for summary judgment on the grounds

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[15] 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 their discovery responses.

[16] Plaintiff's counsel also complained that there would not have been a scheduling order in the first place if Defense counsel would have agreed to a dismissal to allow them more time to build their case. [ROA 213; 7/30/10 Tr. 33:21-25.]

that the Plaintiff does not have the requisite expert opinion to meet her burden of proof in a medical malpractice claims such as this.

Finally, despite the Plaintiff's accusation that the Defendants' attorney violated the Lawyer's Oath of Civility, the Oath did not require Defendants' counsel to consult with the Plaintiff's counsel before filing the motion for summary judgment. As the Supreme Court stated in *In re Anonymous Member of S. Carolina Bar*, 392 S.C. 328, 709 S.E.2d 633, 638 (2011):

> The interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally in the manner in which Respondent attacked Attorney Doe. Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client. There is no substantial amount of protected free speech penalized by the civility oath in light of the oath's plainly legitimate sweep of supporting the administration of justice and the lawyer-client relationship.

The Oath governs the tone of the communications between attorneys. It does not impose duties of consultation in addition to or beyond those found in Rule 11.

Plaintiff argues that: "No warnings. No lesser sanctions. An original and uncontrovertibly accidental mistake, brought on in large part by the removal of the calendar dates by a paralegal, warrants the drastic remedy of the preclusion of experts, and ultimately dismissal of the case, in the eyes of the trial court." [Initial primary Appellant's brief, p. 20 (footnote omitted).] Ultimately, however, the trial court did not enter summary judgment and, instead, granted the Plaintiff's second/renewed motion for reconsideration and accepted the untimely submission of Dr. Oakes' affidavit and only imposed a lesser sanction by limiting the Plaintiff to use of the expert she proffered.

C. The Supreme Court's decision in *Orlando v. Boyd* does not support the Plaintiff's argument that the Trial Court has abused its discretion in limiting the use of other experts.

While the Plaintiff claims that *Orlando v. Boyd* is on all fours with this case, it differs on several key points. First, in that case, the plaintiffs actually had identified an expert before the scheduling order ever was entered, but they failed to comply with scheduling order deadline for deposing the expert. When the defendants moved to dismiss for failure to prosecute, the plaintiffs moved to extend the time to depose the expert and to extend the deadline to allow them to name and depose another expert. The trial court denied the plaintiff's motion to extend the time to depose, and as a sanction for failure to abide by the scheduling order, the trial judge precluded the plaintiffs from using that expert. The trial court also denied their motion to extend the deadline to allow them to name and depose another expert. As a result, the plaintiffs had no expert to establish a deviation from the proper standard of care, and the trial court granted summary judgment. The Court of Appeals vacated the part of the trial judge's order, which precluded the plaintiffs from using the expert, and remanded for the trial judge to make findings of willful disobedience or gross indifference to respondents' rights as required by *Baughman v. American Tel. & Tel. Co.* On remand, the trial judge found the plaintiffs were willfully disobedient of the order and grossly indifferent to the respondents' rights; however, on appeal, the Supreme Court reversed, finding that the trial court abused its discretion in excluding the named expert because the plaintiff's lax efforts were not intentional.

Here, the Trial Court has reconsidered his decision to grant summary judgment to the Plaintiffs, and has allowed the Plaintiff to use Dr. Oakes, despite the untimely

submission of his affidavit. As it stands currently, the Plaintiff may proceed to trial, but is precluded from naming any additional experts on standard of care and/or proximate cause. Nothing in the Appellate Courts' opinions in *Orlando v. Boyd* supports the Plaintiff's contention that being limited to the use of a single expert on the issue of liability is tantamount to summary judgment and dismissal.[17] To the contrary, it is notable that in the first appeal of *Orlando v. Boyd,* the Court of Appeals did not reverse the trial court's refusal to allow the plaintiffs to name another expert.

Nor is there any support in *Orlando* or any other cited appellate precedent for the Plaintiff's argument that she is being denied her right to counsel of her choice. Attorney Graham submitted a notice of appearance on September 8, 2010,[18] and made an appearance at the September 17, 2010 hearing, during which he indicated that he might not stay in the case if the Trial Court would not allow him to name other experts.[19] The Defendants submit that Attorney Graham's choice to withdraw from the case, does not amount to the Trial Court's depriving her of her choice of counsel. Nor does Attorney

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[17] Despite the Plaintiff's argument to the contrary, this Trial Court's exercise of discretion is not comparable to the situation presented in *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., Inc.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999), or *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 489 S.E.2d 679, (Ct. App. 1997). In *Griffin*, the Court affirmed the trial court's decision to strike the defendant's answer after the plaintiff had filed six motions to compel discovery and the trial court had issued four orders directing the defendant to comply with discovery; however, there is no holding that the trial court can only impose sanctions after repeated motions and warnings. And, in *Karppi*, the Court reversed the trial court's order striking a defendant's answer and cross-claim and entering default against it on the grounds that the sanction was too harsh because it adversely affected a co-defendant. Here, the Trial Court's limiting the Plaintiff to the only expert she named (even though untimely) is not a comparable sanction.

[18] ROA 267; 9/17/10 Tr. 37:23-24.

[19] ROA 268; 9/17/10 Tr. 38:7-9.

Graham's opinion that he cannot effectively prosecute the case with only Dr. Oakes amount to the Trial Court granting summary judgment.[20] In the final analysis, it was Attorney Graham who selected Dr. Oakes and obtained his opinion to persuade the trial court to reconsider the order granting summary judgment to the Defendants, and Plaintiff should not be heard to complain that she is being limited to his opinions.

D. The Trial Court properly considered the *Jumper v. Hawkins* factors in limiting the Plaintiff to use of Dr. Oakes.

As noted above, in *Jumper v. Hawkins*, the Court of Appeals enumerated several factors that the trial court should consider before excluding a witness because the party has not complied with a pre-trial scheduling order. Again, the Defendants must point out that the Trial Court ultimately did not exclude the Plaintiff's expert witness, but in fact, allowed the Plaintiff to submit a late affidavit and will allow the Plaintiff to use her expert at trial. However, when the trial court considered the factors in *Jumper*, it held that: [T]he Plaintiff has failed to provide the Court with the appropriate considerations to evaluate any additional proposed witnesses. Furthermore, the record in replete with egregious discovery abuses prejudicial to the Defendants' attempts to conduct meaningful and timely discovery justifying this Court's limitation of the expert witnesses." [ROA 5; 3/25/11 Order, p. 1.] Thus, the question presented is whether the Trial Court acted within its discretion in limiting the Plaintiff to Dr. Oakes as the sole expert on the liability issues of standard of care and proximate cause. Subject to the issues raised in their cross-appeal, Defendants submit that, considering the five *Jumper* factors, the Trial Court did not abuse its discretion.

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[20] ROA 317; 1/5/11 Tr. 5:16-21.

Although the Trial Court allowed the Plaintiff to avoid summary judgment by accepting the untimely affidavit of Dr. Oakes, Plaintiff insists that she cannot prevail without more expert witnesses. However, Plaintiff has not proffered the name of any other experts she would call to testify or the content of their expert opinions; rather, she wants another chance to try to rebuild her case.

Defendants further submit, as discussed above, that in the final analysis, the nature of the Plaintiff's failure to timely identify her witnesses was not inadvertent and does not warrant reversal of the Trial Court's decision. The record shows that the Plaintiff filed a medical malpractice claim without an expert; the Plaintiff did not retain an expert[21] after entering into a consent scheduling order that set a deadline for her to name her experts; the Plaintiff did not retain an expert even after she was served with a motion for summary judgment; only *after* the Trial Court had granted summary judgment and *after* she had filed a motion for reconsideration, did the Plaintiff name an expert when she submitted Dr. Oakes' affidavit as a supplement to her first motion for reconsideration. Defendants maintain that explanations about confusion with the paralegal regarding the scheduling order deadlines and problems of communication with New York co-counsel and the Plaintiff's request for other counsel to review the file do not warrant allowing the Plaintiff to rebuild her case at this late stage. Finally, the Defendants submit that the Trial Court correctly found that the Plaintiff's failure to respond to discovery and comply with the court-ordered deadlines was prejudicial to the

[21] While the Plaintiff's attorney sent the Child to a neurologist for evaluation and consulted a legal nurse consultant, there is no evidence that the Plaintiff's attorney was seeking an expert on the obstetrician's standard of care and any breach thereof.

Defendants' attempts to conduct meaningful and timely discovery and justifies the Trial Court's limitation of the expert witnesses.

CONCLUSION

In their cross appeal, the Defendants maintain that the Trial Court properly granted summary judgment when the Plaintiff failed to present the requisite expert opinion to meet her burden of proof and that the Trial Court erred in granting the Plaintiff's renewed/second motion for reconsideration when the Plaintiff belatedly presented Dr. Oakes' affidavit. Thus, the Defendants request that the Court reverse the Trial Court's order granting reconsideration and reinstate the order granting summary judgment.

In the alternative, based on the foregoing, Defendants submit that the Trial Court acted within its discretion in refusing the Plaintiff's motion to further extend the scheduling order and limiting the Plaintiff to use of only Dr. Oakes as an expert on the issues of standard of care and proximate cause. And, accordingly, the Court should affirm and remand to allow the case to proceed subject to the limitations on the use of experts.

Respectfully submitted,

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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 Respondents' Final Brief of Respondents/ Appellants on Counsel for Appellants/Respondents, via U.S. Mail, first class, postage prepaid to the following address:

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