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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Thomas Rickerson

Appellant,

vs.

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

Respondents

FINAL REPLY BRIEF OF APPELLANT

LAW OFFICES OF WILLIAM ISAAC DIGGS

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REPLY ARGUMENT I

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

We borrow this from another area of the law. "While the Court of Appeals' reasoning in *Carolina Winds [Owners' Association, Inc. v. Joe Harden Builder, Inc.*, 297 S.C. 74, 374 S.E.2d 897 (Ct.App. 1988)] appears to be a seamless web of proper legal analysis, the opinion reaches a result which is repugnant to the South Carolina policy of protecting the new home buyer. The result is that a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the imposition of traditional and technical legal distinctions." *Kennedy v. Columbia Lumber, etc.*, 299 S.C. 335, 341-42, 884 S.E.2d 730 (1989). Transpose the above statement to a medical malpractice case, and Appellant submits the rationale applies to respondents' brief in this appeal, respecting all five arguments addressed. Based on Appellant's *supposed* mis-conduct, as an innocent medical patient of respondents, he should forever be denied access to the courts even though he was severely injured as a result of respondents' negligence. Appellant relied on the implied good faith of respondents' trial counsel, Magee. When Lydia Magee left for maternity leave, Marian W. Scalise filed the motion to dismiss, **R. 24**, and refused to mediate. **R. 107.** Perhaps Mrs. Scalise viewed the case differently from Mrs. Magee.

The motion to dismiss was filed even though the respondents themselves never made an effort to schedule the mediation and never communicated with the Appellant

about the mediation process, and thereafter never co-operated, and even refused to mediate with, the court appointed mediator. Respondents' argument works equally well in reverse we submit, with the *plaintiff* benefiting from failure to mediate. The trial court could have equally ruled that *respondents* should be held in default and only a damage hearing remained to be held to determine plaintiff's damages.[1] However, Respondents cite no conduct, unreasonable or otherwise, on behalf of the Appellant which justifies dismissal of his claim against them with prejudice, as a discretionary sanction, and not as a jurisdictional limitation on the trial court's authority to hear the matter. As respondents admit, the medical malpractice statute is not jurisdictional, *Ross v. Waccamaw Community Hospital,* 404 S.C. 56, 744 S.E.2d 547 (2013) (but see where respondents spend the better part of four (4) pages in their brief attempting to distinguish *Ross* from the instant appeal. Brief of Respondents at pages 13 – 16). Remarkably, respondents take the position that they bear no responsibility as defendants in a medical mal-practice matter and only the Appellant is to be punished for alleged inaction.

In their brief, respondents have (conveniently) omitted reference to the "satisfactory assurance" aspect of interaction between Mrs. Magee and Appellant's counsel. **R. 101; and R 109 – R. 260.** Appellant co-operated with trial counsel, Lydia Magee, in signing the "satisfactory assurance" letter for all Appellant's medical providers regarding applicable HIPPA regulations concerning privacy. Appellant assumed the attorneys were co-operating in this regard in order to prepare for mediation. Appellant

[1] Indeed, this same trial judge has held as much. See *Jane "AP" Doe v. Omar Jaraki, et al*, civil action Case No. 2010-CP-26-5146; Appellate Case No. 2012-212812, orally argued, November 6, 2013, wherein this same trial judge refused to allow the *defendant* to file a responsive pleading in the civil action due in part to his failure to mediate the case pursuant to S.C. Code Ann. 15-79-125.

knew respondents were conducting discovery as permitted by the statute. Respondents now call this "unreasonable neglect ...[and] not diligently pursuing this action...." Brief of Respondents at page 13. At no time did respondents indicate that they would make an issue of time limitations set out in the statute. See *Ross,* 404 S.E.2d at 63, "We further find that the circuit court retains discretion to permit the mediation process to continue beyond the 120-day time period and may consider principles of *estoppel and waiver* to excuse noncompliance. Emphasis added. *See Mende v. Conway Hosp., Inc.*, 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991) (finding where both parties agreed to delay trial temporarily and resume proceedings at a later date, the circumstances involved and the defendant's conduct indicated the defendant waived any objection based on the expiration of the statute of limitations)."

Respondents also take issue with Appellant's filing of a civil action. See Brief of Respondents at page 16, note 5 as alleged evidence that Appellant "desire[s] to circumvent the statutory requirements ...." Because of Respondents' refusal to mediate even in the face of the mediator's attempt to schedule same, Appellant was in a position wherein he was forced to file suit lest he be accused of letting the statute of limitations run. See S.C. Code Ann. § 15-79-125(E).[2]

With all due respect, respondents' argument is without merit and the trial court should be reversed.

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[2] This statute states, "If the matter cannot be resolved through mediation, the plaintiff may initiate the civil action by filing a summons and complaint pursuant to the South Carolina Rules of Civil Procedure. ***The action must be filed***: (1) within sixty days after the mediator determines that the mediation is not viable, that an impasse exists, or that the mediation should end; or (2) prior to expiration of the statute of limitations, whichever is later." Emphasis added.

REPLY ARGUMENT II

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

Respondents' argument on this question is likewise without merit. They attempt to "hang their hat" on the oversight of Appellant's counsel in his failure to include the notice language within the Notice of Intent to File Suit. Respondents have re-written this question from that presented by Appellant in the Brief of Appellant, and seemingly assert that because the language was omitted, Appellant is forever barred. While the trial court might have been correct to dismiss Appellant's Notice of Intent to File Suit, an idea with which Appellant does not agree as we assert it could be amended, there is certainly no justification to *dismiss it with prejudice*.

There is no legislative history relative to this statute which would indicate that meritorious medical malpractice plaintiffs should be denied access to the Courts in this jurisdiction in a situation where the mediation notice had been inadvertently omitted by Appellant's counsel.[3] "Severe sanctions, such as the dismissal of an action, should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights." *See McNair v. Fairfield County*, 379 S.C. 462, 466, 665 S.E.2d

[3] "A multitude of events could cause a mediation session to be delayed beyond the statutory period: illness or weather; fixing a date convenient for all parties; the need to appoint different mediators. The defendants' interpretation of [the mediation statute] would mean that a claimant, regardless of fault, would lose all legal redress because the mediation session did not occur within the 90-day period. This interpretation contradicts the legislature's expressed intent of providing an informal, inexpensive, and expedient mediation system." Ross, 404 S.C. at 65, citing and quoting *Schulz v. Nienhuis*, **152 Wis.2d 434, 448 N.W.2d 655**, at 658-59. (1989)

830 (Ct.App. 2008)(and cases collected and cited therein), as argued in the Brief of Appellant at page 12.

There is no evidence that Appellant acted in bad faith or gross indifference to the opposing parties' rights. Moreover, there was no willful disobedience because no order had been issued. Indeed, it was the Respondents who willfully disobeyed a court order regarding mediation, if any disobedience occurred in this case. Lastly, the trial judge did not make any findings of "willful disobedience." See *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996)(where the Court of Appeals remanded the case for specific finding regarding willful disobedience.

REPLY ARGUMENT III

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

Appellant was acting in good faith and was misled into a trap by respondents in an effort to deny him access to any forum to "litigate" his claim. Under all of the circumstances we submit Appellant was misled into a false sense of security. See *Mende v. Conway Hosp., Inc.*, 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991) (finding where both parties agreed to delay trial temporarily and resume proceedings at a later date, the circumstances involved and the defendant's conduct indicated the defendant waived any

objection based on the expiration of the statute of limitations)." Appellant accorded "satisfactory assurance" to opposing counsel under HIPPA regulations during discovery in preparation for mediation (we thought), **R. 101,** but moreover, respondents' lack of objection to the filing of the requisite notice and the omission regarding the requisite mediation language itself contributed to delay. ADR 4 imposed an obligation on both parties to act even if the mediation language had been inadvertently omitted. At no time did respondents ever indicate they were requiring strict compliance with the time frame included in the statute. ADR 4 does not say, "Subject to tradition" (as seemingly argued by respondents at Brief of Respondents). Rather, the parties are required to contact the neutral. ADR 4. Appellant was reasonable to understand there was implicit agreement between the parties to mediate the case when respondents had obtained the medical records they had sought, even if it did fall slightly outside of the statutory time frame.

REPLY ARGUMENT IV

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

Appellant stands on his argument in brief on this issue. We respectfully submit that respondents' argument is without merit and this error requires reversal of the trial court's order of dismissal with prejudice. The letter from mediator Pearce clearly states that the mediation cannot be had in this instance. **R. 108.** Appellant submits it takes two parties to mediate. Respondents' argument now that "At no point did respondents state

they were unwilling to mediate [,] Brief of Respondents at page 23, is hollow, we submit. Even at this point in time, respondents have never agreed to submit to mediation. In fact, it is not relevant whether Mr. Pearce misperceived respondents' position, he wasn't going to hold the mediation anywise and his position was based on respondents' statements to him via counsel. **R. 108**. In such a situation, we submit, *unwilling to submit the case to mediation* as Mr. Pearce characterizes it, **Id.,** translates very nicely into the concept that *mediation is not feasible,* as contemplated by the statute. The trial Court committed error on this issue we respectfully submit.

REPLY ARGUMENT V

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

Respondents never complained about the omission of the notice to mediate and indeed never raised the issue. It was Appellant's counsel who raised the issue at the hearing on respondents' motion to dismiss. **R. 74, line 20 – R. 75, line 3**. Respondents stated in brief, "[N]o proper law suit has been filed; accordingly Respondents have not been called upon to formally "answer" or otherwise defend the allegations against them. Brief of Respondents at page 18, yet respondents argue that even in the face of the *Ross* opinion, Appellant should be denied access to the courts *with prejudice* and respondents bear none of the responsibility, even if they were negligent medical providers. Respondents' position is not tenable we submit.

In *Ross*, the Court stated,

> *See, e.g.*, Rule 1, SCADRR ("These rules shall be

> construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply."). It is clear that the Legislature enacted section **15-79-125** to provide an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims.

Ross, 404 S.C. at 63. The Court went on the state that, "To accept the view advanced by Respondents would lead to an absurd statutory construction. Specifically, Respondents would have this Court construe section **15-79-125** as a trap for plaintiffs with potentially meritorious claims." Id. (Emphasis in original).

We submit that it is equally absurd to accept respondents' construction and application of the statute in this instance. This is especially so given Appellant's co-operation with the "satisfactory assurance" issues and respondents' lack of communication with the Appellant otherwise, including their lack of objection to Appellant's notice filing deficiency (regarding the mediation language). The Appellant submits it was reasonable to assume there existed an implied understanding that mediation would be held subsequent to receipt of Appellant's medical information.

CONCLUSION

Plaintiff would respectfully ask this Court (1) to reverse the Order of Dismissal and allow this civil litigation to proceed on the merits by (2) declaring that mediation resolution was not possible in this case based on the Mediator's letter as is included in the Record in this matter.

Respectfully submitted,

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This 20th day of December, 2013
Myrtle Beach, South Carolina

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CERTIFICATE OF COUNSEL

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

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This 30th day of December, 2013
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