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 and Natural Guardian of D'Andre Green, an infant under the age of 14 years,

Appellant,

v.

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

Respondents.

INITIAL BRIEF OF APPELLANT IN RESPONSE TO CROSS-APPEAL

Kevin H. Sitnik
The South Carolina Law Firm
Post Office Box 389
Irmo, South Carolina 29063
(803) 520-6573 - Office
ksitnik@bellsouth.net

On Behalf of:

Robert V. Phillips, Esq.
McGowan, Hood & Felder, LLC
1539 Healthcare Drive
Rock Hill, South Carolina
(803) 327-7800 - Office
(803) 328-5656 - Facsimile
rphillips@mcgowanhood.com

Attorneys for Appellant

This 21st day of May, 2012
Lexington, South Carolina

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STATEMENT OF THE ISSUE ON APPEAL

In this cross-appeal, the Repondents Dr. Chaudhry and her practice challenge the denial of their motion for summary judgment.

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I STATEMENT OF ISSUES ON APPEAL

In responding to the cross-appeal of Dr. Chaudhry and her medical practice, the Defendants in the underlying action, the Appellant/Respondent puts forth the issue on cross-appeal as follows:

I. Did the trial court properly deny summary judgment to Dr. Chaudhry and her medical practice, upon the second motion for reconsideration filed by Marquette Johnson, the mother and natural guardian of a minor, D'Andre Green?

III STATEMENT OF THE CASE

Brief Summary of Pertinent Facts

This is a medical malpractice action. Appellant's complaint alleges that as a result of the negligence of the Defendants, "the infant Appellant sustained severe and permanent injuries including a left Erbs Palsy and brachial plexus injury." Complaint, ¶ 16. By all accounts, this is a *complex* medical malpractice case involving a brachial plexus birth injury. In short, the Appellant alleges that her son was injured during the delivery due to the force that exerted by Dr. Chaudhry on D'Andre.

D'Andre Green was born on February 3, 2004. The current action was instituted by Appellant Johnson, Appellant Green's mother and natural guardian, on or about December 8, 2008. Id. The defendants, including the Respondents, filed answers denying liability. By consent order, the individual claims originally asserted by the Appellant as D'Andre's mother were voluntarily dismissed as being barred by the statute of limitations. See Order dated June 3, 2009. Defendant McLeod Regional Medical Center was ultimately granted summary judgment, and that judgment is not on appeal.

For reasons unknown, the Appellant first sought the assistance of a New York attorney, Daniel Buttafucco, to explore the possibility of filing a claim. At some point thereafter, Mr. Buttafucco asked Appellant's current counsel to serve as "local counsel." Fearing that the statute of limitations was about to run on any claim the Appellant might

have individually as the mother of D'Andre[1], Appellant's counsel quickly filed suit.

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

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

In the meantime, a paralegal for Appellant's counsel, reading the contents of letters drafted both to the New York attorney and to the client, mistakenly believed that

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

the firm's involvement with the case had ended, placed the file in the "declined" file drawer, and removed the dates of the Scheduling Order from undersigned counsel's calendar. Undersigned counsel has always accepted full responsibility for this mistake.

The present appeal is the result of a series of motions and hearings upon such motions, beginning with Respondents' Motion for Summary Judgment, which was filed March 24, 2010. A hearing upon such motion was first held on April 30, 2010, at which time the trial Court initially granted summary judgment based upon Appellant's failure to name an expert witness by the date indicated in the initial consent scheduling Order, which had been entered August 27, 2009.

B. Statement Of Pertinent Facts[2]

As noted above, this case has a tortured and convoluted history. However, the issues on appeal stem primarily from the Appellant's inadvertent failure to identify expert witnesses by the November 30, 2009 deadline contained in the initial scheduling Order entered in this case in August of 2009. Thereafter on March 24, 2010, without *any* communication during the preceding seven months from the date of the entry of the scheduling Order and *prior to the close of discovery*, Respondents filed a motion for summary judgment, asserting that such judgment was proper due to the failure of Appellant to identify an expert witness by the date indicated in the scheduling Order. Respondents' Motion for Summary Judgment. On April 29th, a hearing was held on Respondents' Motion for Summary Judgment, at which time Appellant objected to the motion, and sought to enlarge the deadlines in the original Scheduling Order. See generally, Transcript of Hearing of April 29, pp. 5-10.[3]

2 This Statement of Pertinent Facts is virtually identical to that contained in Appellant's Brief.

3 At this hearing, Appellant's counsel additionally noted that it had not received prior notice of the hearing until the Clerk's office called to change the time of the hearing, on the day before the scheduled hearing. See generally, Plaintiff's Motion for Reconsideration, p. 4-5. As subsequently discovered, the Clerk of Court was using an old address for Appellant's

At this hearing, counsel for the Appellant's explained to the Court certain facts regarding the posture of this case. Specifically, the Appellant noted that this case was originally brought to the Appellant's counsel's law firm through an attorney in New York, Mr. Daniel Buttafucco, who sought Appellant's firm to serve as local counsel. April 29th Hearing Transcript, p. 6, ll. 22-24. At that time, Appellant's counsel in Rock Hill noted that any potential claim on behalf of the child's mother may be at risk of having the statute of limitations expire, and thus promptly filed suit on behalf of both the mother and the minor Appellant in order to preserve any such claim by the mother. Id. At p. 6, ll. 19-25. The Respondents subsequently answered the complaint, and sought to dismiss the claims on behalf of the mother due to the statute of limitations.

Thereafter, the Attorney from New York, Mr. Buttafucco, indicated that he did not intend to serve as lead counsel on the case, and indicated his wish for local counsel to assume the lead. See e.g. Id. At p. 7, ll. 1-2. At this point in time, the original attorney within Appellant's counsel's office who had been contacted by Mr. Buttafucco indicated that due to his location in Rock Hill, South Carolina, and his lack of prior experience with this specific type of medical malpractice claim (brachial plexus injury), that perhaps someone in the firm's Columbia office should assume the lead with the file. As a result, two attorneys from Appellant's counsel's Columbia office assumed lead on the file (including the undersigned), and began conducting their own due diligence. Id at p. 7, ll. 2-9.

In response to the Respondents' motion to dismiss the claims of the Mother, and after further investigation of the facts and law pertinent to such a claim, Appellant's new

attorney, Robert Phillips—an address he had not used is some six years, and a different address from that listed by him on the signature line of the Summons and Complaint filed in this action. Id. At 4-5, Exhibit C. This fact is pertinent only insofar as Respondents have repeatedly argued that Appellant's failure to produce an affidavit at this hearing indicates wrongdoing or willful disobedience of the scheduling order.

counsel consented to the dismissal. See Consent Order dated June 3, 2009. In addition, Appellant's new counsel answered certain Requests to Admit served by Respondents' counsel, and began preparing written responses to Respondents' Interrogatories and Requests for Production of Documents. See e.g. Hearing Transcript of July 26, p. 5, ll. 3-5. Furthermore, Appellants' new counsel sent the minor for follow-up treatment and evaluation with a local neurologist to gauge the severity of the injuries, and consulted with a legal nurse consultant. Hearing Transcript of September 17, 2010, p. 24, ll. 15-18; p. 24, l. 24-p. 25, l. 5. During this time period, a status conference was held before Judge Russo, at which time Appellant's counsel sought consent to remove the case from the docket pursuant to Rule 40(j), SCRCP, such that it could complete its investigation of the file. Id. p. 24, ll. 19-24. Counsel for Defendant McLeod Regional Hospital consented, but counsel for Respondents would not consent. Id.; Hearing Transcript of April 29, p. 7, ll. 3-7. As a result, Judge Russo requested the parties to submit a proposed scheduling Order for approval by the Court. The parties prepared a proposed scheduling Order, which was signed by Judge Russo and entered by the Court on August 9, 2009. Scheduling Order dated August 27, 2009. The Scheduling Order contained a deadline for the Appellant to name expert witnesses by November 30, 2009. Id.

Thereafter, Appellant's counsel received the report from the local neurologist, and again consulted with Appellant's in-house legal nurse consultant about the claim. Hearing Transcript of April 29; Hrg. Trans. Sept. 17, p. 25. Appellant's counsel came to certain conclusions about the claim, and communicated those to both the client and to the referring attorney in New York. Hrg. Trans. April 29, pp. 7-8. One of the two attorney's in Appellant's counsel's Columbia office then sent a letter to opposing counsel stating that he would no longer be working on the file, and asking that all future correspondence be

directed to the remaining attorney, the undersigned. Hrg. Trans. Sept. 17, p. 25, ll. 8-11. At this point in time, the attorney from New York ceased responding. Upon being informed of the forgoing, the Appellant's mother asked to have another South Carolina attorney review the file. Appellant's counsel obviously consented, and asked the Appellant for the name and address of another attorney to whom she wished them to provide a copy of the file. The Appellant finally provided the name of another attorney in April, 2010, shortly after the Respondents had filed the motion for Summary Judgment. Hrg. Trans. April 29, p. 7, ll. 11-13. Sometime after the letters to the New York attorney and the client were sent concerning the conclusions of Appellant's counsel, the paralegal for Appellant's remaining attorney mistakenly placed the file in the "declined" file drawer, and removed all of the Scheduling Order dates from Appellant's counsel's calendar. Hrg. Trans. April 29, p. 8 ll. 2-11; Affidavit of Kevin Hayne Sitnik (Exhibit C to Plaintiff's Motion for Reconsideration dated July 16, 2010).

Respondents' counsel did not attempt any written communication with Appellant's counsel either in response to the letter withdrawing as counsel issued by the other attorney in Columbia, nor, in fact, since the date of the entry of the scheduling Order. Hrg. Trans. April 29, p. 9; Affidavit of Kevin Hayne Sitnik (Exhibit C to Plaintiff's Motion for Reconsideration dated July 16, 2010). Respondents' counsel further did not communicate in any way with Appellant's remaining counsel, the undersigned, from the date of the entry of the Scheduling Order, until Appellant was served with a copy of the Motion for Summary Judgment, seven months later. These preceding events were explained to the Court at the hearing on Respondents' Motion for Summary Judgment, held on April 29, 2010, at which time Appellant's counsel took full responsibility for the actions of the paralegal, and orally moved the Court to extend the scheduling Order

deadlines by ninety days, in order for the local attorneys now reviewing the file to have an opportunity to finish their review, be substituted as counsel of record, and provide the name of an expert. Hrg. Trans. April 29, pp. 7; 9. That motion was summarily denied from the bench. Id. p. 11.

Instead, the Court initially granted Defendant's motion for summary judgment. Thereafter, Appellant filed a motion for Reconsideration, and an extensive brief outlining the applicable South Carolina law on the sanctions available to a Court for the failure of a party to name an expert according to a deadline in a scheduling order. Plaintiff's Motion for Reconsideration dated July 16, 2010. During the pendency of this motion, the local attorneys reviewing the file indicated a willingness to assume prosecution of the case, and procured an affidavit of an expert, Dr. Oaks, outlining a breach of the standard of care. Appellant's counsel promptly submitted this affidavit to the Court and opposing counsel as a Supplement to his Motion for Reconsideration. Supplement to Motion for Reconsideration dated June 23, 2010. A hearing was originally scheduled on this motion for July 26, 2010—the same day as the hearing on Defendant McLeod's Motion for Summary Judgment was to be heard. However, by e-mail dated July 6, 2010, the judge's clerk informed the parties that the hearing was cancelled, and the motion for Reconsideration was to be summarily denied by Form Order. Appellant received written notice of the entry of this Order on July 16, 2010. Form 4 Order dated July 6, 2010.

Thereafter, a hearing was scheduled on co-defendant's McLeod's motion for Summary Judgment on July 26, 2010, at which time the Court summarily granted co-Defendant McLeod's nearly identical Motion for Summary Judgment, and invited Appellant to renew her motions for reconsideration as to all Defendants. Hrg. Trans. July 26. On that same day, Appellant filed a written motion to that effect, requesting again

reconsideration of the Court's denial of the previous motion for reconsideration, as well as the newly issued oral ruling dismissing the claims against McLeod Regional Medical Center. Plaintiff's Second Motion for Reconsideration, dated July 26, 2010. At the instruction of the Court, an expedited hearing was subsequently held on the afternoon of Friday, July 30, 2010[4], where the Court granted Appellant's renewed motion for reconsideration, made certain rulings regarding discovery including timing of the deposition of Appellant's newly identified expert Dr. Oaks, agreed to hold the motions for summary judgment in abeyance pending such discovery, awarded as a sanction for missing the deadline attorneys fees and costs associated with Respondents motion for Summary Judgment and attendance at the hearings thereon, and on Appellants' two motions for reconsideration. Hrg. Trans. July 30, pp. 38-40. The Court further instructed Appellants' counsel to prepare an order to that effect, and a Form 4 order which simply "granted" the motions for reconsideration and indicated that a more formal order was to follow was entered on July 30, 2010. Form 4 Order dated July 30, 2010. Respondents counsel failed to follow the Court's instructions and prepare a more formal Order, despite multiple requests by Appellant's counsel. Hrg. Trans. Sept. 17, p, 9 ll. 9-10. As a result, no written Order specifically granting Appellant's new and renewed motions for reconsideration was entered at this time.

Instead, on or about August 6, 2010, Defendant Chaudhry filed a motion, seeking reconsideration of this Court's Form 4 Order which had granted the Appellant's motion for reconsideration. Respondents' Motion for Reconsideration dated August 6, 2010. This motion of the Respondents alternatively sought, for the first time, to compel certain

4 Appellant's counsel requested such an expedited hearing due to the fact that Appellant's time to Appeal the Order granting summary judgment as to Respondents was about to expire, since a renewed or second motion for reconsideration does not toll the time to appeal. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004).

discovery responses from the Appellant. Id. During this interval, Appellant's counsel had diligently attempted to move discovery forward, as instructed by the court, and had filed supplemental responses to Respondents' requests to admit and interrogatories. See generally, Hrg. Trans. Sept. 17 p, 27; p. 42 ll. 8-11; pp. 44-45. Appellant's would-be substitute counsel nonetheless scheduled and took certain depositions of Defendant McLeod's employees, pursuant to the Court's prior instructions, during which undersigned counsel was present, as ordered by the court.[5] Id. p. 5 ll. 5-11. During this time, the Appellant expressed her desire to substitute attorneys with the local attorneys who had completed their review, and obtained the affidavit of Dr. Oaks. These local attorneys submitted a notice of appearance on September 8, 2010, and indicated a willingness to assume representation of the Appellant—*provided* that the Court did not preclude the Appellant's from naming expert witnesses in addition to Dr. Oaks. Hrg. Trans. Sept. 17, pg 36-39; 43-46; 79-80; Hrg. Trans. Jan. 5, pp. 11-14.

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

After arguments were heard at this September 17, 2010 hearing, at which most of of the forgoing was re-hashed before the Court, the Court indicated that it had been previously unaware of the details surrounding the posture of this case (despite the fact

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

that they had been explicated both in written form and in the arguments of counsel on at least five prior occasions), and indicated that it had perhaps been hasty in granting summary judgment. September 17, 2010 Transcript, pp. 27-29. The Court, finding no intentional misconduct, thus once again agreed to hold the Summary Judgment motions is abeyance until the completion of certain discovery (including the deposition of Dr. Oaks).

At the hearing on Respondents' Motion for Reconsideration of the Order granting Plaintiff's motion to restore, the Court stated, unequivocally, that a resolution *of this case* on the merits is preferable to a procedural dismissal. Transcript September 17th, p. 29, ll. 21-22. Furthermore, the Court specifically stated that the intent of its oral ruling at the July 30th hearing was "to give the Defence as long as they want to get prepared, if you follow what I'm saying. That was the intent of the previous order." Id. ll. 4-5. Thereafter, after Mr. Buyck complains that the sanctions don't go far enough, does the Court add the following statement:

> "All right. The other thing that I think is going to expedite the thing, which I think works to your [Respondents'] advantage is that we've limited the Plaintiff's experts, which –I mean, quite often, there are doctors upon doctors that are getting named on up until trial. But because of the predicament that the Plaintiff has put us in, we've restricted the number of experts. I don't think you need two years to prepare it. .....I think that was the ruling, Mr. Sitnik?"
> Hrg. Trans. Sept. 17, p. 33 l. 21-p. 34 l. 3.

At which point in time, the Court addressed the limitation on Appellant's use of experts, throughout the trial. Appellant's counsel argued that that was not his understanding of the Court's prior oral ruling—the ruling which Respondents' counsel failed to reduce into writing. Rather, Appellant contended, and still contends, that the original ruling only limited the Appellant's use of Dr. Oak's for purposes of overcoming the summary

judgment motions, which were being held in abeyance pending the completion of certain discovery, including the deposition of Dr. Oaks.

Nonetheless, upon questioning by Appellant's would-be substitute counsel, the Court further clarified that it believed this to be its prior ruling from the bench, and that 'liability' was to be defined as including both breach of the standard of care, as well as causation. September 17, 2010 Transcript, p. 41, ll. 8-12. Appellant's counsel objected, and would-be counsel indicated that such a complex medical malpractice case would likely require more than one expert to establish both breach (an ob-gyn) and causation (a neurologist), and further indicated that he could likely not undertake representation under such circumstances. September 17, 2010 Transcript, p. 38-40. After some discussion, the Court requested a copy of the transcript of the prior hearing be obtained, confirmed that as a sanction the Appellant would be limited to the use of Dr. Oaks as an expert for 'liability' as previously defined, and once again invited a motion for reconsideration of this sanction. Hrg. Trans. Sept. 17, p. 40; 77. Since Respondents' counsel had failed to draft the Order in accordance with the Court's instructions at the July 30th, 2010 hearing, the Court now Court instructed Appellant's counsel to prepare an Order to this effect. September 17 Transcript, p. 29, ll. 8-22. This Order which simultaneously denied Respondents' Motion for Reconsideration of the Form 4 Order of July 30th, 2010, and granted Plaintiff's New and Renewed Motions for Reconsideration of the Order Granting Respondents' (and Defendant McLeod's) Motions for Summary Judgment, but imposing sanctions on the Appellant, is thus one of the Orders which (finally) is currently under appeal. Order dated October 12, 2010.

As the Court anticipated at the hearing on September 17, 2010, Appellant timely served a motion seeking reconsideration of this Order (Appellant's third Motion for

Reconsideration, in total, but first Motion for Reconsideration of the Order dated October 12, 2009), insofar as this Order, for the first time, imposed the sanction limiting Appellant's use of experts to Dr. Oaks for all issues of 'liability' including both breach of the standard of care an causation, not only for purposes of the Summary Judgment motions (which are still pending), but also for purposes of establishing liability of the Respondents' at trial of this action.[6] Order dated October 12, 2010. In support thereof, Appellant again filed a brief outlining the standard for imposing sanctions as a result of missing a deadline in a first scheduling order, and for witness preclusion as a sanction for discovery violations. Plaintiff's Motion for Reconsideration, dated October 25, 2010.

On January 5, 2011, the Court heard Appellant's new and third Motion for Reconsideration. At this hearing, undersigned Counsel also informed the Court of his departure from the law firm of Appellant's counsel, and moved to be relieved as counsel of record. At this hearing Appellant's counsel and would-be substitute counsel argued that such a limitation as to experts was tantamount to granting summary judgment. Hrg. Trans. pp.14-15, 20-21. After arguments by counsel were heard, the Court, without explication, denied the motion for reconsideration, stating only that, "Well, I'll stand by the ruling...." Transcript of January 5th, 2010, p. 26.

The Court also initially denied undersigned counsel's motion to be relieved as counsel of record. Id at 29. At which point, undersigned counsel asked to be heard, and pointed out to the Court that he had no contract with the Appellant, no access to the client file (which had remained with Appellant's counsel's firm), was then self-employed and maintained no malpractice insurance. Id at 30. At which point in time, Respondents' counsel interjected "we have no objection with Mr. Sitnik being relieved as counsel, Mr.

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

Phillips signed the complaint." Id. Thus, having obtained the consent of Respondents' counsel Mr. Buyck, the Court granted undersigned counsel's motion to be relieved as counsel of record, and asked Respondents' counsel to draft an order to the effect of the oral ruling. Id. Despite Respondents prior protestations about timeliness, it would be over two months before an Order to this effect was entered, on March 25, 2011. This is the second Order currently under appeal. The Order cites as a basis for the sanctions the following:

> "[T]he multiple procedural and factual issues relative to the prior granting of the Motion for Summary Judgment, the Court has exercised its discretion and hereby reconfirms the limitation of the Plaintiff's expert witness as to both standard of care and causation to Dr. Oaks. The Court has considered the [Appellant's] arguments on the record and the various factors enumerated in *Jumper v. Hawkins*, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001) and finds that the Plaintiff has failed to provide the Court with the appropriate considerations to evaluate any additional proposed witnesses. Furthermore, the record is replete with egregious discovery abuses prejudicial to the [Respondents'] attempts to conduct meaningful and timely discovery justifying this Court's limitation of the expert witnesses."
> Order dated March 25, 2010, p. 1.

No mention of attorney's fees or costs was raised by Respondents' counsel at any time, nor was such a sanction included in the proposed Order drafted by Respondents' counsel, and ultimately signed and entered by the Court. The only sanction thus imposed by the Court is a limitation on Appellant's right to employ expert testimony to establish 'liability.' Thereafter, the Appellant timely served his Notice of Appeal on April 14, 2010. The Court also fails to identify what these other "egregious" discovery abuses are—nor could it, since they are non-existent, and merely the byproduct of Respondents' counsel's imagination.

III. ARGUMENT

A. The Denial of a Motion for Summary Judgment is Not Appealable

By Respondents' own statement, their only issue on appeal is to "challenge the trial court's decision to deny their motion for summary judgment...." Respondents' Initial Corrected Brief, p. 1. Although the Respondents then attempt to parse this issue into certain sub-issues which produced this result, the denial of summary judgment is the only true issue sought to be appealed by virtue of the cross-appeal.

However, as this Court is well-aware, the denial of summary judgment is not immediately appealable. Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994). In Ballenger, *supra*, the Supreme Court stated:

> This Court has repeatedly held that the denial of summary judgment is not directly appealable. Willis v. Bishop, 276 S.C. 156, 276 S.E.2d 310 (1981); Mitchell v. Mitchell, 276 S.C. 44, 275 S.E.2d 1 (1981); Neal v. Carolina Power and Light, 274 S.C. 552, 265 S.E.2d 681 (1980); United States Fidelity & Guaranty Co. v. City of Spartanburg, 267 S.C. 210, 227 S.E.2d 188 (1976); Medlin v. W.T. Grant, Inc., 262 S.C. 185, 203 S.E.2d 426 (1974); Greenwich Savings Bank v. Jones, 261 S.C. 515, 201 S.E.2d 244 (1973); Geiger v. Carolina Pool Equipment Distributors, Inc., 257 S.C. 112, 184 S.E.2d 446 (1971); see also Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct.App.1986); Associates Financial Services Co. of South Carolina, Inc. v. Gordon Auto Sales, 283 S.C. 53, 320 S.E.2d 501 (Ct.App.1984). A majority of the other jurisdictions have reached this same conclusion: 4 C.J.S. Appeal and Error, § 98 (1993); 4 Am.Jur.2d Appeal and Error, § 104 (1962 & Supp.1993); 15 A.L.R.3d 899 (1967 & Supp.1993). Further, this Court has held that the denial of summary judgment is not reviewable even in an appeal from final judgment. Raino v. Goodyear Tire, 309 S.C. 255, 422 S.E.2d 98 (1992); Holloman v. McAllister, 289 S.C. 183, 345 S.E.2d 728 (1986).
>
> 313 S.C. at 476-77, 443 S.E.2d 379.

This was reiterated in 2003, in Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003), wherein our Supreme Court reaffirmed this principle, and quashed would-be exceptions to the rule:

> Ballenger specifically overruled two cases which were inconsistent with this rule, and noted that "the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defence since that defence may be raised again later in the proceedings. Therefore, an order denying a motion for summary judgment is not appealable." 313 S.C. at 477-78, 443 S.E.2d 379. See also Silverman v. Campbell, 326 S.C. 208, 486 S.E.2d 1 (1997) (reiterating that denial of summary judgment is not appealable, even after final judgment). The only recent exception to this [354 S.C. 168] rule by this Court was in a case prior to Ballenger, Davis v. Lunceford, 287 S.C. 242, 335 S.E.2d 798 (1985), in which we allowed the appeal of the denial of summary judgment to proceed in the third appeal of a medial malpractice action which had been pending for thirteen years. [7]
>
> We adhere to recent precedent and hold that the denial of a motion for summary judgment is not appealable, even after final judgment. To the extent the cases cited by the Court of Appeals are inconsistent, they are expressly overruled.

Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003).

Put simply, Respondents' cross-appeal is patently improper, a waste of this Court's time and resources, and a waste of the resources of the parties. The improper cross-appeal serves and has served only to confuse scheduling deadlines, and afford Respondents with a vehicle by which they can place an argument before the Court in a manner in which it otherwise, as a respondent, would not be able to do. Simultaneously, the cross-appeal largely addresses the precise issue presented by Appellant's appeal: namely, whether the sanctions imposed by the trial court on D'Andre Green were proper, where such sanctions were levied as a result of Appellant's counsel's failure to name an

expert witness by the date set forth in an initial scheduling order. Truly, that is the only real issue on appeal.

B. Summary Judgment is Not an Appropriate Sanction For the Failure to Name an Expert Witness by a Deadline Set-Forth in an Initial Scheduling Order[7]

"Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial." Spence v. Wingate, 716 S.E.2d 920, 395 S.C. 148 (2011)(*citing* Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004)). Likewise, "[b]ecause summary judgment is a drastic remedy, it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433 439 (2003); Lanham, 349, S.C. At 363, 536 S.E.2d at 334; Doe v. Batson, 345 S.C. 316 322, 548 S.E.2d 854, 857 (2001); Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Furthermore, Appellant acknowledges that in a complex medical malpractice case such as the one at bar, the plaintiff must establish liability through the use of expert testimony. Keaton v. Greenville Hospital Sys., 334 S.C. 488, 514 S.E.2d 570 (1999). In the present case, the Court initially granted summary judgment based solely upon the failure to name an expert witness who could establish liability by the time scheduled in the initial scheduling order, but well before the close of discovery. Specifically, the initial Order notes certain scheduling Order deadlines, and then concludes that the failure to comply with such deadlines is evidence of "gross indifference to these Defendants." Order of May 3, 2010, p. 3. This statement makes clear that the granting of summary

7 The argument is gernerally identical to that contained in Appellant's Brief—i.e., the appropriate sanction for violaton of a scheduling order deadline for naming expert witnesses.

judgment is being imposed as a sanction. However, our courts have consistently held that such a drastic sanction should not be employed absent intentional misconduct, which is absent in the present case.

Orlando v. Boyd, is nearly on all fours with the present case. 320 S.C. 509, 466 S.E.2d 353 (1995). In Orlando, the trial court excluded plaintiff's expert witness for failure to comply with a scheduling order. In that case, the defendant moved to dismiss the action for failure to prosecute because the plaintiff had not identified an expert by the date stated in the scheduling Order. Approximately one month after the filing of that motion, plaintiff moved to extend the scheduling order (again, similarly to the case at bar). The trial court denied the motion to extend the scheduling order as a sanction for the failure to identify the expert pursuant to the scheduling order, excluded the use of an expert plaintiff had belatedly obtained, and then granted summary judgment.

On appeal, this Court vacated the exclusion of the late named witness, and remanded the case for a determination of whether the failure to comply with the scheduling order was the result of 'willful disobedience or gross indifference' to the rights of the defendant. On remand, the trial court found (without noting any facts) that the plaintiffs were "willfully indifferent of the [scheduling] order and grossly indifferent to the [defendants'] rights." Id at 511.

Once again, the plaintiffs in Orlando appealed. This time our Supreme Court reversed the trial court's order excluding the late named witness and granting summary judgment even in the face of the trial court's [unexplicated] finding of 'willful disobedience and gross indifference' on the part of the plaintiff's. In so doing, the Supreme Court instituted a yet higher standard, noting "[t]he exclusion of a witness is a sanction under rule 37, SCRCP, which should never be lightly invoked." Id.

"Furthermore, "[w]here the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of willful disobedience or gross indifference to the the rights of the adverse party." Id. (quoting *Baughman*, 306, S.C. At 108) (emphasis added). The Supreme Court then went further, stating "[w]hatever sanction is imposed would serve to protect the rights of discovery provided by the rules. ***A sanction of dismissal is too severe if there is no evidence of any intentional misconduct.***" Id. (citing Dunn v. Dunn, 298 S.c. 499, 381 S.E.2d 734 (1989) and Kershaw Co. Bd. Of Educ. v. United States Gypsum Co., 302, S.C. 390, 396 S.E.2d 369 (1990) (emphasis added).

Indeed, the trial Court itself seems confused: The Court noted that "[w]hile the defendants argue that the plaintiff's failure to name an expert witness by the date set forth in the original scheduling order should be fatal, the Court finds that adjudication on the merits is more appropriate." Order dated October 12, p. 4. And yet, despite these holdings, the Court inexplicably imposed a sanction specifically designed to prevent an adjudication on the merits—by limiting expert witness testimony necessary to prove an admittedly complex medical malpractice claim.

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

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

And even if some lesser sanction is warranted, Appellant respectfully submits that it must be targeted to cure the error or neglect which occurred, but not impair the wholly innocent Appellant's ability to present fully the merits of her son's claim. In other words, if need be, punish the Appellant's lawyers by awarding some costs or fees if you must—but for heaven's sake don't punish D'Andre Green. There is simply no justice in such a sanction.

Orlando v. Boyd, however, is not the only South Carolina authority on point. In Griffin Grading and Clearing, Inc. v. Tire Service Equipment Mfg. Col, Inc., the plaintiff first filed a motion to compel discovery, and a hearing on its motion was repeatedly continued at the request of the offending defendant. 334 S.C. 193, 198-99, 511 S.E.2d 716 (Ct. App. 199). The parties, nearly a year after the motion to compel was filed, entered into a consent order concerning the disputed discovery. Again, the defendant failed to comply, and a second motion to compel was filed by the plaintiff. At the hearing on this second motion to compel, the court ordered compliance with the consent order

within thirty days. Even after that ruling, in direct defiance of the court's order, defendant did not comply, and the court (on a third motion to compel), ordered the the defendant to produce a witness, and specifically warned the defendant that any further failure to comply might result in the striking of the defendant's answer. Again the defendant did not comply, and yet again, the court heard yet another motion to compel, and ordered compliance within a certain time. In short, by the time the court finally imposed the sanction of striking the defendant's answer (akin to granting summary judgment), six motions to compel had been filed, and four orders compelling discovery had been entered. In the present case, Respondents did not file a single motion to compel until after they had lost their ambush summary judgment motion—not a single one.

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

One other case is worthy of note. In Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 489 S.E.2d 679 (Ct.App. 1997), the trial court struck the pleadings of the a

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

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

> In determining the appropriate sanction for late disclosure of an expert witness, this Court has stated, "it lies within the discretion of the trial judge to decide what sanction, if any, should be imposed. The rule is designed to promote decisions on the merits after ***a full and fair hearing***, and the sanction of exclusion of a witness should never be lightly invoked."
> Barnette v. Adams Bros. Logging, Inc., 586 S.E.2d 572 (2003) (citations omitted) (emphasis added).

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

In the present case, their has admittedly been no intentional misconduct either by D'Andre Green, nor his counsel. See e.g. July 30th, 2010 Transcript, p. 20, ll. 13-16. Nor is there any evidence to support a finding of willful disobedience or gross indifference to the rights of Respondents by either D'Andre Green, nor his counsel. Nor have Respondents made any showing of prejudice accompanied by the failure of Appellant to name expert witnesses within the deadline set-forth in this initial scheduling order, as indicated by Respondents complete silence and inaction during the seven months following the issuance of the Scheduling Order and prior to their filing of a motion for summary judgment. Indeed, at the time that motion was filed, discovery had not closed and a trial was still months away, at the earliest. See Scheduling Order, Exhibit A to Appellant's first Motion for Reconsideration. And in the words of Respondents' own counsel, "[u]sually, a case takes a couple of years to get to trial." Hrg. Trans. p. 32.

Rather, what the record before this Court confirms is that Respondents are seeking a windfall grant of summary judgment, and in so doing, have even admittedly misled the lower Court, by arguing that Appellant's counsel did not submit an expert affidavit until the filing of her second motion for reconsideration on July 26, 2010, when in fact the affidavit had been submitted as a supplement to the first motion for reconsideration on June 23, 2010, prior to the Court's denial of this initial motion. Respondents' first erroneously argued to the trial Court that the affidavit of Dr. Oaks was not submitted until the filing of Plaintiff's Second Motion for Reconsideration. Defendants' Motion for Reconsideration, p. 6. This error was clearly pointed out to the Court and to opposing counsel at the hearing on September 17, 2010, wherein it was stated:

> "Now, Mr. Buyck has also put in his motion to reconsider that he was not provided with a copy of that—with a copy—that Dr. Oaks' affidavit was not provided until the second motion fore

> reconsideration, which is—I thing if the Court checks his file, you will see that it was actually filed as a supplement to our first motion to reconsider. Shortly after Mr. Grahams office obtained that, they did have that on hand, It was present within the record within our motion to reconsider."
> Hearing Trans Sept 17, p. 13 ll. 14-23

Mr. Buyck continued to advance this erroneous argument at the hearing. Id. p. 22, ll18-19 (arguing that the affidavit was not submitted as late as July 30, 2010). Indeed, this misstatement of fact continued into the filing of Respondents' initial brief—Initial Brief, p. 4; p. 12.

In Respondents' initial brief on their cross-appeal, the Respondents continued to argue that the affidavit of Dr. Oaks was submitted with Plaintiff's Second Motion for Reconsideration. Respondents' Initial Brief, p. 12. Yet, as noted above, the affidavit was clearly submitted as a supplement to Plaintiff's original motion for reconsideration, and served on opposing counsel and the Court more than a month earlier. That Respondents' did not correct this error before the trial Court, as they were obligated to do, is of no small moment. In the final hearing on these issues, held on January 5, 2011, the trial Court still labored under the mistaken impression that this affidavit was only filed with Plaintiff's second motion for Reconsideration. Hearing Transcript January 5, 2011, p. 18 ll. 15-16 (The Court: "It was only [with] the second motion for reconsideration that an affidavit was submitted.").

Thus, as a result of Respondents' misrepresentation of facts, the trial Court continued to justify its sanctions based upon an erroneous date on which the affidavit was submitted. This supposed "delay" in the submission of the affidavit was thus held to be evidence of "gross indifference," when in fact the affidavit was submitted over a month earlier, and shortly after its procurement by the Appellants' would-be substitute counsel.

Respondents' also half-heartedly argue that the trial Court's consideration of the Appellant's second motion for reconsideration was improper. However, Respondents' take the argument no further, and do not propose what impact this issue has on the present appeal, nor do they ask for any relief in this regard. Nonetheless, the argument will be briefly addressed.

Respondents, citing Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1 518 S.E.2d 56, 58 (Ct.App 1999), contend that "[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." While this is an accurate quote from Coward Hund, it is taken out of context. The issue in Coward Hund was whether a successive motion for reconsideration tolled the time for appeal. As clarified by the Supreme Court in Elam v. SCDOT,*infra*., the actual holding of Coward Hund is as follows:

> We conclude Coward Hund correctly stated and applied the prevailing view among federal courts that a second Rule 59(e) motion which raises the same issues and arguments made in a previous Rule 59(e) motion does not toll the time to appeal.

Elam v. South Carolina Dept. of Transp., 602 S.E.2d 772, 361 S.C. 9 (2004).

Thus, Coward Hund stands not for the propriety of a second motion to reconsider, but whether such a motion tolls the time for appeal. In fact, this issue was specifically noted in the present case, which is why the second motion for reconsideration was filed and heard with such rapidity. See Hearing Transcript July 30, p. 4, ll. 3-11; Hrg transcript July 26, p. 11, ll. 17-21.

Respondents also argue that the trial Court erred in it's ultimate acceptance of the affidavit of Dr. Oaks in reversing its grant of summary judgment, arguing that such evidence must be received under a Rule 60(b), SCRCP motion. Appellant respectfully

submits that this argument is without merit. The trial Court has the discretion to accept untimely affidavits in response to a motion for summary judgment. See e.g. Smith v. Hastie, 626 S.E.2d 13, 367 S.C. 410 *fn10 (Ct.App. 2005) image description("Given the recognition that the trial court has the discretion to reject an untimely affidavit in a summary judgment motion, it follows that acceptance of a late affidavit would also be within its discretion.").

IV. Conclusion

The Respondents' cross-appeal of an Order denying a motion for summary judgment is not appealable, and should be dismissed on that basis alone. The case law is clear to this effect. However, by improperly proffering such an appeal, Respondents have used it as a vehicle to introduce extraneous arguments that would otherwise not be put before the Court, such as the Noneconomic Damages Awards Act of 2005, which Respondents admit is not applicable to this action. Similarly, Respondents' half-heartedly argue that the trial Court improperly considered Plaintiff's second motion for reconsideration, despite the fact that the second motion for reconsideration was specifically requested by the trial Court at the July 26, 2010 hearing. In fact, the Court acknowledged that the first motion for reconsideration was summarily dismissed. Hrg. Trans. September 17, 2010. p. 17, ll. 2-5.

In short, based on the forgoing, Appellant respectfully submits that the cross-appeal should be denied both as procedurally improper, and on the merits.

Respectfully submitted,

Kevin H. Sitnik
The South Carolina Law Firm
Post Office Box 389
Irmo, South Carolina 29063
(803) 520-6573 - Office
ksitnik@bellsouth.net

On Behalf of:

Robert V. Phillips, Esq.
McGowan, Hood & Felder, LLC
1539 Healthcare Drive
Rock Hill, South Carolina
(803) 327-7800 - Office
(803) 328-5656 - Facsimile
rphillips@mcgowanhood.com

Attorneys for Appellant

This 21st day of May, 2012
Lexington, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

2011-190146

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

v.

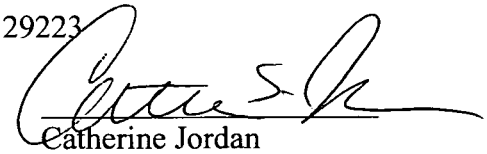
Anu Chaudhry, M.D., McLeod Regional Medical Center, and Florence Women's Health,

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

PROOF OF SERVICE

I, Catherine Jordan, an employee of the South Carolina Law Firm, P.C., do hereby certify that I placed a copy of the Appellant's Initial Response to the Cross-appeal of the above-named Respondents into the United States mail with appropriate first class postage and addressed to counsel for the Respondents at the following address:

Deborah Harrison Sheffield, Special Counsel
117 Brook Valley Road
Columbia, South Carolina 29223



Catherine Jordan
The South Carolina Law Firm
Post Office Box 389
Irmo, South Carolina 29063
(803) 520-6573 - Office

05/21/12