IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DARLINGTON COUNTY
HONORABLE J. MICHAEL BAXLEY, CIRCUIT COURT JUDGE
C/A NO. 2004-CP-16-322

Ruth J. Person,

Appellant,

vs.

Carolina Pines Regional Medical Center,

Respondent.

FINAL BRIEF OF APPELLANT

Daryl J. Corbin, Esquire
Corbin Law Firm
Post Office Box 447
Florence, SC 29503
(843)667-6119
Attorney for Appellant

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STATEMENT OF THE CASE

On April 13, 2004, Appellant Ruth J. Person ("Person") filed a medical negligence claim against C. Brooks Bannister, M.D. ("Bannister"), Hartsville Surgical Center, and Carolina Pines Regional Medical Center ("Carolina Pines"). Thomas V. Mincheff, M.D. ("Mincheff"), and Bannister are surgeons in Hartsville, South Carolina, whose practice is Hartsville Surgical Center. Person earlier commenced a medical malpractice claim against Dr. Mincheff. Prior to trial of this case against Carolina Pines, Person settled her medical malpractice claim against Dr. Mincheff and dismissed the pending actions against Dr. Bannister and Hartsville Surgical Center. Person's remaining negligence claim against Carolina Pines was tried by a jury between November 6 - 14, 2006, before the Honorable J. Michael Baxley ("Judge Baxley"). In addition, Judge Baxley resolved various discovery disputes between Person and Carolina Pines during the litigation, including Person's motions to compel Carolina Pines to answer Interrogatories and respond to Requests for Production and

a Motion to Exclude an expert witness. On October 18, 2006, Judge Baxley issued an Order requiring Carolina Pines to produce various records to Person no later than October 26, 2006.

On November 14, 2006, the jury returned a defense verdict in favor of Carolina Pines. Judge Baxley allowed Person to file a Rule 59 Motion for a New Trial asserting chronic discovery abuse by the defense, the trial court's failure to enforce the South Carolina Rules of Civil Procedure ("Rules") and Judge Baxley's discovery orders, and Judge Baxley's refusal to give the jury four (4) spoilation of evidence charges and another charge involving a ten (10) year medical records retention regulation. During the March 5, 2007, motion hearing, Judge Baxley decided to hold his ruling in abeyance and allow Person to depose an appropriate representative of a document storage company called Iron Mountain Secure Shredding ("Iron Mountain") with which Carolina Pines contracts to store medical charts. Moreover, Judge Baxley authorized Person's counsel to subpoena all records Carolina Pines was required to produce prior to trial to determine whether the defense complied with the October 18, 2006, discovery Order.

In addition, Judge Baxley instructed counsel to submit comprehensive memorandum of law and fact after completion of the Iron Mountain post-trial discovery involving the issue of whether Carolina Pines violated the Rules and the October 18, 2006, Order. Accordingly, after the post-trial discovery, counsel submitted memoranda to Judge Baxley for consideration. In short, Person argued the

Iron Mountain post-trial discovery proved Carolina Pines had access to or possession of several medical charts which it failed to produce in violation of the October 18, 2006, Order. Carolina Pines argued it fully complied with the Order.

On April 22, 2008, Judge Baxley filed and issued an "Order Denying Plaintiff's Post-Trial Motions." Judge Baxley concluded "there was no proof that any of these records would reveal some sort of medical negligence supporting Plaintiff's claims." The Order further states: "(a)lthough the Plaintiff continues to maintain that the defendants were not forthcoming in discovery, the Court finds that this ultimately is not dispositive of the case." Under the circumstances, Judge Baxley required Person to prove the contents of Carolina Pines' materials which the defense never produced despite the March 29, 2007, Order compelling Carolina Pines to fully comply with the October 18, 2006, Order. On May 21, 2008, Person filed and served a "Notice of Appeal."

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING PERSON'S MOTION FOR A NEW TRIAL GIVEN CAROLINA PINES' CHRONIC DISCOVERY ABUSE AND VIOLATION OF THE OCTOBER 18, 2006, PRE-TRIAL DISCOVERY ORDER AND THE MARCH 29, 2007, POST-TRIAL DISCOVERY ORDER.

A. COURTS HAVE A DUTY TO EFFECTIVELY ENFORCE THE RULES OF CIVIL PROCEDURE AND DISCOVERY ORDERS.

In Matter of Anonymous Member, the South Carolina Supreme Court describes the importance of "full and fair" disclosure of information during the litigation process as follows:

> "The primary objective of discovery is to ensure that lawsuits are decided by what facts reveal, not by what facts are concealed." In re Alford Chevrolet-Geo, 997 S.W.2d 173, 180 (Tex. 1999). The entire thrust of our discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party. Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). In this respect, the discovery process is designed to "make trial less a game of blind man's bluff and more a fair contest with basic issues and facts disclosed to the fullest practicable extent." See United States v. Proctor & Gamble Co., 356 U.S. 677, 682, 78 S.Ct. 983, 986-87 (1958). (underscore provided)

Matter of Anonymous Member of the South Carolina Bar, 346 S.C. 177, 193 (2001).

Further, the South Carolina Supreme Court has made clear its intent to persuade judges and attorneys of the importance of obeying discovery rules and orders as follows:

> Our judges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law. (underscore provided)

Id. at 194.

Judge Baxley did not use his authority to effectively enforce the Rules against Carolina Pines before, during, or after Person's trial. As a result, Person did not receive a fair trial. The defense trampled Person unfettered by the Rules. Person's respect for the Rules and Court disadvantaged her. Judge Baxley's failure to make Carolina Pines abide by the Rules and honor his discovery orders absolutely prevented Person's trial from being a "fair contest with basic issues and facts disclosed to the fullest practical extent." See United States v. Proctor & Gamble Co., 356 U.S. 677,

682, 78 S.Ct. 983, 986 - 87 (1958), cited in Matter of Anonymous Member, supra. It is apparent defense counsel had little or no fear Judge Baxley would seriously sanction its misconduct at any stage of Person's litigation, even during the post-trial discovery period.

The South Carolina Court of Appeals notes reversal is required for a party's discovery abuse:

> The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show lack of prejudice, reversal is required. (underscore provided)

Downey v. Dixon, 294 S.C. 42, 45 (Ct. App. 1987).

The Downey opinion further states:

> The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court. Cf. Moran v. Jones, 281 S.C. 270, 276, 315 S.E.2d 136, 139 (Ct. App. 1984). (addressing a prior Rule: "[T]he question of what sanctions, if any, are to be imposed for failure to comply with [the Rule requiring answers to certain standards interrogatories] is left largely to the discretion of the trial judge.") Nevertheless, whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules. See (addressing the comparable Federal Rule) Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1126 (5th Cir.), cert. denied, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970) ("[O]verleniency in the imposition of sanctions is to be avoided where it results in inadequate protection of discovery."); C. Wright, The Law of Federal Courts §90 at 596 (4th ed. 1983) ("Without adequate sanctions, the procedure for discovery would be ineffectual."). (underscore provided)

Id.

Also, the Downey ruling discusses the importance of courts issuing meaningful

sanctions to deter future discovery abuse as follows:

> The rights of discovery provided by the Rules were not protected in any way. Neither was ("Plaintiff") accorded the rights of discovery provided by the Rules, nor was the sanction imposed against ("Defendant") a meaningful deterrent to those who might fail to submit to discovery in the future.

Id. at 45.

Moreover, the South Carolina Supreme Court states in Fontaine v. Peitz, 291 S.C. 536 (1987), as follows:

> When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred.

Id. at 538.

Pursuant to Rule 37(b)(2)(C), SCRCP, when a party fails to obey an order to provide or permit discovery, the court may "make such orders in regard to the failure as are just," including an order dismissing the action or proceedings or any part thereof. Temple v. TEC-FAB, Inc., 370 S.C. 383, 390, 635 S.E.2d 541, 544 (Ct. App. 2006) [citing Matter of Anonymous Member of the S.C. Bar, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001)]. Further, in Jamison v. Ford Motor Co., 373 S.C. 248, 644 S.E.2d 755 (Ct. App. 2007), the South Carolina Court of Appeals indicated trial courts must weigh various factors to fashion an adequate discovery abuse sanction as follows:

> The imposition of sanctions is generally entrusted to the sound discretion of the trial court. Halverson v. Yawn, 328 S.C. 618, 620-21, 493 S.E.2d 883, 884 (Ct. App. 1997); Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 318 (Ct. App. 1987). The circuit court's decision regarding the imposition of discovery sanctions will not be reversed

> absent an abuse of discretion. Samples v. Mitchell, 329 S.C. 105, 111, 495 S.E.2d 213, 216 (Ct. App 1997). In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice. Samples, 329 S.C. at 112, 495 S.E.2d at 216. A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion. Id.

Id.

The Jamison opinion continues:

> A failure to exercise discretion amounts to an abuse of that discretion. Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) (When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); Balloon Plantation v. Head Balloons, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct. App. 1990) (quoting State v. Smith, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.")
>
> Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, whatever sanction the judge imposes "should serve to protect the rights of discovery provided by the Rules." Downey v. Dixon, 294 S.C.42, 362 S.E.2d 317 (Ct. App. 1987). Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery. Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1126 (5th Cir. 1970), cert. denied sub nom., Trefina v. U.S., 91 S.Ct. 118 (1970).

Id.

In Downey, the South Carolina Court of Appeals noted the importance of courts "setting the example" to deter future discovery abuses as follows:

> The rights of discovery provided by the Rules were not protected in any

way. Neither was Ms. Downey accorded the rights of discovery provided by the Rules, nor was the sanction imposed against Mr. Dixon a meaningful deterrent to those who might fail to submit to discovery in the future. (It is perfectly obvious that few, if any, litigants would willingly submit to the discovery provided by the Rules if the alternative were simply paying $50.). Indeed, it can be argued that the sanction imposed in the instant case tended to encourage, rather than discourage, noncompliance with the Rules.

Id.

B. CAROLINA PINES' WIDE-SPREAD VIOLATIONS OF DISCOVERY RULES AND JUDGE BAXLEY'S PRE-TRIAL DISCOVERY ORDER WAS A "CONSISTENT THING."

In Judge Baxley's April 4, 2007, Order (Motion for a New Trial and Motion to Quash Rule 45 Subpoena), notes a "central issue" of Person's Rule 59 motion is as follows:

> (W)hether Defendant Carolina Pines provided Plaintiff's counsel with (1) all hospital operative notes, history and physical records, and discharge summaries involving open and laparoscopic fundoplication surgeries of Thomas V. Mincheff, M.D. ("Mincheff"); (2) Ms. Person's CT scan film of her spleen taken at the hospital; and (3) records involving surgical complication rates of Dr. Mincheff and his surgical assistant, C. Brooks Bannister, M.D.

R. p. 24.

Judge Baxley affirms he previously ordered Carolina Pines to produce all of these items to Person's counsel no later than October 26, 2006. In relevant part, Judge Baxley's Order states:

> In fact, the Court ordered the Defendant to provide all these items and other materials to Plaintiffs counsel no later than October 26, 2006,

almost two (2) weeks prior to trial.

R. p. 24.

Judge Baxley further acknowledged Carolina Pines violated the October 18, 2006, discovery Order as follows:

However, the Defendant failed to fully comply with the Court's order.

R. p. 24.

What sanction did Judge Baxley ever impose upon Carolina Pines for failing to "consistently" produce records central to Person's case? Nothing!

In fact, Judge Baxley knew during the trial that Carolina Pines had not responded in an "appropriate way" to Person's discovery and the October 18, 2006, discovery Order. On November 8, 2006, day three (3) of trial, Judge Baxley scolded defense counsel as follows:

> Mr. Driggers, it sounds like we're hiding the ball here, and this has been a consistent thing. (underscore provided)

R. p. 1415, lines 24 - 25.

> Didn't I tell you to produce this information. And see, now you confront me with this issue of, well, all right it won't be HMA but we're not telling you what Carolina Pines is. This is just not an appropriate way to respond to discovery in a lawsuit. And you put me in a box at 5:30 in the afternoon . . . (underscore provided)

R. p. 1416, lines 20 - 25.

On the first day of trial, Judge Baxley agreed that Carolina Pines' counsel had

violated discovery rules involving disclosure of an expert witness that initially motivated Judge Baxley to exclude his testimony (a ruling he reversed on the morning of trial). Accordingly, Judge Baxley said:

> This confronts the Court with a difficult decision. I believe, and Mr. Corbin, I think you have proven with your arguments that Mr. Driggers was less than forthcoming. (underscore provided)
>
> . . . it just does not appear there was a disclosure that needed to have been early on as there could have been.

R. p. 877, lines 19 - 25.

Judge Baxley not only complained of Carolina Pines' violation of his October 16, 2006, discovery Order, the "hiding of the ball" involving Carolina Pines' expert witness, defense counsel's "less than forthcoming" discovery conduct, the defense counsel's "inappropriate way" to respond to discovery, and Carolina Pines' "consistent thing" in violating the Rules, he also had concerns that Person had to hire an economist since Carolina Pines was not forthcoming with financial information and would not produce it in discovery. R. p. 1416, line 19 - p. 1417, line 3. Under the circumstances, no one can dispute Judge Baxley knew Carolina Pines consistently frustrated Person's legitimate discovery efforts.

1. Carolina Pines failed to produce hospital records involving Dr. Mincheff's experience in performing LNF and open Hill surgical procedures.

Carolina Pines failed to produce for Person almost all the records Judge Baxley previously ordered it to produce no later than October 26, 2006. Person's counsel had

an absolute right to attain all of Mincheff's Operative Notes and Discharge Summaries involving his LNF and open antireflux surgeries on patients other than Person. Nonetheless, Carolina Pines disobeyed Judge Baxley's October 18, 2006, Order and produced a few innocuous records of Dr. Mincheff's surgeries rather than those of at least eleven (11) prior operations and some after Person's operation. R. pp. 151 - 360. How could Judge Baxley reasonably conclude Carolina Pines' selective production of records beneficial to the defense constitutes appropriate behavior under the Rules? What is an adequate consequence if a party abuses discovery for almost two (2) years and violates the Court's Order? The record proves Judge Baxley was aware of Carolina Pines' pervasive discovery abuse. Unfortunately for Person, Judge Baxley refused to effectively sanction Carolina Pines for refusing to comply with his October 18, 2006, Order.

2. Carolina Pines failed to produce information about Dr. Mincheff's surgical complication rates.

Was information about Dr. Mincheff's surgical complications significant in Person's negligent credentialing action? During the March 5, 2007, hearing, Person's counsel said:

> Under the Supreme Court, and my position is that the most critical evidence in this case is Doctor Mincheff's prior surgical history. That is exactly what they hid the ball on was those records. His Honor did not cure that you would not issue a curative charge. You would not let me do an adverse inference charge. You would not even let me discuss it. In my opinion, the rules were not enforced. Your Order was not enforced. And, we did not receive a fair trial. R. p. 765, lines 5 - 13.

> This case is about Doctor Mincheff's surgical history. Those records, he said he had done eight, before Ms. Person. They produced one or two records out of eight. He said he had done three or four after Ms. Persons, and they produced maybe one of those. The statement that they produced all the records is absolutely false. I believe if they had produced the records, you would have seen the evidence, the high complication rate, or higher than what he said.

R. p. 776, lines 1 - 9.

Person's counsel relied upon the Rules and Judge Baxley's October 18, 2006, Order to attain real, verifiable information from Carolina Pines about Dr. Mincheff's complication rates and other important data. However, Carolina Pines failed to provide Person's counsel with the information notwithstanding Judge Baxley's Order. Despite Carolina Pines' serious discovery abuse which hindered Person's counsel's trial preparation and presentation, Judge Baxley failed to issue any sanction against Carolina Pines. Moreover, Judge Baxley refused to charge the jury with adverse inference instructions involving Dr. Mincheff's surgical complication rates and other "missing, lost, or unavailable" data Carolina Pines was required to produce.

3. Carolina Pines failed to produce Person's CT scan film of her spleen and used its discovery abuse to cross-examine Person's expert witness.

Dr. Mincheff admitted lacerations of Person's spleen would constitute medical malpractice. R. p. 1762. Under Judge Baxley's October 18, 2006, Order, Carolina Pines was required to produce no later than October 26, 2006, its CT scan film of Person's spleen so Person's counsel could consult with an expert witness about it. Carolina Pines has never produced the record. During the trial, Carolina Pines told

Judge Baxley it could not find Person's CT scan film and explained that a local records storage business Under §61-16-601.7 of the S.C. Code of Regulations, Carolina Pines must keep a copy of patients' medical records for at least ten (10) years. Quite frankly, Carolina Pines' counsel absolutely knew it failed to honor Judge Baxley's October 18, 2006, Order and told him Person's CT scan film and most of the other hospital records were lost or unavailable.

Person's surgery expert witness at trial was Eric J. DeMaria, M.D. ("DeMaria"), Chief of the Laparoscopic Surgery Program, Vice Chairman of the Department of Surgery, and Professor of Surgery at Duke University Medical Center and Chief of Duke Surgery Service at Durham Regional Hospital in Durham, North Carolina. Defense counsel took advantage of Carolina Pines' "missing, lost, or unavailable" CT scan film and successfully implemented its "hide the ball" strategy without concern of judicial sanction. For example, a significant issue the defense asserted on cross-examination of Dr. DeMaria involved his "failure" to actually review Carolina Pines' CT scan film of Person's spleen to determine whether Dr. Mincheff lacerated it during the surgery. The relevant portion of Dr. DeMaria's cross-examination at trial follows:

Q. Let's talk about that for a minute. There was a CT-scan was done, correct?

A. Yes.

Q. Did you review that scan or did you just read the report?

A. I read the report.

Q. Okay. So you haven't even looked at the films in this case?

A. I have not seen the film.

Q. Okay. I mean just so - - I don't know if these ladies and gentlemen, but a CT-scan reads a lot like an x-ray. It is something you can look at and spot for yourself, correct?

A. Well there are certainly better individuals to do that. There are trained radiologist to read carpal tunnel syndrome, which are the people who read the reports.

Q. Okay. But you haven't done that?

A. I have neither written a report, nor reviewed the x-rays myself.

R. p. 1367, line 8 - p. 1368 lines 1.

Carolina Pines' counsel knew its failure to honor Judge Baxley's Order gave it an opportunity to deceptively impugn Dr. DeMaria for not examining Person's CT scan film.

In response, Person's counsel asked Judge Baxley for a curative instruction to the jury noting Carolina Pines' violation of the Rules and his October 18, 2006, Order. Further, Person's counsel requested an adverse or negative inference charge about Carolina Pines' "missing" CT scan film. However, Judge Baxley refused to do so notwithstanding Carolina Pines' noncompliance with his Order.

Person's counsel argued during the March 5, 2007, hearing as follows:

> Your Honor, there is one more issue that I want to raise, and it is about the CT Scan of Ms. Person's spleen. If Your Honor recalls the doctor conceded, Dr. Mincheff, gosh, have I really sliced up her spleen? That fell beneath the standard of care. I hope Your Honor remembers that portion of the case. I have requested the CT scan of this hospital taken of Ms. Person showing her spleen, because my expert wanted to see it for one thing. Again, they told Your Honor we can't find it, we lost it, and we don't know where it is. Maybe they have got it in Columbia somewhere, where she was transferred. Your Honor issues no sanction at all for that. No curative charge at all for that. No adverse inference at all for that. During the trial my expert witness who did not have the benefit of seeing the CT scan. If Your Honor, if you recall he was asked the question. Well, Doctor DeMaria, you haven't seen Ms. Person's CT scan of her spleen have you? And, yet you want to come to this Court and accuse Doctor Mincheff of malpractice. You have not even see the records. How unfair is that?
>
> If Your Honor recalls, I asked you, I plead with you, give a curative charge. Tell this jury instead of letting them beat up on my witness like that, because of their misconduct, tell the jury they had a duty to maintain it for ten years under the law. They say they lost it, or they don't have it anymore. And, you can take an adverse inference from that. But, they didn't produce it, because they knew it hurt their case. You wouldn't do that.

R. p. 765, line 14 - p. 766, line 16.

The result of Carolina Pines' chronic "hiding the ball" and unabated disobedience of the Rules and Judge Baxley's October 18, 2006, Order was another unfair defense cross-examination advantage due to its discovery abuse. Unfortunately, Judge Baxley chose not to exercise judicial corrective action and allowed (and actually unintentionally encouraged) Carolina Pines to repeatedly reap ill-gotten benefits from strategic violations of the Rules and the Court's Order.

4. Carolina Pines failed to produce its financial data and used its

discovery abuse to cross-examine Person's economist.

Given Person's request for punitive damages, she had the burden to prove Carolina Pines' "ability to pay." Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). The "consistent thing" defense strategy of improperly frustrating Person's legitimate discovery attempts involved not only expert witness disclosure, Interrogatory answers, Requests for Production, "Motions to Quash" deposition notices, and non-disclosure of hospital records, it affected Person's attempt to attain Carolina Pines' financial information, too. In fact, Person's counsel spent thousands of dollars to hire an economist given Carolina Pines' disobedience of the Rules and violation of Judge Baxley's October 18, 2006, discovery Order to disclose various financial data. As a "sanction," Judge Baxley allowed Oliver Wood, Ph.D. ("Wood"), to testify at trial about Carolina Pines' financial ability to pay punitive damages. However, Person's counsel believes Judge Baxley should have allowed Dr. Wood to testify even absent Carolina Pines' chronic discovery abuse involving financial issues. In essence, Judge Baxley's nominal sanction was no sanction at all.

Although Carolina Pines knew it failed to produce any financial data or tax returns in violation of Judge Baxley's October 18, 2006, Order, defense counsel improperly used discovery abuse as an unfair advantage in cross-examining Dr. Wood as follows:

> Q. Yes, sir. You don't really know about the local hospital, do you?

A. In what respect?

Q. What their net worth is, or what their income is, or anything of that nature?

A. It hasn't been provided.

Q. You don't have that information?

A. It was not provided correct. The SEC documents say, that Carolina Pines is owned by HMA.

R. p. 1524, lines 15 - 23.

Why did defense counsel question Dr. Wood whether he even examined any of Carolina Pines' financial data? Person's counsel asked Judge Baxley for an adverse or negative inference charge without success. Instead, Judge Baxley decided Person's counsel could mention the non-disclosure issue during closing arguments as a "sanction." Before closing arguments, Judge Baxley told the jury whatever attorneys say is not "evidence." Judge Baxley then allowed Person's counsel to tell the jury he personally issued a subpoena; the Court ordered Carolina Pines to give Person its financial data; and Carolina Pines violated the Rules and the Court's Order. A reasonable jury might think: "If that is true, why would the Court tell us the attorney's statements are not evidence?" "Why would Judge Baxley not tell us Carolina Pines violated his Order if it's really true?" In short, Judge Baxley's ineffectual sanction against Carolina Pines cost Person approximately $6,000; and the jury could have wrongly concluded Person's counsel instead of Carolina Pines

withheld financial data from Dr. Wood.

Person's counsel argued during the March 5, 2007, hearing as follows:

> The other sanction that Your Honor issued was, because they would not even give me their tax returns. The burden was on me to show their ability to pay punitive damages. You ordered them to give me their tax returns; you ordered them to give me their financial statements, insurance information. Gosh, judge, we are looking for it, we know closing is tomorrow, and we still haven't found it. There were no sanctions issued except if Your Honor recalls when they would not give me the information. I know I have a duty to prove this information about the financial status. I spent six thousand dollars, and hired Doctor Oliver Wood. And, Your Honor, as a sanction allowed him to testify for the cost of six thousand dollars to me. That was no sanction at all. Under the Rules he has an absolute right to testify. What sanction did they receive for anything in this case? I would ask Your Honor to allow us to have a new trial; and enforce the rules and the Court's Order.

R. p. 767, lines 2 - 19.

Carolina Pines gained another advantage from its disobedience of the Rules and violation of Judge Baxley's October 18, 2006, Order.

5. Carolina Pines' discovery abuse involving the depositions of its CEO and others.

Actions taken in a deposition designed to prevent justice, delay the process, or drive up costs are improper and warrant sanctions. Matter of Anonymous Member, supra. When attorneys cross the line during a deposition, their actions do not promote the "just, speedy, and inexpensive determination of every action." Id. See Rule 1, SCRCP. In Anonymous Member, the opinion states:

> Our judges must use their authority to make sure that abusive deposition tactics

> and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than the rule of law.

Id.

During the March 5, 2007, motion hearing, Person's counsel reminded Judge Baxley of Carolina Pines' pervasive discovery abuse involving depositions as follows:

> Even talking about the deposition abuse, if Your Honor recalls. I think I got a Motion to Quash for every deposition notice I filed. It was tooth-and-nail about everything. Your Honor had to Order them to produce their CEO for me to depose, because they said he was not relevant. Your Honor ordered that, and they ignored that Order again, and I had to get you on the phone. I plead with you Your Honor, to make them produce him. So, you gave them another, forty-eight hours to produce him, within three or four days of trial. They finally produced him, consistent with their discovery abuse tactics in this case, Mr. Driggers objected about a hundred times in that deposition. And, I know Your Honor went through objections during trial. And, I think you found two or three maybe that may have had even a modicum of merit. The other ninety-seven had nothing to do with the merits of this case. That was their strategy in this case, to stone wall me.

R. p. 763, line 18 - p. 764, line 9.

Carolina Pines filed two (2) Motions to Quash the deposition testimony of its Chief Financial Officer, David Castleberry ("Castleberry"). In response, Judge Baxley ordered Castleberry to honor the subpoena and appear for his deposition. In fact, defense counsel selected a date suitable to him for Castleberry's deposition at the hospital on October 26, 2006. Accordingly, Person's counsel hired a videographer and court reporter to take Castleberry's deposition. However, the defense filed a second "Motion to Quash" Castleberry's deposition and refused to produce him.

Person's counsel in the presence of defense counsel telephoned Judge Baxley to request enforcement of his order denying Carolina Pines' Motion to Quash Castleberry's deposition and production of documents. In response, Judge Baxley ordered defense counsel to produce Castleberry for his deposition within forty-eight (48) hours, a few days before the date-certain trial, or suffer the most severe consequences.

Although Castleberry appeared for his deposition a couple days later, defense counsel objected approximately one hundred (100) times, effectively disrupting the deposition. R. pp. 659 - 747. Judge Baxley ultimately ruled at trial only a handful of defense counsel's continuous objections had any merit whatsoever. In short, Judge Baxley was fully aware of Carolina Pines' unabated discovery abuse even during the deposition process. Castleberry's deposition transcript filled with frivolous objections was yet another indication at trial of the abusive discovery tactics of the defense.

Person's counsel argued during the March 5, 2007, hearing as follows:

> Even talking about the deposition abuse, if Your Honor recalls. I think I got a motion to quash for every deposition notice I filed. It was tooth-and-nail about everything. Your Honor had to Order them to produce their CEO for me to depose, because they said he was not relevant. Your Honor ordered that, and they ignored that Order again, and I had to get you on the phone. I plead with you Your Honor, to make them produce him. So, you gave them another, forty-eight hours to produce him, within three or four days of trial. They finally produced him, consistent with their discovery abuse tactics in this case, Mr. Driggers objected about a hundred times in that deposition. And, I know Your Honor went through objections during trial. And, I think you found two or three maybe that may have had even a modicum of merit. The other ninety-seven had nothing to do with the merits of this case. That

was their strategy in this case, to stone wall me.

R. p. 763, line 18 - 764, line 9.

During the litigation, Carolina Pines almost always responded to deposition notices or subpoenas with a "Motion to Quash." R. pp. 46, 74, 77, 80, 82, and 124. The stonewalling procedure became so automatic to Carolina Pines that defense counsel even filed a Motion to Quash the deposition testimony of its own expert witness, its Chief Executive Officer, and a Rule 30(b)(6) "most knowledgeable person" involving the credentialing process as irrelevant. R. p. 74. With respect to Carolina Pines' CEO, defense counsel filed a Motion to Quash his deposition; and, after Judge Baxley ordered the deposition, defense counsel filed another Motion to Quash. The Court should discourage such an obstructive litigation strategy.

6. Judge Baxley's on-again, off-again, sanction excluding Carolina Pines' expert witness for two (2) years of Carolina Pines' discovery abuse was not a meaningful sanction.

The genesis of Judge Baxley's October 18, 2006, Order finally compelling Carolina Pines to respect discovery rules was the defense's chronic failure to answer Person's Interrogatories and respond to various Requests for Production. Prior to the October 18, 2006, Order, Judge Baxley initially granted Person's Motion to Exclude an expert witness from Charlotte, North Carolina, B. Todd Heniford, M.D. ("Heniford"), as a discovery sanction for two (2) years of Carolina Pines' discovery misbehavior. In fact, defense counsel even failed to attend a special hearing in

Marlboro County Judge Baxley set aside during a term of court to specifically resolve Person's serious concerns of Carolina Pines' chronic discovery abuse involving its failure to disclose and produce its expert witness for an out-of-state deposition with document production under a subpoena. Although Person's counsel traveled to Marlboro County for the hearing, defense counsel failed to appear and merely left a telephone message with a secretary that he was too busy with a deposition to attend the hearing.

Notwithstanding defense counsel's non-appearance at the hearing, Judge Baxley decided to resolve a motion with a telephone conference a couple days later. In short, Judge Baxley at least "temporarily" decided to sanction the defense and exclude Dr. Heniford's trial testimony. On the morning of the first day of trial, Judge Baxley reversed himself with concerns the sanction would unfairly disadvantage Carolina Pines. R. p. 878. Person's counsel told Judge Baxley Person's expert witnesses would not have time to review Dr. Heniford's deposition prior to their testimony. In addition, since Judge Baxley previously excluded Dr. Heniford as a trial witness, Person's counsel had not had an opportunity to read Dr. Heniford's deposition or adequately prepare for his cross-examination. R. p. 878, line 18 - p. 879, line 14.

Judge Baxley did agree to limit Dr. Heniford's trial testimony specifically to those areas listed in Carolina Pines' Interrogatory disclosing him as an expert witness. However, merely enforcing the Rules does not constitute a meaningful sanction. If

anyone suffered from a sanction involving Carolina Pines' expert witness misconduct, it was Person. Carolina Pines' unfair advantage mandates a new trial. Carolina Pines had a huge advantage because Judge Baxley refused to enforce the Rules or even require the defense to honor his October 18, 2006, Order.

Person honored the Court's Rules and Judge Baxley's orders and was punished for her compliance. Without the trial judge's willingness to enforce the Rules and its own discovery orders, litigation becomes a street fight. If one side respects the Rules and the other ignores them without fear of any serious consequence, who has the advantage? Carolina Pines' reckless disregard of the Rules and disrespect for Judge Baxley's discovery Order granted it an unfair litigation advantage. Judge Baxley's ineffective response to Carolina Pines' blatant and repeated violations of the Rules without any meaningful sanctions for such misconduct constitutes abuse of discretion and a reversible error of law warranting a new trial for Person under Rule 59.

II. THE TRIAL COURT ERRED IN DENYING PERSON'S MOTION FOR A NEW TRIAL GIVEN ITS FAILURE TO CHARGE THE JURY WITH "SPOILATION OF EVIDENCE" INSTRUCTIONS INVOLVING THE ADVERSE INFERENCE RULE FOR MATERIALS CAROLINA PINES FAILED TO PRODUCE IN VIOLATION OF THE RULES AND THE OCTOBER 18, 2006, PRE-TRIAL DISCOVERY ORDER.

Notwithstanding Carolina Pines' consistent discovery abuse as warranting a new trial, Judge Baxley's refusal to charge the jury involving spoilation and the ten (10) year hospital records maintenance regulation mandate reversal of the denial of Person's Rule 59 Motion for a New Trial.

A. The "adverse or negative inference" caselaw supports Person's position.

A trial court is required to charge the current and correct law. Burroughs v. Worsham, 352 S.C. 382, 294, 574 S.E.2d 215, 220 (Ct. App. 2002). When reviewing a jury charge for alleged error, our court must consider the charge as a whole, in light of the evidence and issues presented at trial. Id. An erroneous jury charge will not result in a verdict being reversed unless the charge prejudiced the Appellant's case. Id.

In Stokes v. Spartanburg Regional Medical Center, 368 S.C. 515, 629 S.E.2d 675, the central issue was whether "the trial judge erred in failing to instruct the jury it could draw a negative inference from the hospital's failure to preserve critical pieces of medical evidence." Id. The "critical" records in Stokes consisted of a missing arterial blood gas test result and a nurse's vital signs flow chart. Id. at 517. The Stokes trial judge initially agreed to give the jury a "spoilation of evidence" charge; however, he failed to give the negative or adverse inference instruction, explaining: "that charge I have some problems with this." Id. The South Carolina Court of Appeals reversed the trial court, quoting Kershaw County Bd. of Education v. U.S. Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990), as follows:

> [W]hen evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party.

Id.

Further, the Stokes opinion cites Welch v. Gibbons, 211 S.C. 516, 46 S.E.2d 147 (1948), with approval. The plaintiff in Welch sued a bottling plant, alleging it sold a soft drink which contained poison. The Plaintiff had in his possession the bottled drink, but neither tested the contents himself nor allowed the defendant to test its contents. In Welch, the South Carolina Supreme Court held "the evidence excluded was a circumstance which the jury should have been permitted to consider." Id. In addition, the Stokes opinion rejected the hospital's position that the substance of the (spoilation of evidence) request was included in the trial Judge's general instructions since "the charge as given made no mention of missing evidence at all." Id.

Moreover, the Court in Stokes found the Appellant was prejudiced by the trial court's failing to instruct the jury on "spoilation of evidence." Id. The Stokes opinion cites Baker v. Weaver, 279 S.C. 479, 309 S.E.2d 770 (Ct. App. 1983) for the proposition that a trial court's jury charge is erroneous if the Appellant's requested instruction involved a "substantial feature of the case." Id.

B. Person's adverse or negative inference requests to charge were proper.

Person's counsel proffered Judge Baxley four (4) "adverse or negative inference" Requests to Charge for consideration. R. p. 1813. Each of the proposed charges indicates (1) Judge Baxley ordered Carolina Pines to answer the questions or produce the records to Person no later than October 26, 2006; (2) Carolina Pines violated the Rules of Civil Procedure and Judge Baxley's Order; and (3) the jury was

allowed, but not required, to have an adverse or negative inference against Carolina Pines. R. pp. 1913 - 1920. Person's proposed adverse or negative inference charges correctly state both facts and law.

Under the circumstances, Judge Baxley had an opportunity to issue at least a reasonable "sanction" against Carolina Pines for its substantial, wide-spread, and long-lasting discovery abuses. Under Burroughs, Stokes, Kershaw County Bd. of Education, Welch, and Baker, Person was entitled to have adverse inference charges given. However, Judge Baxley chose to deny all four (4) of Person's proposed charges. Morever, Judge Baxley's jury charge ignored the entire Carolina Pines discovery abuse and missing records issues. In short, Judge Baxley exercised no discretion in refusing to issue any meaningful sanction against Carolina Pines for failing to honor the discovery Rules and his Order. Accordingly, Judge Baxley's inaction constitutes reversible error.

C. The ten (10) year medical records retention request to charge.

Further, Person's counsel requested that Judge Baxley charge the jury involving §61-16-601.7, a regulation that requires hospitals under South Carolina law to maintain patients' records for a minimum of ten (10) years. R. p. 1426, line 19 - p. 1427, line 8. A trial court is required to charge the current and correct law. Burroughs v. Worsham, 352 S.C. 382, 392, 574 S.E.2d 215, 220 (Ct. App. 2002). Carolina Pines had a legal duty under South Carolina law to preserve for at least ten (10) years the medical records to which Person was entitled under the Rules and the

Court's Order. Judge Baxley refused to charge the "current and correct" law to the jury about Carolina Pines' legal obligation to preserve and maintain those records Person had a right to attain under its Order. R. p. 1426, line 19 - p. 1427, line 8, R. p. 1812, lines 7 - 23. At the very least, Person deserved some adverse or negative inference jury charges given Carolina Pines' chronic disobedience of the Rules and Judge Baxley's Order. R. pp. 1913 - 1920.

2. Person's "spoilation of evidence" charge requests involved substantial features of the case.

No one can honestly contend Carolina Pines complied with the Rules or Judge Baxley's orders involving discovery matters. Judge Baxley's comments during the trial and the post-trial discovery hearing undeniably support Person's assertion Carolina Pines consistently committed serious discovery abuse throughout the entire litigation for years. Simply put, Person wasted time and spent thousands of dollars unsuccessfully attempting to force Carolina Pines to legitimately participate in pretrial discovery and produce documents critical to her litigation. In fact, Judge Baxley ordered Carolina Pines on October 18, 2006, to fully answer various Interrogatories and produce records central to Person's case; however, Carolina Pines essentially ignored the Court's Order.

Person should not have to wonder whether the trial result would have been different if Judge Baxley made Carolina Pines honor the same rules and orders she did during the litigation. Does Carolina Pines deserve a defense victory attained through

disrespect of the "rule of law?" In the interests of justice, Person deserves a new trial. Under the circumstances, the Court ought to sanction Carolina Pines for its brazen discovery misconduct. Judge Baxley could have properly used Rule 59 to partially correct some of the injustices in this case. Accordingly, Person respectfully requests that the Court issue judgment against Carolina Pines in her favor and remand the case for a damages hearing; or, in the alternative, reverse Judge Baxley's Order, grant Person a new trial under Rule 59, and order the lower court to issue meaningful sanctions against Carolina Pines to level the playing field and deter future discovery abuses of Carolina Pines and others.

D. Carolina Pines' violations of Judge Baxley's March 29, 2007, Post-Trial Discovery Order.

On March 5, 2007, Judge Baxley held a hearing to consider Person's Rule 59 Motion for a New Trial. R. p. 748 - 780. During the March 5, 2007, hearing, defense counsel incorrectly told Judge Baxley that Carolina Pines had already given Person's counsel every record pertaining to Dr. Mincheff and all records under the October 18, 2006, Order. For example, defense counsel represented to Judge Baxley, before knowing the court would allow Person's counsel to pursue post-trial Iron Mountain discovery, as follows:

> Your Honor, we did not keep anything from him. We did not disobey any Court's Order, and, in fact, by the end of the case we had given Mr. Corbin every record pertaining to Doctor Thomas Mincheff that we have. That includes the ones we had gotten out of storage from an off site records facility, which we had to work through the weekend to get. We spent a lot of time during this trial providing him, and we did

provide. We complied with every single request that he had. (underscore added)

R. p. 773, line 23 p. 774, line 6.

(W)e complied to the best of our ability during the course of the trial, and we got him all records that he requested. (underscore added)

R. p. 774, lines 19 - 20.

On March 29, 2007, Judge Baxley issued an Order holding "in abeyance any ruling involving the substantive merits" of Person's Rule 59 Motion for a New Trial pending completion of Carolina Pines' court-ordered discovery production involving the pre-trial October 18, 2006, Order and deposition of Bambi Austin Parnell ("Parnell") of Iron Mountain. In relevant part, Judge Baxley's Order states:

Under the circumstances, the Court shall hold in abeyance any ruling involving the substantive merits of Plaintiff's Rule 59 Motion for a New Trial until completion of the document production and Iron Mountain deposition. Further, the Court hereby orders Defendant Carolina Pines and defense counsel to comply with the Court's discovery order to provide Plaintiff's counsel with complete and legible copies of all document requests, correspondence, transmittal letters, facsimile transmissions, and material produced for or by Iron Mountain involving Plaintiff's case within fifteen (15) days of the date of this Order. In addition, the Court orders defense counsel to participate in the document production process and Iron Mountain deposition in a good faith manner to facilitate complete and full disclosure of all information under the Court's order involving Ms. Person's discovery requests and efforts. The Court shall expect and require Iron Mountain to fully cooperate with Plaintiff's counsel in this matter.

R. p. 26.

Carolina Pines responded to Judge Baxley's post-trial discovery Order; and

Parnell gave the parties deposition testimony. R. pp. 781 - 839. Further, Judge Baxley instructed counsel to submit comprehensive memorandum of law and facts addressing the issue of whether Carolina Pines complied with the October 18, 2006, pre-trial discovery Order. R. pp. 151 - 360 and pp. 603 - 658. Person's memoranda fully discussed and contains relevant portions of Parnell's deposition transcript, defense correspondence, facsimile transmissions between Carolina Pines and Iron Mountain, an "Iron Mountain Retrieval History Report," correspondence from Iron Mountain's Massachusetts attorney, Iron Mountain's "Fax Order Form," and other records that plainly prove Carolina Pines violated the October 18, 2006, Order as well as Judge Baxley's post-trial discovery Order. Judge Baxley said that proof of Carolina Pines' failure to timely produce records Iron Mountain previously delivered to it would "drive his decision." R. p. 776, lines 15 - 18. However, evidence that Carolina Pines retrieved records from Iron Mountain which it never returned yet refuses to produce was inadequate to motivate Judge Baxley to grant Person's motion nor issue any sanction to Carolina Pines.

During the March 5 ,2007, motion hearing, Judge Baxley noted the significance of the Parnell deposition and Iron Mountain document production as follows:

> We will revisit the issue of whether there is information out there that the Defendants received, or that counsel received that you (Corbin) did not.

R. p. 777, lines 12 - 14.

Further, Judge Baxley inferred that, if Carolina Pines previously received any Iron Mountain information not already provided to Person's counsel, it would substantially affect his Rule 59 ruling as follows:

> If Iron Mountain produces packing slips and the Defendants received information, that you (Corbin) didn't get, that will in great part drive the Court's decision in this case.

R. p. 776, lines 15 - 18.

The Iron Mountain's post-trail discovery proves the following:

(1) Iron Mountain delivered various hospital records to Carolina Pines before October 26, 2006, which Carolina Pines failed to disclose to Person's counsel before, during, or after the trial in violation of Judge Baxley's October 18, 2006, Order and the March 29, 2007, post-trial discovery Order.

(2) Under normal proceedings, Carolina Pines would request various hospital charts from Iron Mountain and return them for continuing storage. Iron Mountain delivered some hospital charts to Carolina Pines which the hospital never returned and never produced in violation of Judge Baxley's October 18, 2006, Order and the March 29, 2007, post-trial discovery order.

(3) After the Iron Mountain deposition, Person's counsel requested that Carolina Pines produce those hospital charts it chose for whatever reason not to return to Iron Mountain. Carolina Pines refused to do so in violation of Judge Baxley's March 29, 2007, post-trial discovery order.

(4) The one (1) LNF hospital chart involving a patient whom Dr. Mincheff admits had a bleeding complication does not exist at Iron Mountain.

After the Iron Mountain deposition and document production, it is clear Carolina Pines had records in its possession even before October 26, 2006, that it failed to produce under Judge Baxley's October 18, 2006, Order. Further, Iron Mountain discovery indicates Carolina Pines never returned some of the records previously stored at Iron Mountain which defense counsel never (even as of today) produced in violation of the October 18, 2006, Order and Judge Baxley's post-trial discovery order. Judge Baxley's "no sanction" response and the denial of Person's Motion for New Trial made her litigation a "game of blind man's bluff" which Carolina Pines won.

Carolina Pines' chronic discovery abuse created a continuing "guessing game" out of Person's legitimate discovery efforts to examine Carolina Pines' records. Who knows what's in those files Judge Baxley ordered Carolina Pines to disclose? Without question, Judge Baxley and Person's counsel do not know the contents of Carolina Pines records! Although post-trial discovery proves Carolina Pines attained volumes of documents from Iron Mountain before conclusion of Person's trial which the defense failed to disclose to Judge Baxley or Person's counsel, such information was insufficient to "drive the court's decision in this case."

CONCLUSION

Judge Baxley's failure to effectively enforce the Rules of Civil Procedure and discovery orders allowed Carolina Pines to chronically abuse the discovery process without any meaningful attention-getting sanction yielding unfair litigation

advantages to the defense. In addition, the trial court's refusal to instruct the jury involving spoilation of evidence and the adverse or negative inference rule given the Court's rulings of "hiding the ball," less than forthcoming discovery responses, and failure to comply with Person's discovery and the Court's Orders constitutes reversible error. Moreover, given the serious, pervasive nature of the defense's discovery abuse before, during, and after trial, the Court should render judgment in favor of Person and remand the case for a jury trial on damages as an appropriate sanction. In the alternative, Person respectfully requests that the Court reverse Judge Baxley's denial of her Motion for a New Trial, remand the case to the Circuit Court for the issuance of appropriate sanctions, and allow her to have a fair trial.

RESPECTFULLY SUBMITTED,

CORBIN LAW FIRM
227 West Evans Street
Post Office Box 447
Florence, South Carolina 29503-0447
(843)667-6119

BY: 

DARYL J. CORBIN
South Carolina Bar no. 1398
Attorney for Appellant

Florence, South Carolina

October 16, 2009

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DARLINGTON COUNTY
HONORABLE J. MICHAEL BAXLEY, CIRCUIT COURT JUDGE
C/A NO. 2004-CP-16-322

Ruth J. Person,

Appellant,

vs.

Carolinas Pines Regional Medical Center,

Respondent.

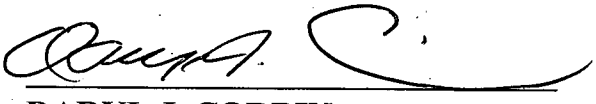
PROOF OF SERVICE

I, Daryl J. Corbin, counsel for the Appellant, Ruth J. Person, certify that I have served the within Appellant's Final Brief and Certificate of Counsel on October 16, 2009, by depositing copies of the same in the United States Mail, postage prepaid, addressed to the following:

Martin S. Driggers, Jr., Esquire
Sweeny, Wingate & Barrow
1515 Lady Street
Columbia, SC 29201

RESPECTFULLY SUBMITTED,

CORBIN LAW FIRM
227 West Evans Street
Post Office Box 447
Florence, SC 29503-0447
(843)667-6119

BY: 

DARYL J. CORBIN
Attorney for Appellant

Florence, South Carolina

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with the Rule 211(b), SCACR and the South Carolina Supreme Court Order dated August 13, 2007.

RESPECTFULLY SUBMITTED,

CORBIN LAW FIRM
227 West Evans Street
Post Office Box 447
Florence, South Carolina 29503-0447
(843)667-6119

BY: _____
DARYL J. CORBIN
Attorney for Appellant

Florence, South Carolina
October 16, 2009