THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Case Nos: 2010-CP-23-09954; 2010-CP-23-09956

Appellate Case No. 2016-000583

Charles Benjamin "Ben" Dickerson and Gale M. Dickerson, ... Respondents,

v.

TLC Corporate; TLC The Laser Center (Institute), Inc., f/k/a TLC The Laser Center (Piedmont), Inc., TLC Physicians; Jonathan Woolfson, M.D., Jeffrey Machat, M.D., Derek P. Van Veen, O.D., Cynthia Wike Yeager, O.D., John Potter, M.D., and David Kohler, O.D., Defendants,

Of whom, Derek P. Van Veen, O.D. is the .... Appellant.

And

Michael "Chad" Luce, ... Respondent,

v.

TLC Corporate; TLC The Laser Center (Institute), Inc., f/k/a TLC The Laser Center (Piedmont), Inc., TLC Physicians; Jonathan Woolfson, M.D., Derek P. Van Veen, O.D., Cynthia Wike Yeager, O.D., and John Potter, M.D., ... Defendants,

Of whom, Derek P. Van Veen, O.D. is the .... Appellant.

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 6

I. Introduction 6

II. The Parties 8

III. The Underlying Allegations of Harm from LASIK Performed in 1998 8

IV. Previous Claims Against These Defendants and Previous Discovery Disputes ... 10

V. The Course of Discovery in These Cases 11

VI. Dr. Van Veen's 2014 Production 13

VII. The Sanctions Order 16

SUMMARY OF ARGUMENT 19

ARGUMENT 22

I. Standard of Review and Legal Framework 22

II. The Severe Sanctions on Dr. Van Veen Are Disproportionate to the Facts, Unsupported in the Record, and Inconsistent with South Carolina Precedent. 24

A. When Dr. Van Veen Realized His TLC Computer Might Contain Responsive Documents, He Located and Produced Them. 25

B. Respondents' Right to a Fair Trial Was Not Impaired. 27

C. The Sanctions Are Based on Respondents' Speculative Interpretation of Documents, Which Are Inadequate to Support a Motion Like This One. 31

D. The Severe Sanctions are Inconsistent with South Carolina Precedent 35

III. The Order Impermissibly Sanctions Dr. Van Veen for the Conduct of Other Parties, Including Conduct in Other Cases. 39

IV. The Sanctions Were Procedurally Improper 44

A. The Motion for Sanctions Did Not Comply with Rule 7(b)(1). 44

B. The Procedural Requirements for Imposition of Criminal Contempt Sanctions Were Not Met, and Even If Those Requirements Had Been Met, the Court's Calculation of the Criminal Sanctions Was in Error. 45

C. No Exhibits in Support of the Motion Were Admitted Into Evidence. 48

V. Striking Dr. Van Veen's Answer Exposes Him to Disproportionate and Unjust Risk, Because It Deprives Him of the Ability to Seek Allocation of Fault to Other Parties 49

CONCLUSION 49

TABLE OF AUTHORITIES

Cases

Balloon Plantation, Inc. v. Head Balloons, Inc.,
303 S.C. 152, 399 S.E.2d 439 (Ct. App. 1990)....22, 40, 43

Camp v. Camp,
386 S.C. 571, 689 S.E.2d 634 (2010)....44

Choice Hotels Int'l v. Goodwin & Boone,
11 F.3d 469 (4th Cir. 1993)....24

Davis v. Parkview Apartments,
409 S.C. 266, 762 S.E.2d 535 (2014)....22

Ex Parte Jackson,
381 S.C. 253, 672 S.E.2d 585 (Ct. App. 2009)....47

Ex Parte TLC Laser Eye Centers, LLC,
404 S.C. 385, 745 S.E.2d 105 (2013)....2, 11, 13

Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.,
334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999)....35, 36, 38

Grosshuesch v. Cramer,
377 S.C. 12, 659 S.E.2d 112 (2008)....47

Guifu Li v. A Perfect Day Franchise Inc.,
281 F.R.D. 373 (N.D. Cal. 2012)....43

Halverson v. Yawn,
328 S.C. 618, 493 S.E.2d 883 (Ct. App. 1997)....38

Hathcock v. Navistar Intern. Transp. Corp.,
53 F.3d 36 (4th Cir. 1995)....24, 38, 45

Illinois C. R. Co. v. Jackson,
179 So. 3d 1037 (Miss. 2015)....48

Karppi v. Greenville Terrazzo Co.,
327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997).... passim

Langley v. Pierce,
313 S.C. 401, 438 S.E.2d 242 (1993)....6

Marshall v. Dodds,
__S.E.2d__, at *3 (Ct. App. 2016) 6

McNair v. Fairfield County,
379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008) 37, 38, 45

QZO Inc. v. Moyer,
358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2005) 36, 37

RDLG, LLC v. Leonard,
No. 15-1153, 2016 WL 2957318, *4 (4th Cir. May 23, 2016) 24

Skinner v. Skinner,
257 S.C. 544, 186 S.E.2d 523 (1972) 44

Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers,
357 U.S. 197, 78 S. Ct. 1087 (1958) 23

Toyota of Florence, Inc. v. Lynch,
314 S.C. 257, 442 S.E.2d 611 (1994) 47

Statutes & Rules

Rule 33, SCRCP 5

Rule 36(c), SCRCP 5

Rule 37, SCRCP 23, 35, 46

Rule 6(d), SCRCP 47

Rule 7(b)(1), SCRCP 21, 44, 45

S.C. Code Ann. § 15-3-545(A) 34

Other Authorities

23 AM. JUR. 2D *Depositions and Discovery* § 231 24

ISSUES ON APPEAL

During his deposition, Appellant Derek Van Veen realized he had not searched the computer issued to him by his employer for responsive documents. The deposition was continued, Dr. Van Veen produced a small number of documents belonging to his employer, and his deposition was resumed. This appeal presents the following questions:

1. Did the Circuit Court err in imposing drastic sanctions – striking Dr. Van Veen's Answer and imposing monetary penalties – on the basis of the record before it?

2. Did the Circuit Court err in imposing harsh sanctions and concluding that Dr. Van Veen intentionally hid documents, where the record indicates that Dr. Van Veen did not recognize the need to search the company computer issued to him, and then produced responsive documents belonging to his employer once he identified those documents?

3. Did the Circuit Court err in concluding that Respondents' "right to a fair trial has been impaired" by the delay in production?

4. Did the Circuit Court err in imposing sanctions on the basis of the record before the Court, given that the interpretations of the evidence presented by Respondents had no evidentiary basis other than Respondents' own speculative interpretations?

5. Was the Circuit Court's imposition of sanctions inconsistent with South Carolina precedent governing such sanctions?

6. Did the Circuit Court err in imposing severe sanctions, where most of the alleged misconduct was attributable to other parties, some of which occurred in other lawsuits?

7. Did the Circuit Court err in imposing sanctions, given that the motion did not comply with Rule 7(b)(1), and the Order relied on documents never admitted as exhibits?

8. Did the Circuit Court err in imposing criminal contempt sanctions on Dr. Van Veen: (i) without the proper procedures and without required evidentiary support; and (ii) in imposing this improper penalty for an improper period of time?

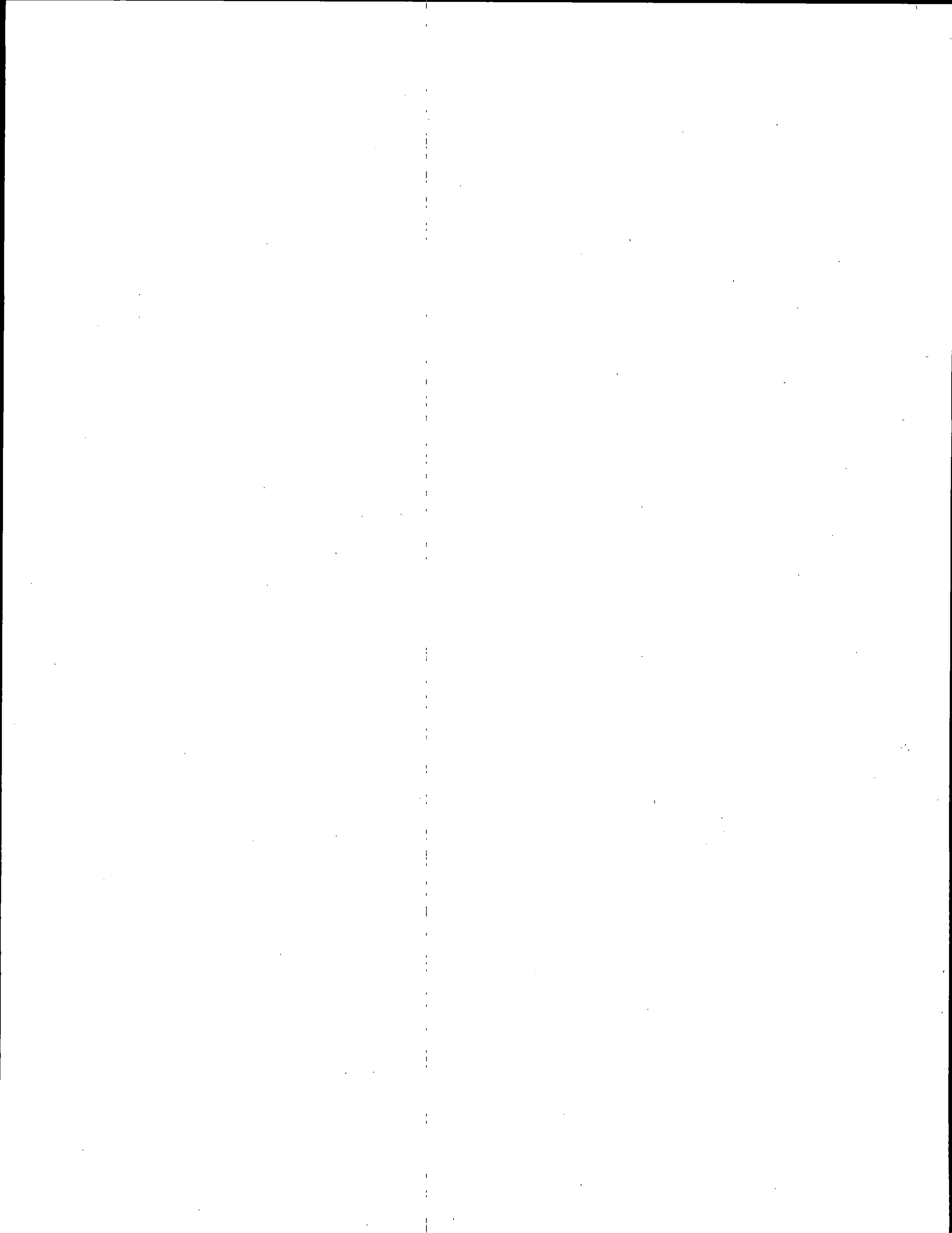
9. Given that multiple defendants were named in this lawsuit, did the Circuit Court err in striking Dr. Van Veen's Answer, thus presumably depriving him of the ability to seek allocation of fault to other parties?

STATEMENT OF THE CASE

Respondents Dickerson and Luce each filed a Complaint on December 7, 2010. Mr. Dickerson and Mr. Luce both filed Amended Complaints on March 22, 2011. (Dickerson Complaint; Luce Complaint) Dr. Van Veen filed motions to dismiss the Amended Complaints on May 2, 2011. The Circuit Court denied the motions to dismiss on September 13, 2011.

Dr. Van Veen moved to stay both cases on October 13, 2011, pending the outcome of appellate proceedings in *In re Hollman*, C.A. No. 2007-CP-23-2347 ("*Hollman*"), a case brought by another plaintiff alleging claims like those in the instant actions stemming from a LASIK procedure performed at TLC-Greenville. Those proceedings eventually resulted in a decision by the Supreme Court in July 2013 in *Ex Parte TLC Laser Eye Centers, LLC*, 404 S.C. 385, 745 S.E.2d 105 (2013).

On November 4, 2011, the instant actions were designated as complex, and assigned for all purposes to the Honorable Edward W. Miller; *Hollman* was also assigned to Judge Miller. The Circuit Court denied Dr. Van Veen's motions to stay on March 9, 2012 (Orders of Mar. 9, 2012), and Dr. Van Veen filed answers to the Amended Complaints of Dickerson and Luce on April 5, 2012. (Dickerson Answer; Luce Answer)



Respondents each served requests for production on Dr. Van Veen on May 9, 2011. (Dickerson Req. Prod.; Luce Req. Prod.) Respondents also each served requests to admit on Dr. Van Veen on September 21, 2011. (Dickerson Request to Admit; Luce Request to Admit) After Dr. Van Veen's motions to dismiss and to stay were denied, Dr. Van Veen responded to the requests for admission on April 5, 2012 (Resp. Dickerson Request to Admit; Resp. Luce Request to Admit), and served written responses to Mr. Luce's discovery on August 14, 2012, and to Mr. Dickerson's discovery on October 10, 2012. (Luce Resp.; Dickerson Resp.) Those responses included an initial production of documents. Similar production requests were served on Defendant TLC, which responded and produced documents on April 10, 2012.

Intervening disputes about discovery between Plaintiffs and Defendant TLC led to appellate proceedings and resulting stays of the instant cases before the Circuit Court. Although Dr. Van Veen was not a direct party to these disputes and appeals, he was affected by them. Specifically, Plaintiffs filed a motion to compel additional responses from Defendant TLC on April 25, 2012. (Motion to Compel) That motion sought production of certain data of Defendant TLC that contained information about third parties who were also treated by TLC. The production of this same data and its use by Plaintiffs were also at issue in *Hollman*. The Circuit Court granted the motion on September 25, 2012, and entered a protective order governing the use of the third-party data on November 25, 2012. (September 25, 2012 Discovery Order; 2012 Protective Order) TLC filed motions to reconsider both orders and, ultimately, appealed the September 2012 Discovery Order to the South Carolina Court of Appeals and the South Carolina Supreme Court. (Notice of Appeal; Petition for Writ of Certiorari) These

appeals were dismissed in March and April of 2013, but TLC then sought a stay of the instant cases pending a decision from the South Carolina Supreme Court in *Hollman*. (Motion for Stay) The Supreme Court granted the stay. (Order Granting Stay)

The Supreme Court issued its decision in *Hollman* on July 3, 2013, and returned the remittitur on July 19, 2013. TLC thereafter engaged new legal counsel. On December 6, 2013, TLC filed a Consolidated Motion to Set Aside or Alternatively Modify the Circuit Court's September 2012 Discovery Order and the 2012 Protective Order based upon the holdings of the Supreme Court in *Hollman*. The Circuit Court held a hearing on TLC's motion, denying it by order of January 10, 2014. The Court's January 10, 2014, order did grant in part, however, TLC's prior motion to reconsider the 2012 Protective Order, and the Circuit Court issued an Amended Protective Order. The Circuit Court further issued a deadline of January 20, 2014, for all Defendants, including Dr. Van Veen, to produce the information set forth in the Circuit Court's September 2012 Discovery Order.

Defendant TLC responded, producing documents containing data on third parties that it had produced in *Hollman* and another case involving similar allegations, *George E. Carter, et al. v. TLC Laser Eye Center, et al.*, C.A. No. 2007-CP-23-7587 ("*Carter*"). Dr. Van Veen produced no additional documents at this time, believing that any responsive documents in his possession had been produced in 2012 and that any additional responsive documents required to be produced under the Circuit Court's September 2012 Discovery Order were solely in the possession of Defendant TLC.

On February 21, 2014, Plaintiffs served new Requests to Admit and Discovery Requests on Dr. Van Veen. (Second Disc. Req.) Dr. Van Veen responded to both on

March 14, 2014 (Resp. to Second Disc.), objecting that the interrogatories and requests to admit contained in those requests exceeded the numbers permitted under Rules 33 and 36(c), SCRCP.

Dr. Van Veen was deposed in the Luce case on March 31, 2014. (March Depo. Tr.) Dr. Van Veen produced additional documents on or about April 22, 2014. (VV Supp. Resp.) Dr. Van Veen's deposition was resumed on May 1, 2014. (May Depo. Tr.)

Respondents Dickerson and Luce filed a "consolidated" motion for sanctions in both cases,[1] seeking sanctions against Defendant TLC, Dr. Van Veen, and Defendant John Potter, ranging from the striking of answers, to attorneys' fees in those cases and other cases, to imprisonment. (Sanctions Motion) The motion did not set forth the allegations of wrongdoing with any specificity, and was not accompanied by affidavits or other evidentiary materials. TLC responded to the motion with a memo pointing out these procedural irregularities in the motion. (Memo in Partial Resp.)

The Circuit Court held two hearings on the motion. It heard an initial oral argument on the motion on March 24, 2015 (March Tr.), and a second oral argument on the motion on May 21, 2015. (May Tr.) Plaintiffs presented a memorandum in support of sanctions at the March 24, 2015 hearing (Memorandum in Support), and following that hearing submitted a supplemental memorandum in support of sanctions. (Supp. Memo)

Before an order issued, Defendants TLC and Potter reached settlements with Mr. Dickerson and Mr. Luce.

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[1]While the Dickerson and Luce actions have not been formally consolidated, all proceedings concerning this motion were treated by the parties and the Circuit Court as occurring in both actions. This appeal also consolidates the two actions. For simplicity, this Brief will treat the two actions together, unless the distinction is significant.

On December 21, 2015, the Circuit Court issued its written Order striking Dr. Van Veen's Answer and imposing substantial monetary sanctions on him. (Order)

Dr. Van Veen served a Motion to Alter or Amend Judgment on December 30, 2015. (Mot. Recon.) In support of that Motion, Van Veen also filed an affidavit. (VV Aff.) The motion to alter or amend was denied by Order filed March 7, 2016. (Recon. Order) Dr. Van Veen filed a Notice of Appeal on March 21, 2016.

STATEMENT OF FACTS

I. Introduction

This lawsuit arises out of two LASIK (an acronym for "laser-assisted in situ keratomileusis") vision correction procedures performed in the late 1990s. Although their core allegations are medical malpractice claims, the actions were filed in 2010, outside the six-year repose period for medical malpractice claims. Respondents' theories for avoiding this bar include allegations that some or all of the defendants acted to conceal documents and diagnoses concerning Respondents and that this should bar the operation of the statute of repose.[2] (Dickerson Complaint ¶¶ 37, 51-60; Luce Complaint ¶¶ 35, 46-56)

After he had made an initial production of documents, Dr. Van Veen's deposition commenced on March 31, 2014. During the deposition, Dr. Van Veen realized that he had not thoroughly searched the computer issued to him by TLC. (VV Aff. ¶ 9) The

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[2]Respondents' argument has no support in South Carolina law and is directly contrary to the South Carolina Supreme Court's decision in *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), which explained that "[a] statute of repose is typically an absolute time limit beyond which liability no longer exists and ***is not tolled for any reason*** because to do so would upset the economic balance struck by the legislative body," and that South Carolina's medical malpractice statute of repose "constitutes an outer limit beyond which a medical malpractice claim is barred, ***regardless of whether it has or should have been discovered.***" *Id.* at 403-04, 438 S.E.2d at 243 (internal quotation marks omitted) (emphasis added). These holdings of *Langley* were recently re-emphasized in this Court's decision in *Marshall v. Dodds*, __S.E.2d__, at *3 (Ct. App. 2016).

deposition was continued, and Dr. Van Veen conducted a search of that TLC-issued computer. (VV Depo. Tr. 282) Dr. Van Veen located on that computer eight previously unproduced responsive documents belonging to TLC (the "New Documents"), which he produced. (VV Aff. ¶¶ 7, 11) It is undisputed in the record that Dr. Van Veen did not himself place these documents on the TLC computer issued to him; this was the work of TLC's information technology staff. (VV Aff. ¶ 7) The documents were not Dr. Van Veen's personal documents. (VV Aff. ¶ 5) The documents in question were no longer used for patient care, and had been submitted to TLC's corporate offices. (VV Depo. Tr. 196; VV Aff. ¶ 4) The retention of such documents was not part of Dr. Van Veen's duties with TLC. (VV Aff. ¶ 4)

Two months after Dr. Van Veen's production, Defendant TLC began a rolling production of documents that continued until October 2014 and resulted in the production of over 130,000 pages of previously unproduced documents. Included among those 130,000 pages of documents were the eight documents that Dr. Van Veen had produced following his deposition on March 31, 2014.

As soon as Dr. Van Veen located the New Documents he produced them. (VV Aff. ¶ 11) Dr. Van Veen's behavior is that of someone who made a mistake in determining how to search for documents – ***not*** the conduct of a conspirator in a concerted effort to hide and destroy evidence. Respondents were not irreparably harmed, and the suppositions of broader misconduct are nothing more than a combination of speculation and focus on conduct not attributable to Dr. Van Veen. When the record is carefully considered, it will not support the draconian sanctions levied by the Circuit Court.

II. The Parties

TLC the Laser Center, Inc. ("TLC") is one of the nation's largest providers of vision correction surgery and other eye care. It operates a surgery center in Greenville, South Carolina (formerly "TLC-Piedmont" and now "TLC-Greenville") where the surgeries alleged in the Complaints were performed.

The individual defendants in these actions are or were physicians employed by TLC. Dr. Jonathan Woolfson, who is a defendant and not a party to this appeal, performed the two surgeries in question. Dr. John Potter helped oversee TLC's clinical services division and later served as TLC's vice president for patient services.

Appellant Dr. Derek Van Veen was first employed by TLC in July 2003; he was hired to serve as Clinical Director at TLC-Greenville. Dr. Van Veen did not operate on either Respondent. Indeed, Dr. Van Veen is not a surgeon, was not employed by TLC at the time of those surgeries, and never even examined or met one of the Respondents, Mr. Dickerson, whose last consultation with TLC preceded Dr. Van Veen's hiring.

Respondents Ben and Gale Dickerson reside in Anderson County. Respondent Ben Dickerson had LASIK vision correction surgery performed in April of 1998, with an enhancement performed in Canada in August of 1999. Gale Dickerson is Ben Dickerson's wife and has made a claim for loss of consortium.

Respondent Chad Luce resides in South Carolina. Respondent Luce had LASIK vision correction surgery performed in May of 1999.

III. The Underlying Allegations of Harm from LASIK Performed in 1998

LASIK is a vision-correction procedure that involves the creation of a flap in the cornea, use of a laser to reshape the cornea to improve vision, and repositioning of the

flap. Though increasingly common, LASIK and similar vision-correcting surgeries were still in a relatively early stage of development in the 1990s.

Ben Dickerson and Chad Luce each underwent a LASIK procedure at TLC's Greenville facility in the late 1990s, with Mr. Dickerson's surgery occurring in April of 1998 and Mr. Luce's in May of 1999. Each was given substantial information on the risks and potential complications of the surgery, and each signed a detailed waiver. (Dickerson Waiver; Luce Waiver) Those waivers included the fact that LASIK was then an investigational procedure that had not yet received approval from the U.S. Food and Drug Administration, as well as numerous warnings that risks and complications from LASIK included post-surgical vision problems like those alleged in the Complaints. (Dickerson Waiver pp. 3, 5-7, 10; Luce Waiver pp. 2, 4-11)

The Complaints allege that Respondents were not appropriate candidates for LASIK because they had conditions that placed them at high risk for ectasia. (Dickerson Complaint ¶ 30; Luce Complaint ¶ 31) Ectasia is a post-surgical thinning of the cornea that can result in a range of vision problems, from mild to more severe.

The Complaints allege that each Respondent did, in fact, develop post-operative ectasia. (Dickerson Complaint ¶ 35; Luce Complaint ¶ 34) The Complaints further allege that TLC, after diagnosing each of them with ectasia, failed to communicate that diagnosis. A key allegation of the Complaints, and of Respondents' attempts to avoid the effect of the statute of repose, is the claim that TLC and other defendants acted in a concerted fashion to hide the diagnosis of ectasia. (Dickerson Complaint ¶ 36, 41, 60; Luce Complaint ¶¶ 34, 39, 56) In particular, the Complaints allege that TLC maintained a "complex case" system and an "advocacy program" that involved tracking of ectasia

patients in files other than their medical files, allegedly to avoid informing these patients of the adverse diagnosis of ectasia. (Dickerson Complaint ¶¶ 57-60; Luce Complaint ¶¶ 52-56)

The defendants, including Dr. Van Veen, have denied these allegations of wrongdoing. In particular, they deny that there was anything nefarious about the "complex case" and "advocacy program" systems that were in place simply to provide and track continuing care to patients, and for purposes of internal improvement. Defendants deny that patients' complications were hidden from them. Indeed, both Respondents sought additional treatment precisely because they recognized that the surgeries had left them with continuing vision difficulties. (Dickerson Complaint ¶ 34; Luce Complaint ¶ 34; Luce Aff. ¶ 3)

IV. Previous Claims Against These Defendants and Previous Discovery Disputes

Two other similar cases were filed on behalf of LASIK patients at TLC's Greenville surgery center against TLC and other defendants; those actions were filed by the same attorneys who represent Mr. Dickerson and Mr. Luce. Dr. Van Veen was not a party to either, although he was deposed in each. These cases, *John Hollman v. Dr. Jonathan Woolfson, et al.*, C.A. No. 2007-CP-23-2347 and *George E. Carter, et al. v. TLC Laser Eye Center, et al.*, C.A. No. 2007-CP-23-7587, ("*Hollman*" and "*Carter*") were filed before the instant cases, and they each settled before trial – which means that discovery had not been completed in those cases. They bear mentioning because they involved rancorous discovery fights between the parties, and because the Circuit Court's imposition of sanctions on Dr. Van Veen was improperly based in part on conduct of other parties, and on conduct in those other cases.

The discovery disputes in *Hollman* actually lasted until the Supreme Court's July 2013 decision in *Ex Parte TLC Laser Eye Centers, LLC,* 404 S.C. 385, 745 S.E.2d 105 (2013).[3] At issue in that case was the production and use of certain information of Defendant TLC concerning third parties that were also treated by TLC. That same issue has permeated the instant cases, and has been a central point of contention between Respondents' counsel and TLC over a long period of time.

V. The Course of Discovery in These Cases

While the instant cases have been pending for some time, they were still in the midst of discovery when Dr. Van Veen made his supplemental production in 2014. The history of the cases is set forth in the Statement of the Case, but key points concerning the progress of the cases bear repeating.

Dr. Van Veen and his codefendants filed motions to dismiss the Amended Complaints on May 2 and 3, 2011. Plaintiffs served written discovery on Dr. Van Veen and his codefendants on May 9, 2011. (Plaintiffs' First Requests Dated May 9, 2011) Some of Dr. Van Veen's codefendants moved to stay discovery pending resolution of the Motions to Dismiss. (Motion for Protection Dated May 19, 2011) The Circuit Court denied Dr. Van Veen's Motion to Dismiss on October 13, 2011.

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[3]The lengthy procedural background to *Hollman* is set forth in the Supreme Court's opinion. *See* 404 S.C. at 387-390, 745 S.E.2d at 106-107. In general, these disputes and the Supreme Court's *Hollman* decision had to do with the discoverability and proper use of a database and medical records containing the names and "Confidential Health Information" (as that term is defined in HIPAA) of a number of TLC patients diagnosed with ectasia, who are not parties to any of the pending lawsuits. Plaintiffs' counsel have sought the right to contact these other patients and use the information in these documents to bring other cases, and TLC has resisted such uses. For purposes of the instant case, the important points to emphasize regarding this protracted dispute are (i) Dr. Van Veen was on the sidelines for this fight; and (ii) the fight was squarely focused on the database and third-party records and their proper use, and ***not*** on the few New Documents that Dr. Van Veen has produced.

Plaintiffs filed motions to compel on October 3, 2011. (Motion to Compel Dated Oct. 3, 2011) Dr. Van Veen and his codefendants filed motions to stay this litigation pending resolution of *In re Hollman* ten days later, on October 13, 2011. (Van Veen's Motion to Stay Dated Oct. 13, 2011) The Circuit Court denied the motions to stay and granted the Plaintiffs' motion to compel by order dated March 9, 2012. (Order of March 9, 2012) Dr. Van Veen thereafter provided his discovery responses.

The Circuit Court issued two additional orders concerning discovery on September 25, 2012, and November 25, 2012. The September order granted a motion to compel filed by Plaintiffs in April 2012 seeking production of certain documents containing third-party data previously produced in the *Hollman* litigation ("September 2012 Discovery Order"), The November order was a protective order governing the use of the third-party data (the "2012 Protective Order"). The primary focus of all of these discovery disputes was the production and use of information concerning patients ***other than the parties to any of the lawsuits***. These discovery fights were not centered on documents concerning Mr. Dickerson or Mr. Luce. Nor were these documents in the control or possession of Dr. Van Veen.

Defendant TLC filed motions to reconsider both of these orders and ultimately appealed the September 2012 Discovery Order to this Court and to the South Carolina Supreme Court. (Notice of Appeal; Petition for Writ of Certiorari) Dr. Van Veen was not a party to the appeals, but the instant cases were stayed for all purposes during their pendency. After resolution of those appeals, the remittitur to the Circuit Court was entered on April 23, 2013. TLC then sought a stay of these proceedings from the Supreme Court until resolution of the appellate proceedings in *In re Hollman*, and the

Supreme Court granted the stay. On July 7, 2013, the Supreme Court rendered its decision.

After the Supreme Court handed down *Ex parte TLC Laser Eye Centers, LLC*, 404 S.C. 385, 745 S.E.2d 105 (2013), TLC sought leave to substitute counsel in the *Dickerson* and *Luce* cases, and on December 6, 2013, new counsel for TLC filed a motion to set aside or modify the Circuit Court's September 2012 Discovery Order and the 2012 Protective Order based upon the holdings of the Supreme Court. The Circuit Court denied this motion and set a deadline of January 20, 2014, for all Defendants to produce outstanding discovery as set forth in the Circuit Court's September 2012 Discovery Order.

Defendant TLC responded, producing a number of documents containing data on third parties that it had produced in the *Hollman* and *Carter* matters. Dr. Van Veen produced no additional documents at this time, believing that any responsive documents in his possession had been produced in 2012 and that any additional responsive documents required to be produced under the Circuit Court's September 2012 Discovery Order were solely in the possession of Defendant TLC.

Respondents commenced a deposition of Dr. Van Veen in these two cases on March 31, 2014. It was in the course of that deposition that Dr. Van Veen realized that he had not searched an office computer issued to him by TLC. The deposition was continued, to allow Dr. Van Veen to conduct such a search.

VI. Dr. Van Veen's 2014 Production

After conducting this search, Dr. Van Veen produced eight documents on April 22, 2014, (the "New Documents") totaling twenty-seven pages, that he located on the computer issued to him by TLC. After the production, Dr. Van Veen's deposition was resumed, on May 1, 2014.

The only record evidence concerning these documents shows that they were moved to Dr. Van Veen's computer by TLC's information technology staff when he was issued the computer. (VV Aff. ¶ 7) There is ***no*** evidence that Dr. Van Veen was previously aware that these documents were on this computer. (VV Aff. ¶¶ 9-10) Dr. Van Veen did not own this computer, and it is plain from their content that these documents belonged to TLC, not to Dr. Van Veen personally. Nothing in the record suggests that TLC did not have the right to search this computer and make a production from it.

Contrary to the breathless arguments made below by Respondents, the New Documents added little to the case for liability. Equally importantly, they were produced while discovery was ongoing, and Respondents had full opportunity to react to their production.

The New Documents were:

1. A "Patient Complaint Log" with entries naming three patients not parties to this litigation, which indicates it was last updated in January 2004 (Complaint Log; Bates No. GCC_LUCE 000104);

2. A "Patient Advocacy Log" with entries naming seven patients not parties to this litigation, which indicates it was last updated in June 2006 (Advocacy Log; Bates No. GCC_LUCE 000105 – GCC_LUCE 000106);

3. A list of twenty-nine "complex case" patients including Respondent Dickerson (Complex Case List; Bates No. GCC_LUCE 000107 – GCC_LUCE 000110);

4. A list or study of patients – identified by initials only – who appear to have been diagnosed with ectasia (Ectasia Study; Bates No. GCC_LUCE 000111 – GCC_LUCE 000116);

5. A communication from Dr. Van Veen to Dr. John Potter, who worked in TLC's corporate headquarters for clinical services, with brief comments on sixteen patients, including both Respondents (Potter Communication; Bates No. GCC_LUCE 000117);

6. A "Knowledge Module" created by TLC concerning the handling of patient complaints (Knowledge Module; Bates No. GCC_LUCE 000118 – GCC_LUCE 000128);

7. A blank template for a non-clinical patient complaint log (Non-Clinical Log; Bates No. GCC_LUCE 000129); and

8. A draft procedure concerning handling patient complaints (Complaint SOP; Bates No. GCC_LUCE 000130).

In short, one document, the Potter Communication, makes an exceedingly brief reference to both Respondents; one document mentions only Mr. Dickerson; and one refers to patients by initials. None of the documents sheds material new light on the Respondents' respective claims. And the scattered and random nature of the documents confirms Dr. Van Veen's contention that this was a small handful of overlooked documents – not a secret cache of smoking guns hidden away pursuant to a conspiracy.

After Dr. Van Veen made this production, TLC made its own independent supplemental production of approximately 130,000 pages. There is no evidence that Dr. Van Veen had custody of or control over any of those documents; indeed, it appears they were maintained by TLC in TLC's corporate offices, not at TLC-Greenville. Overwhelmingly, it was the documents produced by TLC that were relied on by Respondents and the Circuit Court in justifying sanctioning Dr. Van Veen. But nothing in the record supports the conclusion that Dr. Van Veen was responsible for any decision by TLC – either to withhold or to produce documents.

It is also important to note that every one of the New Documents produced by Dr. Van Veen was also contained in TLC's production, and in some cases they appear in

multiple places.[4] This confirms that these documents were TLC corporate documents, not Dr. Van Veen's personal documents.

VII. The Sanctions Order

The Circuit Court struck Dr. Van Veen's Answers in both cases, ordered Dr. Van Veen to pay attorneys' fees totaling $166,500, and imposed an additional fine on Dr. Van Veen in the amount of $77,800, characterizing this amount as necessary to "vindicate the court" and "eliminate benefits bestowed on Dr. Van Veen due to his discovery abuse." (Order at 25-26; Order Denying Motion to Amend at 3) Neither the procedural path to this conclusion, nor its factual underpinning, supports such a harsh result.

Respondents filed their motion for sanctions against TLC, John Potter, and Dr. Van Veen on March 9, 2015 – approximately 10 months after Dr. Van Veen's production of the New Documents and his second deposition. The motion had no supporting documents, affidavits, or deposition testimony. It did not specify any facts to support its general allegations of wrongdoing, nor did it differentiate between the conduct of Dr. Van Veen and other defendants. (Motion for Sanctions) TLC and other defendants filed a memorandum noting the deficiencies of the motion on March 19, 2015. (Memo. Partial Response) Respondents filed a brief one day prior to the hearing; most of its attachments related to costs and fees incurred by Respondents' counsel. (Resp. Memo. Sanctions)

[4]The eight New Documents produced by Dr. Van Veen appear in TLC's own production at TLC_2014_VanVeen_0000001 through TLC_2014_VanVeen_0000017, TLC_2014_VanVeen_0000043, and TLC_2014_VanVeen_0000044. In addition to appearing in this portion of TLC's production, the Patient Complaint Log also appears at TLC_2014_Potter_0005153, the Complex Case list also appears at TLC_2014_TDrive_0048774, and the Knowledge Module also appears at TLC_2014_Lerum_0003315, TLC_2014_TDrive_0017248, and TLC_2014_Tullo_0107336.

The Circuit Court conducted an initial hearing on the motion on March 24, 2015. It appears that at some time soon after that hearing Respondents provided the Circuit Court and the other parties with a thumb drive containing 122 documents, but it does not appear they were ever actually marked or entered into the record as exhibits.[5] The argument transcript further reflects that Respondents' counsel projected and discussed a number of documents at the hearing; there does not appear to be a record of which documents were shown in this fashion. Respondents' counsel also played a portion of Dr. Van Veen's second deposition, without having designated it in advance, and without counter-designations by defendants.

Counsel for the various defendants pointed out that they were seeing the documents for the first time during the argument, as well as the other procedural irregularities of the hearing, such as the playing of Dr. Van Veen's deposition. The Circuit Court recessed the hearing, scheduling it to be reconvened on May 21, 2015, with the stated purpose of giving the defendants a chance to digest the presentation. Respondents filed a Supplemental Memorandum, with attachments, on May 19, 2015. (Supp. Memo. Sanctions)

On May 21, 2015, The Circuit Court heard arguments from defendants and additional argument from Respondents. Counsel for Dr. Van Veen argued against the imposition of any sanctions and joined in those arguments made by counsel for TLC and Dr. Potter. (May Tr. 49-53, 66)

After the Circuit Court asked Respondents' counsel to prepare an order for the court's consideration, TLC settled on behalf of itself and defendants Potter and Yeager.

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[5]Our calculation is that the documents on the thumb drive run to approximately 25,329 pages.

This left Dr. Van Veen as the only object of the motion, despite the fact that a substantial portion of the argument had focused on the conduct of TLC and Dr. Potter.

Thus, the sanctions Order is based on arguments that focused more on the conduct of TLC and Dr. Potter than on Dr. Van Veen. The Order bases its severe sanctions against Dr. Van Veen on two propositions, both of which are incorrect. First, the Order treats Dr. Van Veen as having made a knowingly false representation to Respondents ***and to the Circuit Court*** that he had produced all documents in his control. (Order p. 23) Second, the Order asserts that Respondents have been denied a fair trial by the delay in production of documents on Dr. Van Veen's work computer. (Order pp. 23-24)

There is no record evidence that Dr. Van Veen knew of the documents that he produced in 2015, but hid their existence. To the contrary, the random and sparse nature of those few documents demonstrates that Dr. Van Veen was not the custodian of any cache of electronic documents; instead, he overlooked the possibility that a few scattered documents were present on the TLC computer issued to him. (VV Aff. ¶¶ 4, 7-10) Moreover, while the Order refers to discovery responses by Dr. Van Veen reflecting his belief that he had produced what he needed to produce, there is no representation by him – and in particular no representation ***to the Court*** – that he had searched his TLC computer.

The Circuit Court's assertion that these Respondents have been denied a fair trial by Dr. Van Veen's conduct is similarly without record support. The parties were in the midst of discovery – with the first deposition having just been taken – when Dr. Van Veen produced the New Documents. There was ample opportunity to develop any implications from those documents. To the extent there was conduct that prejudiced Respondents, it was the conduct of Dr. Van Veen's employer, TLC. After Dr. Van Veen's small

production, TLC produced over 130,000 pages of additional documents. There is no suggestion or evidence that Dr. Van Veen controlled these documents, nor that the few documents he held provided information not included in the TLC production. While the Circuit Court adopts Respondents' speculation that "other documents ***must have existed***," (Order p. 18; emphasis added), and that these unspecified documents would have been found, somehow, if Dr. Van Veen had made his production earlier, this conclusion is just that – speculation.

Dr. Van Veen is a regional employee of TLC who was shown only to have overlooked a few documents, placed on his TLC computer by another employee, without any bearing on the case. On the actual record, the Circuit Court's decision to impose a six-figure monetary sanction, plus the prospect of bearing the entire brunt of liability for two surgeries that he did not perform and that are outside the statute of repose, was unjust.

SUMMARY OF ARGUMENT

The Circuit Court imposed severe sanctions on Dr. Van Veen that could result in ruinous personal liability for him. The facts in this case are far less egregious than those in which such sanctions have been upheld. Because the record will not support such onerous sanctions, the Order should be reversed.

What the record reveals is that Dr. Van Veen, in producing documents, did not initially search the computer issued to him by his employer for responsive documents. When he realized this possibility, Dr. Van Veen conducted a search and produced a small number of additional documents. These were not his personal documents, but belonged to his employer. This is a case of inadvertence, not conspiracy or willfulness.

The scattered and random nature of the documents that Dr. Van Veen located and produced confirms that he did not knowingly possess and hide a large or systematic group of responsive documents. Indeed, the small number of documents on his company computer confirms that this computer was not a prime repository that needed to be searched. And Dr. Van Veen's voluntary production undermines the idea that he embarked on a campaign to hide or destroy documents.

The Circuit Court's conclusion that Respondents' "right to a fair trial" was "impaired" by Dr. Van Veen's delayed production is unsupported in the record. Discovery is still open and there is still ample opportunity to ask questions and formulate arguments concerning these documents. The notion that if Dr. Van Veen had made his production earlier, some other documents might have surfaced somewhere else is counterfactual supposition. There is no irreparable prejudice to either Respondent.

In general, the Circuit Court's findings concerning Dr. Van Veen are based on speculative and tendentious interpretations of documents offered by Respondents, rather than on actual testimony by parties with knowledge. The Circuit Court's characterization of internal TLC documents as "secret" or "hidden," its assertion that Dr. Van Veen and other defendants were acting improperly to take advantage of their rights under the South Carolina statute of repose for malpractice claims, and its presumption that Dr. Van Veen knew that the New Documents were on the computer issued to him are all based in supposition rather than fact.

The facts actually proven in this case – as opposed to the tenuous superstructure of supposition erected by Respondents – will not support such dire sanctions. The cases in which sanctions have been upheld have involved continued willful misconduct, direct and

knowing violation of court orders, and warnings to the perpetrators of the consequences of continued failure to comply. Here, by contrast, all that the record shows is that Dr. Van Veen – we would argue understandably – did not conduct a full search of a company-issued computer that, in fact, turned out to contain only scattered documents. When he located those documents, he produced them. This does not warrant striking his Answers.

Time and again, the Order punishes Dr. Van Veen ***personally*** for conduct of other parties, including conduct in other cases. Elementary principles of justice require that Dr. Van Veen be sanctioned only for his own conduct, and only in the currently pending case. He cannot be held responsible for his employer's conduct.

The sanctions should also be reversed because they were procedurally improper. Rule 7(b)(1) requires that a motion "state with particularity the grounds" on which relief is sought. The motion for sanctions was devoid of particularity. Respondents also failed to have the documents offered in support of their argument made exhibits. Especially when such extraordinary relief is sought, these procedural failures have real consequences.

In like manner, the Order imposed criminal contempt penalties on Dr. Van Veen without the required procedural safeguards or evidentiary support. Even if some criminal penalty were appropriate, the Order's calculation of the penalty amount is plainly wrong.

Finally, the Circuit Court's Order imposed a disproportionate burden on Dr. Van Veen because, in striking his Answer, the Court deprived him of the right to seek to allocate fault to other parties. Thus, instead of being deemed liable for any harm fairly attributable to his own involvement, Dr. Van Veen now faces automatic liability for all alleged harm, whether it is in fact traceable to the original surgeon, to decisions made by Dr. Van Veen's employer TLC, or to actions of others. Even if striking Dr. Van Veen's

Answer were justified (and it was not), this expansion of his liability would be unjust.

ARGUMENT

I. Standard of Review and Legal Framework

The discretion of a trial court to sanction a litigant for a purported failure to comply with the rules of discovery is not unbridled, and this Court reviews any sanction imposed for abuse of discretion. *Davis v. Parkview Apartments*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014). "An abuse of discretion may be found . . . where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." *Id.* at 282, 762 S.E.2d at 543.

Applying this standard of review, this Court has explained that "the sanction imposed should be reasonable, ***and the Court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case***." *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990) (citing *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers,* 357 U.S. 197, 78 S. Ct. 1087 (1958)) (emphasis added). "The sanction should be aimed ***at the specific misconduct of the party sanctioned***." *Id.*, 399 S.E.2d at 440. "In other words, the sanction should be a rifle-shot, not a shotgun blast." *Id.*, 399 S.E.2d at 440. In cases involving multiple parties, "[t]he need for the trial court to narrowly tailor its sanction to the offense committed by a party is never more evident." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 543, 489 S.E.2d 679, 682 (Ct. App. 1997).

Sanctions that effectively foreclose a decision on the merits – like the sanction at issue here – are subject to close scrutiny as well as a heightened evidentiary burden. The South Carolina Supreme Court has recently reiterated that

> when the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly. Thus, where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction.

Davis, 409 S.C. at 282-83, 762 S.E.2d at 544 (citations and internal quotation omitted).

This strict standard of proof when the severest of sanctions are at issue is founded upon fundamental guarantees of due process in both the federal and South Carolina Constitutions. The United States Supreme Court's decision in *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087 (1958), recognized the tension between the sanctions that may be imposed under Rule 37 of the Federal Rules of Civil Procedure (which corresponds with Rule 37, SCRCP) and fundamental rights to due process. *Rogers* concerned a trial court's dismissal of a complaint with prejudice due the plaintiff's failure to comply fully with a pretrial discovery order. Looking to its own precedent in two earlier decisions, the Supreme Court reversed the trial court, explaining in the process

> The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey v. Elliott*, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215, and *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530. These decisions establish that ***there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.***

357 U.S. at 209, 78 S. Ct. at 1094 (1958) (emphasis added). Given these profound and weighty constitutional concerns, "Denying a party the opportunity to be heard ***should be carefully invoked and reserved for the most egregious of cases.***" *Karppi*, 327 S.C. at

549, 489 S.E.2d at 685 (Anderson, J., concurring in a decision of this Court reversing the circuit court for striking a defendant's answer as a discovery sanction) (emphasis added).

Cognizant of the constitutional concerns, the Fourth Circuit, like many other federal circuits, requires that a warning be given in advance when a party's failure to meet the conditions of a court order will foreclose its right to an adjudication on the merits. *Hathcock v. Navistar Intern. Transp. Corp.*, 53 F.3d 36, 40 (4th Cir. 1995); *see also Choice Hotels Int'l v. Goodwin & Boone*, 11 F.3d 469, 473 n.2 (4th Cir. 1993) ("Considerations of constitutional due process also suggest that the district's court's warning must be explicit and clear."); *RDLG, LLC v. Leonard*, No. 15-1153, 2016 WL 2957318, *4 (4th Cir. May 23, 2016) ("we require explicit and clear notice to parties when their failure to meet the conditions of a court order will preclude their right to an adjudication on the merits."); 23 AM. JUR. 2D *Depositions and Discovery* § 231 ("It is generally expected that the trial court will issue a warning to the offending party that the sanction of a default judgment will be entered for continued discovery failures.").

II. The Severe Sanctions on Dr. Van Veen Are Disproportionate to the Facts, Unsupported in the Record, and Inconsistent with South Carolina Precedent.

The actual facts here are simple and do not support the severe sanctions imposed by the Circuit Court. There is no evidence or suggestion that Dr. Van Veen had any personal documents relevant to the case. When initially asked to produce documents, he produced TLC's copies of Respondents' medical files, as is typical in malpractice litigation. When he was deposed, he realized that he had a TLC-issued computer that he had not searched. He then searched that computer, located a handful of documents belonging to TLC, and produced them. The random nature of those documents, and the fact that Dr. Van Veen produced them, constitute clear evidence that this was an

oversight, not a conspiracy to hide evidence. There is no evidence that Dr. Van Veen was conscious of the documents before this search, nor that he engaged in any concerted effort to thwart production. His employer, TLC, had custody of many such similar documents, had the responsibility to produce them, and has now produced them. Dr. Van Veen was not responsible for making the production for TLC. There is no "reverse *respondeat superior*" theory under which Dr. Van Veen can be sanctioned for the conduct of TLC.

The Order plainly prejudices Dr. Van Veen. In addition to requiring him to pay a large amount of money, it deprives him of any right to assert defenses, in a case in which he has substantial defenses. Dr. Van Veen should have the right to contest the claims against him on the merits.

A. When Dr. Van Veen Realized His TLC Computer Might Contain Responsive Documents, He Located and Produced Them.

The Circuit Court's various conclusions that Dr. Van Veen "violated the court's orders" and had "hidden" the New Documents on his computer contrary to his discovery obligations are unsupported in the record. (Order pp. 8-9) What the record does show is that Dr. Van Veen oversaw production of TLC's clinical files concerning Respondents that were present at TLC-Greenville. When under examination he realized that there might be additional documents on the computer issued to him by TLC, he searched that computer.

This happens. It does not support a conclusion of conspiracy, unless one already assumes a conspiracy. And it will not support sanctions of the severity at issue here.

If Dr. Van Veen had been a party to the sort of conspiracy posited by Respondents, he would not have produced these documents. They would have been deleted long ago by one conspirator or another, and he would have asserted that he had searched his TLC

computer and found nothing. That did not happen. The clear picture here is of a party who believed he had met his production obligation, and who acted appropriately when it became apparent that a further search was called for.

Dr. Van Veen believed that the hard copy medical records of Respondents were the relevant and responsive documents over which he had control, and he searched for such documents. (VV Aff. ¶ 6; VV Depo. Tr. 352-354) He was not the custodian of TLC's Patient Advocacy or Complex Case Logs or other similar documents. (*Id.*) The documents he produced were a random scattering and were placed on his TLC computer by other TLC personnel without discussion with him. (*Id.*) The documents were both old, and outdated in the sense that their use had been discontinued for years. (*Id.*)

The nature of the New Documents supports the conclusion that this was an oversight, not obstruction. Most of them do not mention Respondents. Those that do are terse and add little information – certainly not on their faces, and not even on the interpretive theories advanced by Respondents. The Patient Advocacy system was discontinued in 2006 (VV Aff. ¶ 4), making it highly credible that Dr. Van Veen would not know he had a random report from that era located somewhere on his laptop. Dr. Van Veen was not sitting on a mother lode of documents. He unwittingly had a few stray documents on his computer, which he failed to locate in his initial search for documents.

The fact that a TLC training module states that a Clinical Director like Dr. Van Veen is the "owner"[6] of all clinical complaints will not bear the interpretive weight that the Circuit Court and Respondents place on it. While this module appears to locate administrative responsibility, this simple statement is no substitute for proof that Dr. Van

[6]The quotation marks appear in the TLC document. (Knowledge Module; GCC_LUCE 000118)

Veen had actual knowledge of the New Documents, and made a conscious decision not to produce them. While this is what the Order holds (Order p. 16), there is no such proof.

It bears emphasizing that there is no evidence that Dr. Van Veen ***personally*** had any responsive documents. Each of the New Documents was also contained in TLC's own production. *See* note 4, *supra*. What is at issue here is responsibility for producing documents belonging to TLC. Even assuming that Dr. Van Veen had responsibility for gathering the documents present at TLC-Greenville, imposing a ***personal*** sanction that could destroy him financially and professionally is wildly disproportionate to any failure to have looked hard enough for ***corporate*** documents on his initial search.

Nor is there evidence of a false representation by Dr. Van Veen ***to the Circuit Court***. Dr. Van Veen's written discovery responses, even though founded on a mistaken understanding of what was on his TLC computer, are ***not*** the same thing as a direct, consciously false representation in court. Nor did Dr. Van Veen make any representation that he had searched the computer in question. He believed he had conducted an appropriate search, and his discovery responses reflect only that. He did not misstate what he had done. He believed that this production was reasonable.

The record will not support the Circuit Court's conclusion that Dr. Van Veen was a knowing participant in a conspiracy to hide information. In sanctioning Dr. Van Veen in a way that could destroy him, the Circuit Court made an impermissible leap from Dr. Van Veen's supplemental production to the conclusion that he had engaged in the most egregious form of willful misconduct. The sanction order must accordingly be reversed.

B. Respondents' Right to a Fair Trial Was Not Impaired.

The Circuit Court's finding that Respondents' "right to a fair trial has been impaired" is error; it is without support in the record or in logic. Discovery has not closed

in either case. Dr. Van Veen's deposition was the first taken in either case. He produced the New Documents with time remaining to ask questions and revise theories to account for them. And Respondents have not explained with any specificity how it is that the New Documents somehow impair the right to a fair trial. The claim that a fair trial is impossible is a mere assertion, not an argument.

The Order appears to base this conclusion on the proposition that if Dr. Van Veen had produced the New Documents earlier, then other documents, related to the New Documents in some unspecified way, might still have been in existence and might have been produced. (Order pp. 18-19)

There are several problems with this assertion. First, it speculates that these unspecified documents were in existence when Dr. Van Veen made his first production in this case on August 14, 2012, but that they had all been destroyed, by the actions of an unnamed person, by the time TLC made its supplemental production in 2015. This is a very specific assumption, and it has no record evidence.

On top of this, the finding speculates further that these unidentified documents would make a material difference in the trial of these cases. Again, this is only a supposition. Nothing in the record identifies or describes a destroyed document that could make a difference in the fairness of Respondents' trials. And because there is no evidence or suggestion that ***Dr. Van Veen*** was responsible for the assumed destruction of these assumed documents, it is improper to punish him with a ***presumption*** that the assumed documents would have been relevant.

Third, there is no suggestion or evidence that these other, assumed documents were in Dr. Van Veen's custody or control. If they existed, and if they were destroyed,

this was the work of someone else. It is therefore improper to sanction Dr. Van Veen on the theory that the production of these documents would make a difference in the trial of this case, when he was not their custodian and was not responsible either for producing them or for their (assumed) destruction. Dr. Van Veen cannot be punished for the conduct of someone else – and still less for speculation about what that person might have done.

Nor does the reference in the Order to two other particular documents explain how the right to a fair trial has been impaired by Dr. Van Veen's conduct. The Court refers to a "medical study" found on Dr. Potter's computer and refers without explanation to "the inability of Plaintiffs to conduct meaningful and credible discovery." (Order pp. 19-20) This document was never on Dr. Van Veen's computer and it appears to be available now in the litigation; that document does not support sanctioning Dr. Van Veen. The same is true for the Court's treatment of an apparent meeting between Dr. Van Veen and Dr. Potter. (Order p. 20) The Court purports to sanction Dr. Van Veen for his inability to recall this meeting. That is improper.

On a closely related point, the Circuit Court's order sanctioning Dr. Van Veen erred in concluding that had Dr. Van Veen produced the New Documents in 2012 instead of early 2014 "the remaining documents [from TLC] would have been promptly produced and over two years of appellate litigation would have been avoided." (Order p. 10) As noted above, the appellate fight was focused on production and permissible uses of a database dealing with patients other than these Respondents; that fight would have gone on regardless of the timing of Dr. Van Veen's production.

More generally, the conclusion that Respondents' right to a fair trial was impaired cannot be based on the content of the documents produced by TLC. Whatever the reason

that TLC made its supplemental production when it did, there is no evidence that Dr. Van Veen was responsible for TLC's corporate production. Sanctions on Dr. Van Veen must be limited to his own conduct.

Nor may Dr. Van Veen be sanctioned in these cases for the conclusion that production of the New Documents in the earlier cases might have resulted in a different outcome there. This possibility appears to have infected the Circuit Court's decision. The Circuit Court held that Dr. Van Veen had "had a decade of opportunities as either a witness or a named defendant to be forthright about the existence of the [New Documents]," that the New Documents "were never produced" in the prior litigation in *Hollman* and *Carter*, and that Dr. Van Veen's "prior testimony" in those earlier cases had been "false and intentionally misleading." (Order pp. 9, 18) This is plainly improper. Those prior cases settled, and with those settlements the issues of how a trial might have looked became moot and unanswerable. Moreover, Dr. Van Veen was not even a party to those cases. He simply cannot be sanctioned in the instant cases for the speculative possibility that if he had been asked similar questions in a prior case and answered similarly, those cases might have settled on different terms or not at all.

Respondents assert that the New Documents represent a turning point in their understanding of the case. This claim will not withstand analysis. Respondents already knew of the Patient Complaint/Advocacy and complex case procedures. Those items are alleged in the Complaint. (Dickerson Compl. ¶¶ 55-58; Luce Compl. ¶¶ 50-53) The brief comments by Dr. Van Veen to Dr. Potter regarding sixteen patients also do not shed new light. And the study does not contain material information not in the patient files. Again,

the attempt to portray production of the New Documents as a dramatic turn in this case simply fails. It is a "gotcha" moment, but it does not represent a watershed.

At most, the impact of Dr. Van Veen's conduct in the cases before the Court was a delay – during the discovery period – in production of the eight New Documents. That delay did not impair the right to a fair trial of either Respondent.

C. The Sanctions Are Based on Respondents' Speculative Interpretation of Documents, Which Are Inadequate to Support a Motion Like This One.

A motion – particularly one of this gravity – must be supported in the record. We discuss below the particular procedural inadequacies of the record created by Respondents, but the Order is also substantively defective because the Order adopts uncritically the interpretations and speculations of Respondents, without a sound basis.

The arguments and interpretations relied on in sanctioning Dr. Van Veen were not based on witness testimony interpreting the documents, either in deposition testimony or by affidavit. Instead, time and again in their argument to the Circuit Court, Respondents simply placed their own interpretation on the documents, and the Circuit Court adopted those interpretations. These examples demonstrate the problem:

(1) Plaintiffs' counsel characterized one of the New Documents, the Ectasia Study, as a "secret medical study of 17 patients and a total of 25 eyes," concluding summarily the study was "secret" simply because the patients were "not named as names" and were identified only with initials. Counsel further speculated that the Ectasia Study was "not designed for treatment" but instead for the Defendants "to figure out how much longer they had." (March Tr. 36) The Circuit Court adopted this terminology uncritically. (Order pp. 17, 19)

(2) Plaintiffs' counsel characterized another of the New Documents, the Potter Communication, as evidence of a supposed "secret meeting" between Van Veen and TLC's corporate office concerning patients with ectasia. (March Tr. 37)

(3) Plaintiffs' counsel offered the following "translation" for one of Dr. Potter's emails addressing the protection of records of patients experiencing complications: "Translation, to extent one is even necessary, DO NOT TELL PATIENT, DO NOT TELL HIS OTHER DOCTORS, GIVE ME THE CHART AND HIDE THE ORIGINAL TO LIMIT ACCESS." (Memo in Supp. of Sanctions p. 20)

The result is that the Order views events solely through the prism created by Respondents, and then sanctions Dr. Van Veen on the basis of that view. Because that view is speculative, the Order itself is defective. The Circuit Court's conclusion that Respondents' right to a fair trial has been impaired is one example of this speculation, but there are others, each of which is by itself fatal to the Order. Taken together, they absolutely require reversal.

The Circuit Court erred in characterizing the New Documents as "secret." The Order goes to considerable lengths to chide TLC for maintaining "secret" documents concerning ectasia and these Respondents. While this is one of Respondents' themes, the record does not support a finding of "secrecy." We are aware of no legal principle that prohibits a business or medical practice from maintaining internal records for its own purposes. The only actual testimony concerning the documents for which Dr. Van Veen has been sanctioned is that they were maintained by TLC to allow it to track and to

determine how to treat ectasia risks.[7] (VV Depo. Tr. 275-276) Far from being nefarious, this is what we would want doctors to do with new procedures or unexpected outcomes. The Circuit Court seems to assume that TLC had an obligation to copy every patient on every document concerning that patient. That plainly is incorrect. If by "secret" the Circuit Court means "not shared with the patient," then there is nothing wrong with secrecy. If by "secret" the Court means "created willfully to harm the patient," then the conclusion is without record support. Finally, the important point cannot be lost that Dr. Van Veen should not be punished for TLC's conduct, and that all the documents in question belonged to TLC, not to Dr. Van Veen.

For much the same reason, the Circuit Court erred in adopting the equally pejorative and equally unsupported conclusion that the New Documents were "hidden." The only record evidence – and it is by far the most plausible view – is that Dr. Van Veen was simply unaware that the few, random New Documents were on his TLC computer. He was not the custodian of such records, the records were in fact old and no longer in use, and Dr. Van Veen was not the person who placed them on this computer. They were not hidden, and certainly not by Dr. Van Veen. Because Dr. Van Veen has been severely sanctioned for "hidden" documents, and because the conclusion that the New Documents were "hidden" is without foundation, the Order should be reversed.

The Circuit Court assumed with Respondents that the documents showed that Dr. Van Veen lied in discovery when he said he had not "diagnosed" Respondent Dickerson with ectasia. (Order pp. 5 n.4, 12 n.8) In fact, Dr. Van Veen never examined Mr.

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[7]This issue was also addressed extensively during the May hearing by TLC's counsel, who referred to prior depositions of Dr. Potter and Dr. Van Veen in the *Hollman* case, where both doctors explained the entirely legitimate purposes of tracking data on patients with suspected ectasia or other vision complications. (May Tr. 12-23)

Dickerson. (VV Depo. Tr. 310-311) Only through Respondents' interpretive lens does possession of a document identifying Mr. Dickerson as an ectasia patient equate to a "diagnosis."

It was also error to adopt the Respondents' interpretation that the New Documents were created as part of a scheme to lull Respondents until the repose period had expired. Respondents face a formidable barrier to recovery in South Carolina's six-year statute of repose for medical malpractice. S.C. Code Ann. § 15-3-545(A). Accordingly, the focus of their efforts has been much more on creating some impression of impropriety that might support an argument for waiving or tolling the repose period, than on demonstrating actual medical culpability. (*See, e.g.*, Memo in Support of Sanctions pp. 4-6; March Tr. 37-39) So at every opportunity, Respondents have suggested that documents and events support the narrative of a "conspiracy" to "take advantage of" the repose period. Respondents accordingly told the Circuit Court that the New Documents (and TLC's supplemental production) confirmed that TLC and Dr. Van Veen were engaged in such impropriety. Putting to one side whether there is anything improper about being aware of the existence of a statute of repose, there is no actual evidence that this is what Dr. Van Veen was doing. No testimony and no document shows an impropriety with respect to the statute of repose. It was error for the Circuit Court to assume such a scheme on the record before it.

Finally, the Circuit Court erred in adopting Respondents' presumption that Van Veen had to have known that the New Documents were on TLC's computer issued to him. Plainly, the severe sanctions imposed on him cannot stand if he was unaware of that small number of responsive documents on that computer. The record evidence, and the most

plausible reading of circumstances, is that he did not know. He did not have a full set of Patient Advocacy files that he routinely reviewed; the documents were a smattering of old files. And when he found them, he turned them over. This is not the conduct of someone who consciously withheld documents.

The actual record does not support the Circuit Court's conclusion that Dr. Van Veen was a part of a scheme to defraud the court, that he lied about what he had produced, or that he acted intentionally. (Order pp. 16-17, 23-24) Only by assuming the conclusion is it possible to hold that Dr. Van Veen knew that he had "secret" files "hidden" on his TLC computer, created for the particular purpose of deceiving Respondents. In fact, none of this happened and none of it is supported in the record. The core presumptions of the Order are precisely that – presumptions. Accordingly, the Order must be reversed.

D. The Severe Sanctions are Inconsistent with South Carolina Precedent.

Not only are the severe sanctions imposed by the Circuit Court unsupported by the facts and the record, they are also inconsistent with those South Carolina cases that address sanctions pursuant to Rule 37, SCRCP.

As indicated above, this Court has made clear that any sanction imposed "should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). Further, "[w]here the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." *Id.* at 198-99, 511 S.E.2d at 719. None of those elements was present here, yet the Circuit Court's decision to strike Dr. Van Veen's Answer has effectively imposed on him a judgment by default.

The cases in which this Court or the Supreme Court has affirmed a trial court's decision striking an answer as a discovery sanction show conduct far more egregious than anything that happened here. For example, in *Griffin*, the defendant engaged in "a pattern of non-compliance" with the rules of civil procedure. *Id.* at 197, 511 S.E.2d at 718. This involved some "six different motions to compel discovery," "four court orders to comply with discovery," and the repeated failure of the defendant to produce a 30(b)(6) deponent. *Id.* at 198, 511 S.E.2d at 718. At a contempt hearing after the trial court had ordered compliance with an earlier ***consent order*** intended to resolve discovery disputes, the court specifically warned the defendant that its failure to comply with court orders going forward would mean that the court would consider, among other sanctions, striking the defendant's answer. *Id.* at 196-97, 511 S.E.2d at 718. The defendant still failed to comply, the trial court struck the defendant's answer, and this Court affirmed.

Similar extreme conduct was at issue in this Court's decision in *QZO Inc. v. Moyer*, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2005). There, a business sued one of its former partners, seeking (among other relief) a TRO requiring the immediate return of a computer that belonged to the business and contained proprietary information. Based on the allegation that the information on the computer was in danger of being lost or destroyed, the Court granted the TRO the same day the Complaint was filed, requiring the defendant to turn over the computer immediately upon receipt of the TRO. The defendant instead waited seven days to turn over the computer, and when it was finally turned over, a forensic investigation revealed that the computer's hard drive had been reformatted the day before, "effectively erasing any information the computer may have contained." 358 S.C. at 257, 594 S.E.2d at 547. While this Court re-affirmed in *QZO* that "[w]hen a court

orders a sanction that results in default or dismissal, the end result is harsh medicine that should not be administered lightly," *id.* at 256, 594 S.E.2d at 547, it nevertheless upheld the trial court's decision striking the defendant's answer.

This Court's decision in *McNair v. Fairfield County*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008) is also instructive concerning the level of misbehavior required to justify striking a litigant's pleading. In that case a landowner filed suit, challenging Fairfield County's decision to condemn a tract of land he owned and which the County wanted for an airport expansion. The County responded to discovery requests, but the landowner filed a motion to compel, alleging the County had failed to produce certain documents, had failed to organize coherently those it did produce, and had failed to provide complete responses to interrogatories. The Court agreed with the landowner, ordering the County to correct its responses within fifteen days. The County did nothing to correct the responses, however, despite six letters from counsel for the landowner over a six-month period. The landowner finally filed a motion for dismissal and/or sanctions. At the hearing counsel for the County promised to provide the discovery responses within a month, and the hearing was continued. A month later the County had still not responded. Its counsel explained that the County was reluctant to continue litigating the case as federal funding for the airport project was in jeopardy, and asked the Court for permission to prepare a scheduling order rather than striking the County's Answer. The Court agreed, still holding sanctions in abeyance, but this time warning the County that the Court was "inclined to strike the answer" but that "in hopes of resolving the problem amicably" the Court would grant the parties an additional 45 days to "reach some kind of accord." *Id.* at 465, 665 S.E.2d at 831. No such scheduling order ever came, and after 45 days the Court

struck the County's answer and dismissed with prejudice the County's condemnation action.

A survey of South Carolina cases like those, dealing with the severest of discovery sanctions, reveals another common thread beyond extreme and willful misbehavior. As in *Griffin* and *McNair*, most of the cases affirming a sanction that foreclosed a right to an adjudication on the merits have featured an ***explicit warning from the trial court*** that it would consider such a sanction if faced with continued non-compliance. *See, e.g., Davis*, 409 S.C. at 277, 762 S.E.2d at 541 (sanction of dismissal imposed only after court warned it would consider such a sanction for continued noncompliance); *Halverson v. Yawn*, 328 S.C. 618, 620, 493 S.E.2d 883, 884) (Ct. App. 1997) (after plaintiff's counsel failed to appear at hearing on defendant's motion to compel, trial court provided 30-day deadline for plaintiff to respond to discovery requests and warned that failure would result in dismissal); *see also McNair*, 379 S.C. at 467, 665 S.E.2d at 832 ("We note the trial court warned the County during the December hearing it was inclined to strike the County's Answer"); *Karppi*, 327 S.C. at 550, 489 S.E.2d at 686 (striking answer was "too severe a sanction . . . especially without warning of the impending default") (Anderson, J., concurring)).

As noted in Section I above, given the significant constitutional concerns present when a discovery sanction is imposed that results in a default, many federal circuits, including the Fourth Circuit, actually ***require*** that the trial court warn it will consider such a sanction if noncompliance continues. *Hathcock*, 53 F.3d at 40; *see also Choice Hotels Int'l*, 11 F.3d at 471 n.2 ("Considerations of constitutional due process also suggest that the district's court's warning must be explicit and clear.").

In this case, Dr. Van Veen's actions do not rise to the required level of bad faith, willful disobedience, or gross indifference to the rights of the plaintiffs necessary to support a sanction of striking his answer. Dr. Van Veen overlooked a search that turned out to reveal responsive documents, but there is no evidence that he did this willfully, nor that he intentionally misled the Circuit Court. Moreover, ***none*** of the trial court's relevant discovery orders warned of such a sanction if they were not obeyed. For these reasons too, the Circuit Court's decision must be reversed.

III. The Order Impermissibly Sanctions Dr. Van Veen for the Conduct of Other Parties, Including Conduct in Other Cases.

The Circuit Court sanctioned Dr. Van Veen personally. His Answer was stricken, exposing him to personal liability. He personally has been directed to pay a substantial monetary fine and a large portion of plaintiffs' attorneys' fees and costs. Particularly where sanctions for allegedly improper conduct are at issue, it is wildly unjust to penalize one person for another person's conduct. The Circuit Court effectively made Dr. Van Veen vicariously liable for wrongs that even the Respondents ascribe to TLC and to John Potter. This is simply improper.

Respondents' briefing and presentation to the Circuit Court focused to a very large degree on the conduct of John Potter, and on documents produced by TLC. Dr. Potter, Director of Patient Services for TLC, was accused of masterminding a scheme to hide diagnoses from ectasia patients. His conduct was front and center in every presentation by Respondents. (*See, e.g.,* March Tr. 37, 67, 70-75, 78-91; May Tr. 48, 62, 64) And those presentations relied in large part on documents produced by TLC – not by Dr. Van Veen.

So when TLC and Dr. Potter settled, the remaining record was too sparse to justify sanctioning Dr. Van Veen alone. However, the urge to sanction someone appears to have

been too strong to resist, and neither Respondents nor the Circuit Court paused to analyze the case for sanctions against Dr. Van Veen alone. Consequently, he bore the brunt of the case against TLC and Dr. Potter, when they stepped out of the line of fire. In the words of this Court in *Balloon Plantation*, the Circuit Court aimed a "shotgun blast" at Dr. Van Veen, not a "rifle-shot." 303 S.C. at 154, 399 S.E.2d at 440.

This can be seen both in the analysis of the sanctions Order and in its disproportionate consequences for Dr. Van Veen. As we have already shown, the Order sanctions Dr. Van Veen for "hiding" documents when he had only a few random documents, and when those documents belonged to TLC, which had control over when and whether to produce them. The Order sanctions Dr. Van Veen for a "secret" program when – besides the fact the program was not "secret" – the patient advocacy program was overseen by Dr. Potter. The Order sanctions Dr. Van Veen for impairing Respondents' right to a fair trial, with no showing that Dr. Van Veen had the assumed documents that assertedly could have affected the course of their trial. The Order admits that it is penalizing Dr. Van Veen for the contents of the TLC production of 130,000 pages, because the Court assumed that his production "led to" the TLC production. (Order p. 26) The Order even assumes (with no record evidence) that Dr. Van Veen had the ability to pay the hefty fine imposed on him "based on his willingness to incur the costs of a protracted discovery dispute" (Order p. 25 n.12), when it was TLC and not Dr. Van Veen that conducted that dispute.

In addition to sanctioning Dr. Van Veen for the conduct of other parties, the Order sanctions him for conduct in ***other cases***. Time again, Respondents and the Circuit Court hearken back to discovery fights and testimony in the *Hollman* and *Carter* cases. (Memo

in Support of Sanctions pp. 2, 5-8, 15, 22, 25; Supplemental Memo p. 4; Order pp. 9, 18) While Respondents' counsel and even the Circuit Court may have recollections from those cases, they simply are not part of the record here. Dr. Van Veen was not a party in either. Both cases settled before the close of discovery. The careless sprinkling of references to those matters is the opposite of careful jurisprudence, and it requires reversal.

The Circuit Court's failure to distinguish between the conduct of the various parties before it is evident in another critical way: the impact of the sanctions Order on Dr. Van Veen is dramatically disproportionate. Because the other defendants settled, the striking of Dr. Van Veen's Answers leaves him facing 100% of liability in this case. Since the striking of his Answers could well include any affirmative defense seeking apportionment of fault, he may have no ability to point to the conduct of others or even to seek an offset.[8] Had the other defendants not settled, and had their Answers also been stricken, the Circuit Court would have been forced to grapple with apportionment. With the other defendants gone, Dr. Van Veen – a peripheral player who neither performed surgery nor oversaw the programs that Respondents say were designed to lull them into inaction – faces the prospect of the full force of liability. This is, for him, a potential financial death sentence.

Much the same disproportion is at work in the requirement that Dr. Van Veen pay one-third of nearly $500,000 demanded by plaintiffs in attorneys' fees and costs. The result is a $166,500 attorneys' fee sanction imposed on Dr. Van Veen personally. The Circuit Court based its calculation on the assumption that Dr. Van Veen was "one of the three parties that engaged in sanctionable conduct." (Order Denying Motion to Alter or

[8]Dr. Van Veen does not concede that he has no right to assert an offset or apportionment and reserves the right to argue for such right in the event the Order is not reversed.

Amend p. 3) Dr. Van Veen's share of responsibility for that $500,000 demand, if any, should be based on his role in the sanctionable conduct, or the number of documents he failed to locate in comparison to those withheld by TLC. In either case, Dr. Van Veen's responsibility for the attorneys' fee award should be minimal, and certainly far less than one-third of what Respondents demanded.

This Court has explained that discovery sanctions must be imposed with particular and targeted focus in cases that involve multiple defendants. Under the facts before this Court, if any party is to blame, it is TLC, not Dr. Van Veen. TLC produced over 130,000 pages of additional documents; Dr. Van Veen produced eight documents totaling less than 30 pages – all of which belonged to TLC. Because Dr. Van Veen did not have personal responsive documents, the sanction on him is, essentially, based on his role as one TLC employee charged with searching for documents. Yet the Circuit Court imposed the severest of sanctions, effectively a default judgment, on Dr. Van Veen, in large part due to the conduct of TLC and other defendants.

This Court's decision in *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997) is instructive of the appropriate analysis for discovery sanctions in a case involving multiple defendants. In *Karppi* a buyer of floor coverings sued both a seller and supplier of products, claiming the products were defective. The supplier then filed cross-claims against the seller. The trial court later struck the supplier's answer, cross-claim, and counterclaim as a discovery sanction. This Court reversed the trial court, explaining that

> The need for the trial court to narrowly tailor its sanction to the offense committed by a party is never more evident than in cases involving multiple parties. Where, as here, multiple parties are involved, the trial court must closely scrutinize the dynamics of the litigation and be

> extremely cautious before striking the pleadings of a transgressing party because of the effects such action is likely to have on the other parties.

327 S.C. at 543, 489 S.E.2d at 682. This Court further explained that in striking the supplier's pleadings in their entirety, including the supplier's cross-claims, the trial court had effectively resolved the cross-claim and granted a windfall to the codefendant seller, whose discovery rights had not been violated. Further, the seller's ability to assert the supplier's defense that the materials had not been defective was also foreclosed, because the supplier's answer had been stricken. Such a wide-ranging sanction "ran afoul of the requirement that the sanction imposed be reasonable – comprehensive, yet not overly broad." *Id.* at 544, 489 S.E.2d at 682; *see also Balloon Plantation*, 303 S.C. at 154, 399 S.E.2d at 440 (any sanction "should be a rifle-shot, not a shotgun blast"); *Guifu Li v. A Perfect Day Franchise Inc.*, 281 F.R.D. 373, 392 (N.D. Cal. 2012) (declining to impose default judgment on all defendants as discovery sanction given that defendants were "not equally culpable for the discovery violations that have occurred" and explaining such a sanction "would be an over-inclusive remedy, and would potentially allow Plaintiffs to obtain a windfall without ever reaching the merits of the . . . claims").

An analogous sort of overreach occurred here in two respects. First, as explained in detail above, Dr. Van Veen has been punished for actions in discovery that were overwhelmingly the fault, if any, of TLC. Second, striking Dr. Van Veen's answer in its entirety leaves him unable to assert a defense that any harm to Respondents was the fault of codefendants in the case, not him. (Dickerson Answer ¶ 41; Luce Answer ¶ 39)

In old Western movies, a common device in a bar scene was for a cowboy to wind up for a punch. When the target ducked, the punch landed with full force on the jaw of an unsuspecting patron behind the target. This has happened to Dr. Van Veen. Respondents

focused their presentation on TLC and Dr. Potter. The Circuit Court accepted that presentation at face value. But when TLC and Dr. Potter ducked, Dr. Van Veen took it squarely in the jaw. That is unjust, and the Order should be reversed.

IV. The Sanctions Were Procedurally Improper

In addition to the foregoing substantive defects, the Order must be reversed because the motion for sanctions was procedurally improper.

A. The Motion for Sanctions Did Not Comply with Rule 7(b)(1).

Rule 7(b)(1) of the South Carolina Rules of Civil Procedure is clear and direct. A motion must "state with particularity the grounds" on which relief is sought. Our courts have held that this requirement is key to avoiding prejudice to the non-moving party. "[T]he basic purpose of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefore." *Skinner v. Skinner*, 257 S.C. 544, 549, 186 S.E.2d 523, 526 (1972). When a litigant challenges a motion for lack of particularity, "the court should ask whether any party is prejudiced by a lack of particularity or whether the court can comprehend the basis for the motion and deal with it fairly." *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (internal quotation omitted).

The Sanctions Motion fails this test. The closest the motion comes to any specification of conduct is the rote recitation that Dr. Van Veen, Dr. Potter, and other unspecified "officers and/or employees" of TLC "were involved in the withholding, modification, and spoliation of material evidence in this case." (Sanctions Motion p. 3) Nothing in the motion identifies what evidence was withheld, modified, or destroyed, nor is there any attempt to specify what individual was responsible for any particular conduct.

Both the Respondents and the Court effectively admitted that the Sanctions Motion was inadequate in this regard. It was acknowledged time and again on the record that the

targets of the motion were learning what was alleged against them for the first time at oral argument. (March Tr. 21, 23-26, 28-29, 97) This sort of ambush is inconsistent with the imposition of severe sanctions contained in the Order.

This failure was compounded by the absence of any prior warning to Dr. Van Veen by the Court that he faced the striking of his Answers. As noted above, numerous courts, including this Court, have recognized the importance of such a warning. *McNair*, 379 S.C. at 467, 665 S.E.2d at 832 ("trial court warned the County . . . it was inclined to strike the County's Answer"); *Karppi*, 327 S.C. at 550, 489 S.E.2d at 686 (striking an answer was "too severe a sanction . . . especially without warning of the impending default") (Anderson, J., concurring)); *Hathcock*, 53 F.3d at 40 ("a party is entitled to be made aware of the drastic consequences of failing to meet the court's conditions at the time the conditions are imposed, when he still has the opportunity to satisfy the conditions and avoid the sanction" (brackets and internal quotation omitted)). The absence of a warning here magnifies the effect of the failure to enforce Rule 7(b)(1).[9]

The subsequent record created by Respondents is inadequate for the reasons discussed throughout this Brief, but that is irrelevant to this particular argument. Rule 7(b)(1) requires a particular statement in the motion itself. That did not happen, and the deficiency is not subject to cure.

B. The Procedural Requirements for Imposition of Criminal Contempt Sanctions Were Not Met, and Even If Those Requirements Had Been Met, the Court's Calculation of the Criminal Sanctions Was in Error.

The Circuit Court erred in imposing a $77,800 monetary fine on Dr. Van Veen.

[9]While the Order recites that defendants "were repeatedly warned" to turn over all documents (Order p. 23), there was no warning that the striking of an answer was imminent, nor that Dr. Van Veen would be sanctioned if he did not conduct a specific search.

Neither the procedures used nor the Circuit's Court's calculation was proper.

The Circuit Court explained that the monetary fine was based upon a figure of $100 per day multiplied by "778 days of delay caused by Defendant Van Veen's failure to obey discovery orders." (Order p. 26) The Court further stated this fine was designed to "eliminate the benefits bestowed on Dr. Van Veen due to his discovery abuse, as well as the necessity to vindicate the court from being lied to." (*Id.*) Two conclusions are inescapable from this holding.

First, this monetary fine – which is not even one of the remedies expressly permitted under Rule 37(b) – is a criminal, not civil, contempt sanction, and therefore required proof beyond a reasonable doubt. That burden was not met. This Court has explained the difference between civil and criminal contempt this way:

> The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant, while the primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders. If it is for civil contempt, the punishment is remedial and for the benefit of the complainant. If it is for criminal contempt, the sentence is punitive and meant to vindicate the authority of the court.

Ex parte Cannon, 385 S.C. 643, 662, 685 S.E.2d 814, 824 (Ct. App. 2009) (citations, brackets, and internal quotation marks omitted). Thus, while the Circuit Court stated that it was denying Respondents' request for civil and criminal contempt (Order p. 7), the reality is that the Court imposed criminal contempt. The fine imposed on Dr. Van Veen was backward-looking and punitive; it was not meant to ensure future compliance – indeed, he had already complied – but to punish Dr. Van Veen and "vindicate the court." This difference is critical, for "civil contempt must be proven by clear and convincing evidence, while criminal contempt must be proven beyond a reasonable doubt." *Id.* at 661, 685 S.E.2d at 824; *see also Ex Parte Jackson,* 381 S.C. 253, 259, 672 S.E.2d 585,

588 (Ct. App. 2009) ("The distinction between civil and criminal contempt is crucial because criminal contempt triggers additional constitutional safeguards."). Not only did the Circuit Court nowhere purport to make findings beyond a reasonable doubt in its Order, but for the reasons discussed above, that highest standard of proof is not met.

Second, given that the $77,800 fine is a criminal contempt sanction, the procedures used to impose it were woefully inadequate. "Charges of constructive contempt are brought by a rule to show cause which must be based upon an affidavit or verified petition. The failure to support the rule to show cause by an affidavit or verified petition is a fatal defect."[10] *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 267, 442 S.E.2d 611, 617 (1994); *see also Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 121 (2008) ("[O]ur jurisprudence clearly establishes that the proper procedure to determine whether a party should be held in contempt is to bring a summons and a rule to show cause.")

Respondents' skeletal motion seeking the criminal contempt sanctions the Circuit Court eventually imposed fails this test in numerous ways. Respondents did not file a Rule to Show Cause. Nor did Respondents attach a supporting affidavit to a Rule to a Show Cause. *See* Rule 6(d), SCRCP ("When a motion is to be supported by affidavit, the affidavit shall be served with the motion.").[11] Nor did Respondents' motion specify what Court orders had been violated and how.

Last, even if the evidentiary burden for criminal contempt sanctions had been met here, which it was not, and even if the appropriate procedures had been followed, which

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[10] "Constructive contempt is contemptuous conduct occurring outside the presence of the court." *Ex Parte Jackson*, 381 S.C. at 261, 672 S.E.2d at 589.

[11] Plaintiffs' counsel later filed a supporting memorandum that included affidavits from the plaintiffs in *Luce* and *Dickerson* as well as *Carter* and *Hollman*, but these affidavits came well after the Motion for Sanctions itself. (Memo in Support of Sanctions)

they were not, the Circuit Court miscalculated the fine. The Circuit Court based the fine on an amount of $100 per day (a figure itself that is unsupported) and multiplied that amount by 778 days. This period was the number of days between Dr. Van Veen's initial response to Requests for Production in *Luce* on August 14, 2012, and the final date of ***TLC's supplemental production on October 1, 2015***. Dr. Van Veen made his supplemental production on April 22, 2014, some 162 days prior to TLC's completion of its supplemental production. And this action was effectively stayed for a period of 204 days before that. It is unfounded and unfair to penalize Dr. Van Veen for that additional time, and the amount of his fine should, at a minimum, be reduced accordingly.

C. No Exhibits in Support of the Motion Were Admitted Into Evidence.

The Order is also procedurally unsound because the documents referred to in the Order were never made part of the record. It appears that a number of documents were projected during oral argument and discussed, and that a larger collection of documents was provided on a thumb drive, at some point, by Respondents' counsel to all counsel present. However, none of this was entered into evidence, and there does not appear to be any clear record of the documents relied on. Given the gravity of the sanctions, this procedural carelessness requires reversal. *Cf. Illinois C. R. Co. v. Jackson*, 179 So. 3d 1037, 1045 (Miss. 2015) (reversing denial of summary judgment where court considered exhibits not on file before the hearing).

The transcript of the March 24, 2015 argument is clear. The Court reporter noted at the outset that while there was discussion of admitting certain documents as exhibits, this did not happen. (March Tr. 3) Similarly, the transcript contains discussion of documents that were shown by projection, but those documents are neither identified nor made part of the record. (*E.g.*, March Tr. 33, 36, 65, 66, 68) While a larger collection of documents

from which the projected documents were drawn was provided to all counsel at some point after the March hearing, that larger collection of documents was not put into evidence.[12]

The procedural record will not support the Order. For this reason alone, the Order must be reversed.

V. Striking Dr. Van Veen's Answer Exposes Him to Disproportionate and Unjust Risk, Because It Deprives Him of the Ability to Seek Allocation of Fault to Other Parties.

As noted above, striking one defendant's answer in a case in which multiple parties bear responsibility creates a special sort of injustice. If the Order stands, Dr. Van Veen will not be able to interpose any affirmative defense – including seeking an apportionment of liability, or perhaps even set-off – in either of these cases. For the reasons set forth in Section III above, we believe this clear injustice supports reversing the Order in its entirety.

In the alternative, if this Court does not reverse the Order, it should at a minimum direct modification of the Order on remand to allow Dr. Van Veen to present evidence of the culpability of others, so that his liability is limited to a fair proportion of the whole. Dr. Van Veen should also have the benefit of reduction of any judgment by the value of any settlements. The happenstance that other defendants settled should not leave Dr. Van Veen facing 100% of liability in this case.

CONCLUSION

When Derek Van Veen realized that the computer issued to him by TLC might contain responsive documents, he searched it and produced what he found. His conduct

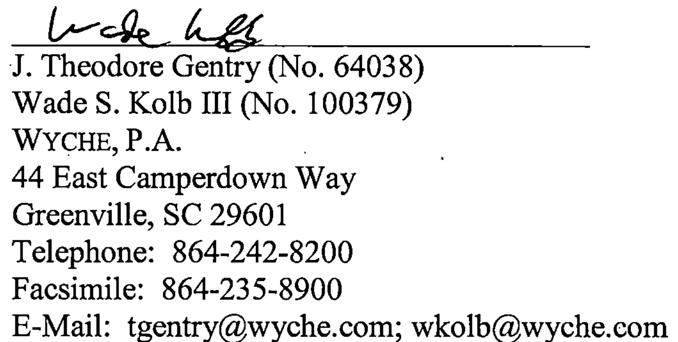
[12]The undersigned counsel for Dr. Van Veen were retained after the Notice of Appeal was filed. We accordingly do not have personal knowledge of what was provided.

was not willful, and did not irreparably prejudice Respondents. The documents themselves belonged to TLC, not Dr. Van Veen, and they do not prove a conspiracy to hide documents.

The Circuit Court imposed disproportionate punishment on Dr. Van Veen. Its Order allows lurid speculation to crowd out careful analysis of the record. It also punishes Dr. Van Veen for the conduct of others.

For these and the other reasons set forth herein, the Order should be reversed and the matter should be remanded to allow Dr. Van Veen to defend himself on the merits.

Respectfully submitted,



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