THE STATE OF SOUTH CAROLINA
In The 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..... Appellants.

And

Michael "Chad" Luce .....Respondent,

v.

TLC Corporate; TLC The Laser Center (Institute), Inc. f/k/a TLC The Laser Center (Piedmont), Inc., Jonathan Woolfson, 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..... Appellants.

INITIAL BRIEF OF RESPONDENTS CHARLES BENJAMIN "BEN" DICKERSON, GALE M. DICKERSON AND MICHAEL "CHAD" LUCE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COURT RULES

ISSUES ON APPEAL

1. Did the Circuit Court abuse its discretion in imposing severe sanctions when it considered and weighed the proper factors and found that Van Veen intentionally hid documents relevant to Dickerson's and Luce's claims and only produced them because he got caught hiding documents in a deposition?

2. Did the Circuit Court abuse its discretion in concluding that Dickerson's and Luce's right to a fair trial has been impaired when there is a presumption of prejudice and the record supports the trial court's finding of prejudice?

3. Did the Circuit Court abuse its discretion in imposing sanctions when the trial court provided Van Veen nearly two months after the first sanctions hearing to prepare and present a rebuttal and when Van Veen never requested additional time to submit evidence or argument?

STATEMENT OF CASE

Respondents allege that for over 11 years, Appellant Dr. Van Veen lied to his patients by giving false diagnosis and inaccurate medical information in order to escape liability for medical malpractice. After litigation ensued, Dr. Van Veen lied to the circuit court for six years[1] about the existence of the evidence of this misconduct. In 2014, Dr. Van Veen was caught hiding incriminating evidence on one of his work computers. This evidence demonstrated/confirmed that he, and his employer, participated in the scheme to fraudulently hide true diagnoses and accurate medical information from their patients until the statutory deadlines to filed lawsuits had passed. This discovery was the lynchpin in the further production of nearly 130,000 documents. By the time Dr. Van Veen's lies were exposed, due to the lapse of time, other relevant evidence had been destroyed pursuant to a document retention policy and witnesses memories had faded. The Court issued sanctions, including the striking of the Appellant's Answer, for what the Honorable Edward W. Miller called, "the most egregious case of discovery abuse" he had ever seen.

[1] Carter litigation commenced in 2004 and Hollman in 2006. However, the lower Court Order in June 2008 required production of all documents that were not produced through the balance of the Hollman/Carter litigation or through the Dickerson/Luce litigation until 2014.

STATEMENT OF FACTS

At the outset, it is important to advise the Court that the Respondents will offer a decidedly different Statement of Facts than those in the brief of the Appellant. The reason for this stark contrast is the genesis of the facts offered by the parties. The facts offered by the Respondents originate from the testimony, evidence, and arguments that were heard over a series of hearings conducted by the Circuit Court in conjunction with the Motion for Sanctions that is the subject of this appeal.

Although the Appellant, Dr. Van Veen, was given the same opportunity to present testimony, evidence, and argument, Dr. Van Veen failed to submit any substantive testimony or evidence until after the Court's Order granting sanctions. Only then did he file an affidavit in support of his Rule 59 Motion to Reconsider the Sanctions Order. It is from this belated and untimely affidavit, which the Honorable Edward W. Miller found self-serving and in direct contradiction to the facts[2] of the case, that the Appellant chooses to base the majority of his Statement of the Facts.

Respondents Chad Luce and Benjamin Dickerson filed suit against, *inter alia*, Dr. Van Veen and his employer on December 7, 2010. These cases were consolidated for purposes of this appeal.

The Allegations of the Complaints

The Complaints are substantially similar, as each alleges causes of action for malpractice and fraud. First, as to malpractice, both Luce and Dickerson's medical claims involve LASIK eye

[2] The contradictions are important, particularly where the Affidavit is opposed by Dr. Van Veen's deposition testimony. For example, compare Dr. Van Veen's Affidavit claiming the found documents were placed on the computer by TLC, with testimony wherein Dr. Van Veen confirms on one document he had updated it on June 5, 2006 and it was continually on his computer. (Van Veen Depo, May 2014, ¶ 203:29 – 205:5.)

surgery performed by Dr. Johnathan Woolfson (Woolfson) at the TLC Laser Center (Institute), Inc., (TLC Piedmont) located in Greenville, S.C. (Luce/Dickerson Am. Compl.'s.) Luce's surgery occurred on May 27, 1999 and Dickerson's on April 30, 1998, with a subsequent surgery on August 25, 1999, at the TLC facility in Ontario Canada. (Id.)

The Respondents allege that pre-surgery tests showed irregularities of their corneas which should have ruled out surgery due to the risk of a post-surgery complication known as LASIK induced ectasia. (Id.) LASIK induced ectasia is a condition caused when, by surgical ablation, the cornea is too thin and becomes unstable. (Id.) At the time of the Respondents' surgeries, ectasia was progressive and incurable, resulting in decreasing vision and potential corneal transplant surgery. (Van Veen Depo, 3/31/04, ¶ 159:18-161:14.) Following their respective surgeries, each Respondent developed ectasia. (Luce/Dickerson Am. Compl.s.)

Second, regarding the allegations of fraud, Luce and Dickerson's allegations involve subsequent post-surgery conduct by TLC, and TLC's local clinical director of the Piedmont Surgery Center, Dr. Derek Van Veen. (Id.) Respondents allege during the time period from 1998 - 2002, TLC was performing numerous LASIK surgeries on similar non-candidates which resulted in escalating post-surgery vision complaints (ectasia) by its patients. (Pl. Ex.'s 66; 85-Tabs 1, 55-58, 75; 97, 98, 101, 104-119.)

In July 2003, the problems (ectasia) from ill-advised LASIK surgeries were extremely serious, and Dr. Van Veen was hired as the TLC Clinical Director at the Piedmont facility. (Van Veen Depo., 8/12/08, ¶ 9-16.) In this facility, the incidence of ectasia was as high as 400 times the national rate.[3] (Pl. Ex. 85, Tabs 122-23.) As many as 60 Piedmont patients, all under Dr. Van Veen's care, were identified as suffering from surgically induced ectasia. (Pl. Ex.'s 16-64a.)

[3] Exhibit 85, Tab 122 was a study of Piedmont patients under the care of Dr. Van Veen. The study included the current litigants and concluded the Piedmont ectasia rate was .2%. Tab 123 confirms the national TLC rate to be .005%

TLC was experiencing similar problems on a national scale with over 350 reported ectasia cases (Pl. Ex. 66), but Dr. Van Veen's TLC Piedmont facility was the worst.

In response to this ectasia problem, Respondents allege Dr. Van Veen and TLC engaged in a deliberate scheme to covertly hide the nature (ectasia) and seriousness (incurable/progressive) of their patients' conditions until the applicable statutes of limitation had expired. (Pl. Ex.'s 65; 67; 68; 70; 71- bates 4727, 4737, 128902, 16069, 107971; 72-74; 77; 81-83.) As part of the scheme, Respondents allege Defendants hid crucial medical information, inclusive of the diagnosis of ectasia, from its patients in order to delay discovery of their serious eye injuries. (Id.)

This scheme also allegedly included the consolidation of a separate set of records for each patient, inclusive of the Respondents, that were kept by the Clinical Director (Dr. Van Veen at the Piedmont facility) and later (post 2008) consolidated at a TLC corporate level. These records were compiled by using internal TLC systems known as the Complex Case Process (Van Veen Depo., 03/31/14, ex. 2; Pl. Ex. 71- bates T-Drive 493714.) and Advocacy Logs ("database") (Van Veen Depo., 03/31/14, ex. 3; Van Veen Depo., 5/1/14, ex.'s 27, 29; Pl. Ex. 71- bates T-Drive 493714.). As to the Respondents and other similarly situated TLC Piedmont patients, Dr. Van Veen compiled and constructed each of their secret separate patient records. (See generally, Exhibits 16 - 64a which comprise records of each Piedmont patient not in patient chart and Exhibit 13, which are the documents found on Dr. Van Veen's computer and compares with Affidavits of litigants, Exhibits 1 – 4.)

The Respondents allege these records included medical information and diagnoses different from the patients' medical records and were used to monitor and control the patients until the threat of litigation had passed. (compare Pl. Ex. 82 with Pl. Ex.'s 86, 88, 106.) The

Respondents also claim that neither the Respondents nor other patients were aware of Defendants' scheme and, by extension, were never informed as to the true diagnosis of surgically induced ectasia. (Pl. Ex.'s 1-4.)

Procedural History

Dr. Van Veen's conduct in the present litigation cannot be fully understood without beginning—at the beginning.

George Carter filed suit against TLC Piedmont in 2004, and John Hollman followed with a lawsuit in 2006. (Hollman/ Carter Compl.'s) Hollman and Carter shared the distinction of being non-candidates for LASIK surgery. (Id.) Nevertheless, Dr. Woolfson at TLC Piedmont performed the LASIK surgery followed by care from Dr. Van Veen. (Id.) Both Hollman and Carter suffered from the undiagnosed (at least to them) condition of post-LASIK induced ectasia. (Pl. Ex. 1-2.) In all essential matters, their stories were substantially similar to the current Respondents.

The discovery of the alleged fraudulent scheme, perpetuated by Dr. Van Veen and TLC, initially occurred in the Hollman case.[1] In 2006, Hollman requested his TLC Piedmont medical records, and the TLC clinical staff *inadvertently* gave him both his medical chart and the second set of records maintained by Dr. Derek Van Veen. (Pl. Ex. 7.) This secret second set included Complex Case forms diagnosing an undisclosed ectasia condition and Dr. Van Veen emails confirming Hollman's condition. Importantly, it also included admissions by Dr. Van Veen of trying to "buy time" and acknowledgments of similar patients with identical problems. (Pl. Ex. 6.)

[1] Hollman had been continually under the care of TLC doctors, including Dr. Derek Van Veen, but had never been told of his diagnosis of ectasia until June 2006 when Dr. Potter and Dr.

The Hollman/Carter cases joined in discovery. Despite considerable resistance in June 2008, the Honorable Judge John C. Few ordered Dr. Van Veen's TLC Piedmont Surgery Center to produce discovery relevant to the scheme to defraud. (Disc. Order October 2008) TLC Piedmont disclosed over 60 patient records maintained and controlled by Dr. Van Veen, most of whom had substantially similar pre and post-surgery histories. (Dickerson and Luce were in this group discovery.) (Pl. Ex.'s 16-64a.) In addition to the disclosure of the records of other TLC Piedmont patients, TLC produced both a combined TLC database-- wherein Piedmont patients were grouped with hundreds of other national TLC patients-- and protocols for the collection and monitoring of patient data.

The Hollman/Carter litigation included continuous discovery disputes, culminating in multiple appeals. Throughout the process, TLC Piedmont repeatedly claimed "no documents" relevant to the fraud claims existed. (Pl. Ex. 122.) Prompted by TLC "corporate" bankruptcy, Hollman and Carter settled their claims in 2010. TLC Piedmont filed post-litigation sanction motions against Hollman (In re Hollman, C.A. 2007-CP-23-2347). (Pl. Ex. 8, Tab 294.) During that time, the In re Hollman appeal was used both to delay the Respondents' discovery and to end discovery by seeking a ruling that would have barred any discovery by the Respondents concerning their fraud claims. (Pl. Ex. 8, Tab 477.)

Procedural Posture of Respondents' Case

Dickerson and Luce filed suit on December 7, 2010. (Pl. Ex. 8, Tab 426.) Dr. Van Veen and TLC Piedmont moved to dismiss the claims, but the motions were denied on October 13, 2011. (Pl. Ex. 8, tabs 465, 475.)

The Respondents served Discovery Requests on May 9, 2011 that requested production of documents relating to the allegations of fraud. (Pl. Ex. 8, Tab 458.) Named defendants TLC,

Dr. John Potter, and Dr. Cynthia Yeager filed motions for protection from these discovery requests. (Pl. Ex. 8, Tab 459.) Dr. Van Veen did not file a similar motion and did not join in the other defendants' motions.

On October 13, 2011, Dr. Van Veen filed a motion to stay this litigation until In re Hollman was decided. (Pl. Ex. 8, Tab 477.) The circuit court denied Dr. Van Veen's motion on March 9, 2012, and ordered responses to the Respondents' discovery requests. (Pl. Ex. 8, Tab 501.) Dr. Van Veen did not appeal this Order, choosing instead to respond to the Respondents' First Requests for Admission on April 5, 2012. (Pl. Ex. 8, Tab 508.) On August 14, 2012 and October 10, 2012, Van Veen responded to Respondents' discovery requests in the *Luce* and *Dickerson* cases, respectively. (Pl. Ex.8, Tabs 531, 548.)

In his responses to the Respondents First Requests for Admissions in the *Dickerson* case, Dr. Van Veen denied he had made a diagnosis of ectasia based on his review of Dickerson's chart and denied he failed to inform Dickerson of his condition. (Pl. Ex. 8, Tab 508.)

Further, in his responses to Respondents' discovery requests in both the *Luce* and *Dickerson* cases, Appellant Van Veen stated, "These Answers are complete and responsive in accordance with its understanding of the Interrogatories, as drafted, and are based upon records or other information in its possession, or reasonably available to it at the time they were made..." (Pl. Ex 8, Tabs 531, 548.) These discovery requests specifically sought relevant documents relating to the Respondents, their claims, their medical treatment, including documents relating to the Respondents' inclusion in the TLC secret databases. Appellant Van Veen represented to the Respondents, and the circuit court, that no such documents existed. (Id.)

In response to Appellants' discovery responses, Respondents filed a Motion to Compel responses on April 25, 2012, resulting in an Order on October 5, 2012 compelling discovery. (Pl.

Ex. 8, Tabs 514, 544.) In an effort to aid in the discovery process, the circuit court issued a Protective Order on November 15, 2012, which governed the use of third-party patient information. (Pl. Ex. 8, Tab 553.) TLC Piedmont filed motions to reconsider both Orders and, ultimately, appealed both Orders to the South Carolina Court of Appeals (via direct appeal) and to the South Carolina Supreme Court (via a Writ of Certiorari). (Pl. Ex. 8, Tabs 561-62.)

Dr. Van Veen, however, did not join in either appeal. The Court of Appeals and Supreme Court denied the respective appeals. (Pl. Ex. 8, Tabs 581-82.) Concurrently, TLC Piedmont was continuing its appeal in In re: Hollman. When direct appeals in Dickerson and Luce failed, TLC Piedmont successfully obtained a stay of the Respondents' litigation pending a decision in In re Hollman. (Pl. Ex. 8, Tab 587.) That decision was filed on July 3, 2013, and, in part, allowed the Respondents cases to go forward. (Pl. Ex. 8, Tab 588.)

Following the resolution of the direct appeals in the Respondents' cases, and the ancillary appeals in In Re: Hollman, the circuit court issued a second order. (Pl. Ex. 8, Tab 597.) This Order, on January 10, 2014, again required Dr. Van Veen, and other defendants, to comply with previous orders and produce outstanding discovery by January 20, 2014, nearly two and a half years after discovery was initially requested. (Id.) Importantly, during the almost two years of delays occasioned by appellate proceedings, Dr. Van Veen never supplemented his discovery and maintained a position that he had no additional responsive documents.

In response to the January 20, 2014 Order, Defendant TLC produced documents identical to those produced in the prior litigations of Hollman and Carter without any additional new production. (Pl. Ex. 8, Tabs 610-13, 615.) Dr. Van Veen again produced no new documents, steadfastly maintaining his position that none existed. (Pl. Ex. 8, Tabs 608-09.) Respondents subsequently filed additional discovery requests and requests to admit in an effort to gain full

disclosure on matters relevant to their cases. (Pl. Ex. 8, Tabs 600-01.) In response, Dr. Van Veen objected to Respondents' Requests to Admit (Pl. Ex. 8, Tab 609.) and the Respondents' Supplemental Discovery Requests (Pl. Ex. 8, Tab 608.) on the basis that every request exceeded the limits permitted by the rules did not answer. In so doing, Appellant Van Veen again refused to produce truthful answers and responsive documents. (Id. at Tabs 608-09.)

Dr. Van Veen's Role and Actions as Clinical Director

In addition to knowing the procedural history, it is crucial to understand Dr. Van Veen's role. As Clinical Director of TLC Piedmont, he was both the manager of the Piedmont facility, authorized to speak and act for the corporation (Van Veen Depo., 03/31/14, ¶ 15:8-17.) and the clinician in charge of patient care pre and post-surgery (Id. at ¶ 15:1-7; Van Veen Depo., 05/01/14, ¶ 214:7-215:12.) In essence, as it related to patients, Dr. Van Veen handled all post-surgery care issues and controlled all information. (Id.) This is crucial when considering the conduct of Dr. Van Veen before he was a named Defendant in the present litigation (2010). TLC Piedmont's compliance with discovery and discovery orders in the prior litigation were, because of his position, solely and completely controlled by Dr. Van Veen. (Id.)

In July 2003, Dr. Van Veen was hired as the Clinical Director of the TLC Piedmont Greenville, South Carolina LASIK Surgery Center[3] and has continually maintained that position through the present. (Van Veen Depo., 08/12/08, ¶ 9-16.) Pursuant to TLC guidelines/protocols, as a Clinical Director, Dr. Van Veen made all decisions concerning the care of patients at his facility. (Van Ven Depo., 03/14/14, Ex.'s 2-3.) Dr. Van Veen was in charge of all follow-up care concerning all surgical patients and made decisions when, and under which circumstances, ophthalmologists or other optometrists were consulted. (Id.) All patients who entered the doors

[3] TLC Piedmont was changed to TLC Laser Surgery Center (Institute) and has been a named defendant in both the current and prior litigation.

of the Piedmont facility for surgery or follow-up care, were his patients. (Id.; Van Veen Depo., 05/01/14, Ex.'s 22,23,27.)

If TLC Piedmont patients experienced post-surgery issues or voiced complaints, those patients were treated and managed exclusively by Dr. Van Veen. (Id.) In the case of Luce, Hollman, and Carter, Dr. Van Veen actively purported to treat and manage their care post 2003. As to Dickerson, Dr. Van Veen inherited his files and actively reviewed and managed Dickerson's post-surgery condition. This comports with TLC protocol, which provided, as Clinical Director, he was "the owner" of all patient complaints. (Van Veen Depo., 03/31/14, ex. 3.; Van Veen depo., 05/01/14, ¶ 214:21-215:17.)

In response to the increased clinical complaints resulting from LASIK induced post-surgery ectasia, TLC created two systems for the management of patient problems - the Complex Case system and the Advocacy Program (a/k/a Advocacy Logs). (Id. at ex's 2-3.) Both systems had detailed protocols (SOP's) published in 2003. (Id.) These protocols also placed complete responsibility for the handling, treating, managing, and documenting the patient's problem on the Clinical Directors. (Id.)

These protocols required extensive documentation including: initial detailed report forms (approved forms attached to protocols), monthly required updates, periodic clinical assessments, and detailed written analysis on treatment and/or clinical resolution. (Id.)

As to the 60-plus Piedmont patients whose clinical post-surgery problems warranted inclusion in Complex Case or Advocacy Program, Dr. Van Veen served as the author, collector, and preserver of all required documentation.(Id.; see also Pl. Ex. 13.) Included in these 60 patients were the current Respondents. (Pl. Ex 13.)

As the ectasia problem grew increasingly more severe, the Complex Case system and the Advocacy Program became the primary method by which TLC Piedmont fraudulently managed its patients by hiding the diagnosis of surgically caused ectasia, to avoid lawsuits. (Pl. Ex. 86.) Specifically, upon the identification of a patient with the clinical problem of ectasia, Dr. Van Veen was required to: 1) avoid telling the patient of his diagnosis; 2) physically separate that patient's records; 3) place those records in his exclusive control; 4) fill out detailed forms concerning the patient's clinical problems and medical care at the Piedmont facility separate from the patients' medical records; 5) provide regular monthly written updates on the patient's condition and visual problems; 6) perform necessary clinical exams outside of the Respondents' medical chart; and, 7) report to and involve corporate TLC personnel to assist in the control of the patient by hiding the diagnosis and monitoring the condition until expiration of the risk under applicable statute of limitation or repose. (Pl. Ex.'s 6-Tab 158 pgs. 119-20 & 135-138; 65; 67; 70; 73; 83; 85-Tab 114; March Van Veen Depo. ex. 3.)

As to the 60-plus Piedmont patients with surgical problems, including the Respondents, the contact with each patient occurred under the control of Dr. Van Veen. (Pl. Ex.'s 13; 8-Tab 257; 102; and March Van Veen Depo. ex. 2-3;, May 2014 Van Veen Depo, ¶ 217:19-21.) TLC Piedmont and Dr. Van Veen used the existing protocols of Complex Case and the Advocacy Program *to internally* communicate the correct diagnosis, chart progression of ectasia, and actively calculate the length of time until the expiration of the statute of limitations. (**compare** Pl. Ex. 92 with Pl. Ex. 88.)This internal communication assisted Dr. Van Veen in providing misleading and false information to the patient concerning his or her condition by keeping those communications out of the patient's medical record. (Van Veen Depo., 3/31/2014, ¶ 114 – 115.)

Specifically, current Respondent Luce, and former litigants, Hollman and Carter, have confirmed by affidavits that Dr. Van Veen lied concerning the diagnosis of their condition. [Pl. Ex.'s 1-3.) As to Respondent Dickerson, the recently discovered records show that Dr. Van Veen, while never personally seeing Dickerson, reviewed his medical records, diagnosed him with post-surgery ectasia, and never attempted to inform him of the diagnosis and condition that he had. (Pl. Ex. 4.)

The scope of Dr. Van Veen's hidden activities in managing patient problems to avoid the risk of litigation, while suspected, was never brought to light until after the "hidden documents" were finally produced in 2014. These documents revealed Dr. Van Veen *dealt with the problems produced by ectatic patients daily* during his tenure (2003 - present). (Pl. Ex. 85, Tab 125.) He utilized numerous medical studies of the patients where proper diagnoses of ectasia were made and risk exposure to TLC analyzed. (Pl. Ex. 13.) He scheduled and attended meetings with TLC Corporate, including Dr. Potter, who was spearheading the ectasia problem. (Pl. Ex.'s 78, 79.) He transferred medical information to other employees and physicians who reviewed the files without knowledge of the patient. (Id.) A multitude of spreadsheets and monitoring reports secretly analyzing the condition of the current Respondents and other Piedmont patients, were based exclusively on information generated by Dr. Van Veen. (Pl. Ex. 13.) These spreadsheets and reports were completed in a time frame between 2003 and 2010, but the patients never received a single document. (Pl. Ex.'s 1-4.)

Dr. Van Veen's Active Participation in Conduct Subject to Sanctions

Until Dr. Van Veen was caught hiding documents, the limited discovery produced since 2008 consisted of the protocols for Complex Case and Advocacy, a few emails indicating numerous ectasia patients existed at TLC Piedmont, and the medical charts of the Respondents/

former Respondents, and other TLC Piedmont patients, (without a diagnosis of ectasia) All of these Piedmont patients were included in a produced, centralized database of TLC's patient problems (ARMS), which was compiled through the Complex Case and Advocacy system. (Pl. Ex. 86; Pl. Ex. 97; Pl. Ex. 98)

Since so little was produced, the Respondents still had questions about missing documents relating to: (1) the documentation required under the protocols; (2) the extensive involvement of Dr. Van Veen and TLC Corporate in the ARMS database, (3) meetings and constant collaborations between Dr. Van Veen and TLC Corporate; and (4) the lack of patient records detailing these activities in light of the centralized record keeping required to be maintained by Dr. Van Veen. In an attempt to resolve these issues, the Respondents deposed Dr. Van Veen on August 12, 2008, August 8, 2010, March 31, 2014, and May 1, 2014 and his TLC Corporate ectasia contact, Dr. John Potter, on June 12, 2008 and September 24, 2009.

Under oath, Van Veen denied knowing of other ectasia patients, attending meetings concerning the Piedmont ectasia victims, and filling out the required reports under Complex Case and Advocacy Programs. (Pl. Ex. 85, Tab 125, pp. 103, 109 – 110, 113. Deposition of Dr. Van Veen dated 8/18/10, Pages 47-51; and Deposition of Dr. Van Veen dated 5/1/14, pp. 233 – 239 and Ex's 25 and 26 to Deposition) Dr. Potter also issued similar under-oath denials. (Deposition of Dr. John Potter dated 9/24/09, pp 226-229) Dr. Van Veen and TLC Piedmont, through unequivocal statements, resolutely claimed for over six years that no other documentation of either ectasia problems or the alleged fraudulent scheme existed. During this time period, there was constant pending litigation imposing upon Van Veen and TLC duties to produce and preserve documents.

Dr. Van Veen Caught Hiding Documents

After the second Order compelling Discovery in the Respondents' cases, Dr. Van Veen did not produce a single document. (Pl. Ex. 8 Tabs 608 and 609) TLC Piedmont (and additional parties, Potter) produced the identical documents previously produced pursuant to a court Order in the Hollman case. (Pl. Ex. 8 Tabs 610-613 and 615) When Dr. Van Veen failed to produce additional documents, despite substantial evidence suggesting their existence, the Respondents submitted supplemental discovery requests on 2/21/14. (Pl. Ex. 8, Tab 600) Dr. Van Veen refused to answer the supplemental discovery as being beyond the scope of the rules. (Pl. Ex. 8, Tabs 608 and 609)

Stymied in their discovery efforts, Dickerson and Luce noticed Dr. Van Veen's deposition which was held on March 31, 2014. Dickerson and Luce had in their possession, pursuant to the Court Order, the 60 medical records of Piedmont patients. Out of those 60 records, *only one isolated report* required within the Complex Case and Advocacy systems existed. (Pl. Ex.11 to Deposition of Dr. Van Veen of 3/31/14) - Complaint Log dated 1/5/09. This isolated monthly complaint log was authored by Dr. Van Veen and should have existed in each of the 60 files of the Piedmont patients, including the Respondents.[5]

During the deposition, Respondents' counsel questioned why the Complex Case/Advocacy documents had not been produced as ordered. Initially, Dr. Van Veen *denied* the existence of the monthly complaint logs. (Deposition of Dr. Van Veen dated 3/31/14, pp. 75, ll. 8 through pp. 76, ll. 11) When confronted, however, with the singular existing report, Dr. Van Veen was caught in an inconsistency he could not deny. Dr. Van Veen acknowledged that other documents might exist on his personal computer at the TLC Piedmont facility. (Deposition of Dr.

[5] If followed, and the recently discovered evidence proves it was, the Complex Case and Advocacy protocols should have produced, at a minimum, 3,600 monthly reports from 2003 through 2006 prior to Dr. Van Veen transferring files to Dr. Potter.

Van Veen dated 3/31/14, pp. 103, ll. 2 through pp. 104, ll. 7 and pp. 113 – 122) Dr. Van Veen admitted that he had never searched his computer for relevant discoverable documents despite having been a litigant under discovery orders for the past four years and having been the Clinical Director of TLC Piedmont for over eleven years, during which litigation concerning these issues had been constantly ongoing. (Deposition of Dr. Van Veen dated 5/1/14, pp. 203, ll. 3 through pp. 204, ll. 24)

The deposition was suspended and Dr. Van Veen subsequently produced documents located on his computer on April 22, 2014. (Pl. Ex. 13) These documents directly related to, and mentioned by name, the Respondents and prior litigants Hollman and Carter. Further, the documents contained the names of most of the Piedmont patients whose records had been subject to production pursuant to multiple Court Orders since 2008.[6] (Exhibit 11 to Deposition of Dr. Van Veen dated 5/1/14) The deposition was resumed on May 1, 2014, and testimony at this deposition raised more questions concerning likely unproduced documents. The deposition was again suspended, and, ultimately, after nearly two and a half years of discovery delay, Dr. Van Veen and TLC Piedmont produced nearly 130,000 pages of documents after an initial search of the most likely place for relevant documents--the Clinical Director's computer.

The Significance of the Withheld Documents

The documents "found" on Dr. Van Veen's computer under his exclusive control were extremely relevant and crucial to the Respondents' case. (Deposition of Dr. Van Veen dated

[6] In Dr. Van Veen's statement of facts, he erroneously characterizes this computer as one outside of his control and claims that the documents on this computer were placed there by other TLC employees. This is not true. Dr. Van Veen's sworn testimony reflects that the new computer on which the documents were located was one of successive computer replacements for his personal work computer and the IT personnel with TLC merely transferred existing data from an old discarded computer to the new computer.

5/1/14, pp. 203 – 204) The documents were either authored by him or were secret[7] medical summaries/studies on his patients. (Pl. Ex. 13) Dr. Van Veen had been in control of these documents since their inception/creation some of which dated back to 2004-2006. (Deposition of Dr. Van Veen dated 5/1/14, pp. 203, ll. 3 through pp. 204, ll. 24) These documents only surfaced because Dr. Van Veen was caught in deposition testimony and forced to acknowledge their existence. Despite numerous hearings on the sanction motion, Dr. Van Veen never denied these essential facts. These 130,000 pages were not just TLC's responsibility to produce. Dr. Van Veen should have produced many of these documents.

For example, TLC's production contained emails both to and from Dr. Van Veen. (Pl. Ex. 85, Tab 125, 135, 136) These emails confirmed his "daily" involvement in the management of his ectasia patients, including the named Respondents.

Also, a multitude of pages contained information under the exclusive control of Dr. Van Veen and evidence his actions in the fraudulent scheme. (Pl. Ex. 16-64a) These documents included spreadsheets, data compilations, and analytical reports confirming Dr. Van Veen's compliance with Complex Case and Advocacy reporting requirements. (Pl. Ex. 85, Tabs 4, 54, 61, 75, 79, 97; Ex. 103, Tabs 28, 43] Further, other emails and documents confirmed: (1) numerous other meetings, specifically addressing Van Veen's patients; (Pl. Ex. 13) (2) requests directed to Dr. Van Veen to transfer records to John Potter (Pl. Ex. 85, Tabs 126-134; Pl. Ex. 104-119) at TLC Corporate Office, including the compliance by Dr. Van Veen with those requests; and, (3) the existence of a separate TLC ectasia database including all of Van Veen's

[7] The Respondents characterize these as secret studies and compilations because they are outside of the patient medical charts and, according to the Affidavit of Luce, Dickerson, Hollman, and Carter, were done without their knowledge or permission.

injured patients. (Pl. Ex. 85, Tab 2) While documents show this database clearly exists, it has never been produced by Dr. Van Veen or TLC.

Additionally, the documents showed --through medical studies-- that Dr. Van Veen and TLC had not only diagnosed ectasia, but engaged in a mapping of those diagnoses to determine when the expiration of the statute of limitations would protect the company from its malpractice exposure. These documents named the Respondents, former litigants, and most of the TLC patients whose complaints of ectasia had been managed improperly by Dr. Van Veen. (Pl. Ex.13) The documents also directly contradicted the sworn testimony of Dr. Van Veen in the prior litigation wherein he denied being involved in specific meetings concerning his ectatic patients. (Pl. Ex. 85, Tab 125; Email from Dr. Potter to Dr. Van Veen dated 6/11/08)

Next, the other major category of documents belatedly produced contained TLC corporate records illustrating the scheme to defraud patients was a nationwide corporate approach to the risk of malpractice suits. (Pl. Ex. 66-85) One of the clearest examples of this is contained in an email from one of TLC's Clinical Directors to the Bill Tullo, TLC Corporate Director of Clinical Services, and member of TLC Corporate Clinical Advisory Group:

> The other issue was trying to figure out the best way to keep our charts so that there are no "suspect keratoconus" terms left in the chart. What we will do is have the techs/pcs print out whatever they get on the day of consult. If the patient books and BEFORE it is placed in the chart, we will print out an axial map so that it doesn't read that. Jodi does like for us to repeat a lot of tests (topo/orbs) so we will NOT place them into the chart until we agree on which ones go into the chart. The other pics taken will be shredded.

(Pl. Ex. 65)

Outside of the Piedmont patients, records were recovered that showed the clear and disturbing pattern of intentionally withholding of medical diagnosis and crucial medical information from patient charts nationwide. As one of less than seventy clinical directors of

TLC surgery centers, Dr. Van Veen was actively involved in this cover-up. In fact, Dr. Potter, the TLC head of patient Advocacy, acknowledged that Dr. Van Veen played a most prominent role in managing the ectasia crisis. (Deposition of Dr. John Potter dated 9/24/09, pp. 208 – 209) These documents also estimated the depth and exposure faced by Dr. Van Veen and corporate TLC with the admitted Piedmont ectasia cases. (Pl. Ex. 84)

Finally, the undisclosed documents showed that information in the originally produced ARMS database was spoliated, inaccurate, and false. While the culprit, in intentionally spoliating this database was Dr. John Potter, an analysis of the Piedmont patient entries proved that the false information entered into the database was supplied by Dr. Van Veen. (Pl. Ex. 88 – 101. Transcript of hearing dated 5/21/15 pp. 63-66 and 3/24/15 Hearing Transcript pp. 79-91) TLC Piedmont and, by extension, Dr. Van Veen, used and relied on this intentionally spoliated database to deny its fraud and delay proceedings for over eight years while simultaneously hiding the documents.

The Resulting Prejudice

Even with the production of over 130,000 pages of documents, major gaps still currently exist in the documentation of the files of the Respondents', the prior litigants, and Dr. Van Veen's Piedmont patients. As to the Respondents, protocols would require complaint logs, monthly updates, and outside physician analysis. (Deposition of Dr. Van Veen (3/14/14), Ex. 2 and 3) None of these exists.

Moreover, the prejudice caused by the lack of documents is compounded when viewed in conjunction with the delays. Dr. Van Veen operated under a document retention policy which required the preservation of these types of records for a period of only six to seven years. (Pl. Ex. 5) If these documents were produced when initially sought in the prior litigation, all documents

would have been within the retention policy. Even if documents had to be preserved at the beginning of the current litigation (2010), all documents during Dr. Van Veen's tenure would have been within the retention policy (2003 - forward). This would have included *all* documents authored by Dr. Van Veen in compliance with Complex Case and Advocacy protocol, as well as *all* documentation of the numerous meetings and secret medical studies concerning the Respondents, previous litigants, and similar Piedmont patients.

Specifically as to Dr. Van Veen, the loss of documents is crucial to the Respondents' right to a fair trial. For example, in his deposition, Dr. Van Veen was asked about the Advocacy log found on his computer (Deposition of Van Veen, pp. 345-346) and denied the existence of any other documents but subsequently, TLC produced documents proved others existed. (Pl. Ex. 86) In addition, when Dr. Van Veen's deposition resumed, he was questioned about each of the documents he had been caught hiding on his computer, and confronted with the fact that they were not stand-alone documents but would be part of a considerable document stream. However, Dr. Van Veen utilized the lapse of time to feign complete ignorance over the documents. (Deposition of Dr. Van Veen dated 9/24/09, pp. 273, 278, 287 – 296, 312 – 325) He could not recall a single event or give any additional information other than producing the document found on his own computer. (Id.)

In the Motion for Sanctions, the Respondents played a twenty-minute excerpt from Dr. Van Veen's videotaped deposition illustrating his lack of memory concerning an in depth medical study of his own patients found on his own computer. (Deposition of Dr. Van Veen dated 9/24/09, pp. 287 – 296) The excerpt was representative of his entire testimony in which he continued to deny any knowledge about the documents found on his computer relating to his

patients. His lack of memory after eight years of hiding documents, created prejudice that could not be overcome to provide the Respondents the right to a fair trial.

Finally, had Dr. Van Veen just searched his work computer for ectasia patients he was dealing with daily, this evidence would have been produced years ago. This would have alleviated previous defense arguments and appeals centering specifically on this lack of evidence. Indeed, the Respondents, and prior litigants, have either had their case delayed or affected by appeals in which Dr. Van Veen, TLC, and others represented to each appellate court that this evidence did not exists. This was both time consuming and expensive.

SUMMARY OF ARGUMENT

The Circuit Court has broad discretion to issue sanctions when a party fails to obey an order to provide or permit discovery, and the trial court's decision to do so must not be disturbed absent an abuse of discretion. Van Veen bears the burden of convincing this Court that an abuse of discretion occurred. Here, it is undisputed that Dr. Van Veen violated a court order. In deciding to order sanctions against Van Veen, the Circuit Court provided Van Veen with ample time to respond to Dickerson's and Luce's assertions, considered the proper factors, weighed the evidence, and appropriately entered an order issuing sanctions against him for his blatant failure to cooperate in discovery.

Van Veen does not appear to argue that sanctions should not be issued but merely argues that the sanctions imposed are disproportionate to the conduct, and he fails to offer alternative, lesser sanctions that he believes would be appropriate. In this appeal, he makes the false assertion that the "New Documents" were documents that were generated by his employer, TLC, and placed by TLC on his computer many years ago without his involvement. Contrary to Van Veen's arguments, the record supports the trial court's finding the documents not produced by

Dr. Van Veen were highly relevant to the claims that he was a central figure in making diagnoses of surgically-induced ectasia and working with TLC's corporate office to conceal the information from his patients in the Upstate of South Carolina in an effort to avoid claims. While Van Veen attempts, understandably, to distance himself from the conduct of TLC, he ignores the fact that *he* was the individual who separated affected patients' charts from the other patients' records and worked hand-in-hand with TLC corporate representatives to hide Piedmont patients' true medical conditions from them. Without Van Veen's involvement, TLC could not have gained information regarding TLC Piedmont patients who were injured at the facility where Van Veen served as the Clinical Director. The record clearly establishes that Van Veen was *the* central figure in the Upstate of South Carolina who participated in the scheme and that he made no effort to produce relevant information until he could no longer deny the existence of such information when examined in a deposition. Furthermore, the record establishes that the New Documents ultimately produced by Van Veen were subject to the 2012 Order compelling discovery and were over three months after the deadline imposed by the trial court's January 10, 2014 order. Additionally, the record establishes that these New Documents were a small part of the documents ultimately produced that were either authored or controlled by him. Finally, the record establishes there are other documents that have either been destroyed by him or which continue to be withheld by him.

Van Veen also argues, disingenuously, that the process through which sanctions were issued was not fair to him. In doing so, Dr. Van Veen ignores the fact that he had almost *two months* between the first and second hearings to prepare a response to the evidence presented by counsel for Dickerson and Luce. Furthermore, prior to the May 23, 2015 hearing where he was afforded a full and fair opportunity to be heard, Dr. Van Veen never requested additional time to

prepare for the hearing – or to keep the record open after the hearing. Furthermore, Dr. Van Veen never filed a memorandum in opposition to Plaintiffs' motions or their memoranda in support of the same. Once he was provided with the opportunity to be heard, Dr. Van Veen did not provide any evidence to explain his violation of the trial court's January 10, 2014 order. In fact, during that hearing, his counsel admitted that Van Veen's disclosure of documents appears to have been the catalyst for the ultimate production of approximately 130,000 pages of documents that had previously been withheld. Dr. Van Veen now argues that the plaintiffs failed to state the grounds for their motion for sanctions with specificity, but even if that were true, given his two-month preparation period, he fails to show how he was prejudiced by the same or how he would have responded differently if such specificity had been stated in the motion. Furthermore, he failed to raise that issue in his Rule 59(e) Motion to Alter or Amend, and that issue is not preserved for review.

The record supports the trial court's finding that Van Veen's failure to produce documents did not result from innocent and excusable oversight. Instead, he tried to deny his involvement in generating certain documents until one such document was presented to him during his deposition. At that time, he finally admitted that other documents might exist on his own work computer and that he had made no effort to search for them. Dr. Van Veen did not voluntarily produce such information, as he now asserts. Instead, he denied their existence under oath and through discovery responses until counsel for Dickerson and Luce showed him a copy of a form that he generated and which showed him that he could no longer credibly claim ignorance of its existence. In other words, his deposition coupled with other evidence in the record shows a classic case of getting caught and not of an unwitting bystander who accidentally failed to produce documents relevant to the plaintiffs' claims. The trial court was well within its

authority to impose sanctions to level the playing field and address the discovery abuse by Dr. Van Veen. The trial court properly exercised its discretion, and its order striking Van Veen's Answer, awarding fees, and imposing a fine should be affirmed.

ARGUMENT

I. Standard of Review and Legal Framework

When reviewing an order issuing sanctions for discovery abuse, the appellate courts should not reverse absent an abuse of discretion. "Under Rule 37(b)(2)(C), SCRCP, when a party fails to comply with a discovery order, the trial court has the discretion to impose a sanction it deems just, including an order dismissing the action. Absent an abuse of discretion, the trial court's imposition of discovery sanctions will not be reversed on appeal, and **the party appealing from the order of sanction carries the burden of proving an abuse of discretion occurred.**" McNair v. Fairfield Cty., 379 S.C. 462, 465–66, 665 S.E.2d 830, 832 (Ct. App. 2008) (citations omitted) (emphasis added).

Rule 37, SCRCP provides, in pertinent part:

> "If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending **may make such orders in regard to the failure as are just, and among others the following:**
> . . .
> (C) **An order striking out pleadings or parts thereof**, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
> . . .
> In lieu of any of the foregoing orders or **in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."**

Rule 37, SCRCP (emphasis added).

"In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." McNair v. Fairfield Cty., 379 S.C. 462, 467, 665 S.E.2d 830, 832–33 (Ct. App. 2008). "Severe sanctions, such as the dismissal of an action, should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights." Id., 379 S.C. at 466, 665 S.E.2d at 832.

"The selection of a sanction for discovery violations is within the trial court's discretion. [The appellate court] will not interfere with that decision unless the trial court abused its discretion. An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) (citations omitted).

"The entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party. Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and **when these rights are not accorded, prejudice must be presumed.**" Samples v. Mitchell, 329 S.C. 105, 113–14, 495 S.E.2d 213, 217–18 (Ct. App. 1997) (citations omitted) (emphasis added).

"The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

II. The Circuit Court did not Abuse its Discretion in Imposing Severe Sanctions on Dr. Van Veen

The record in this case establishes a much different set of facts than those asserted by Dr. Van Veen *after the hearing and in his Brief.* Dr. Van Veen's own deposition testimony and the documents that are available are sufficient to support the trial court's decision. Contrary to the story that Dr. Van Veen *now* tells outside of the record, the record shows that Dr. Van Veen generated the "New Documents" and numerous other documents that have still not been produced and that he kept them continuously on his computer at TLC Piedmont. It also shows, by his own admission, that he never deleted the documents and never instructed others to delete them. It also shows that he generated, owned, and had custody of the documents continuously as early as 2003 to the present. As the trial court properly recognized, TLC's standard operating procedures provide that the Clinical Director (Van Veen) was the "owner" of patient complaints, was responsible for examination and treatment of the complaining patients, and coordinated the flow and dissemination of information between TLC corporate and the patient.

Prior to ordering sanctions, the trial court considered the precise nature of the discovery withheld and the discovery posture of the case, the wilfullness of Van Veen, and the prejudice to Dickerson and Luce. After considering the evidence in the record and weighing the factors within the framework provided, the trial court properly exercised its discretion, and its Order should be affirmed.

A. Dr. Van Veen Produced the "New Documents" Because he Got Caught, Not Because he Voluntarily Produced Them

The discovery that Dr. Van Veen hid documents occurred because of luck – not because of a voluntary production by Van Veen. Specifically, in the 2003-2006 timeframe, Dr. Van Veen generated, maintained, and shared with TLC's corporate office a separate set of patient medical information that contained and discussed patients' true diagnoses of ectasia which had been caused by LASIK surgery at TLC Piedmont. As part of that process, Dr. Van Veen

generated documents called Clinical Complaint Logs for approximately sixty patients. According to Dr. Van Veen, that information was not to be shared with the patients. However, Dr. Van Veen accidentally included a Clinical Complaint Log in one of the sixty patients' medical chart which was produced to plaintiffs in this litigation. Prior to showing the document to Dr. Van Veen in his deposition, Dr. Van Veen denied any knowledge of the Clinical Complaint Logs. However, once he was confronted with the document and he could no longer credibly deny its existence, he admitted that he generated the information and kept it separate from the patients' medical records. Furthermore, once he was confronted with the document, he admitted that he had utilized such forms, as well as others called Complex Case and Advocacy, in monitoring patients and that he captured certain information within spreadsheets on his computer. The record establishes that Van Veen would have created the documents for the sixty known ectasia patients, but only one of those documents has been produced. Documents produced in discovery show that Dickerson and Luce were included in the patients that Van Veen diagnosed with ectasia without their knowledge, maintained their information separate from their medical charts, and shared the information with TLC corporate. Furthermore, Dr. Van Veen admitted in his deposition that he had never checked his computer in spite of the fact that discovery requests were served in 2011and the trial court's Order of 2012 and January 10, 2014 Order required him to do so.

Van Veen's new assertion that the New Documents were TLC documents placed by TLC on his computer is not in the record and is absolutely false. Specifically, Dr. Van Veen argues in his brief that "[t]here is **NO** evidence that Dr. Van Veen was conscious of the documents before [his search in March 2014]" (Page 25, Van Veen Initial Brief) (emphasis added). Dr. Van Veen was the TLC Piedmont Clinical Director and was in charge of generating and maintaining the

documents relating to ectatic TLC Piedmont patients and sharing the information with TLC corporate. Van Veen became the clinical director in 2003, and the documents were generated around 2003-2006. No other individual within TLC Piedmont had that responsibility. Van Veen now makes it sound as if the documents were placed on his computer by TLC staff without his knowledge. While it may be true that TLC's technology staff transferred the files to Van Veen's new computer each time he was provided a new computer, this does not change the fact that they were documents generated and maintained by Van Veen. His sworn deposition testimony confirms this position. Now, Van Veen takes a contrary position for the very first time in an affidavit that was submitted with his Rule 59(e) Motion. That affidavit is untimely, is not properly included in the record, and is contrary to his own deposition testimony and the documents that have been produced by Van Veen and TLC in the litigation.

Van Veen argues that if he had been part of a conspiracy, he would not have produced the New Documents. (P. 25, Van Veen Initial Brief). According to Van Veen, the documents "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." (Pp. 25-26, Van Veen Initial Brief). This argument ignores that fact that Van Veen initially tried to deny knowledge of Clinical Complaint Logs in his deposition and that such forms for nearly sixty patients including Dickerson and Luce have either been destroyed or are being withheld.

Van Veen also argues that he produced, in response to discovery requests, a copy of Dickerson's and Luce's medical charts, which is typical in any medical malpractice case. Van Veen ignores the fact that Dickerson and Luce alleged, in detail, a scheme of fraud in which Van Veen was intimately involved and that Dickerson and Luce specifically requested information in discovery that is *not* contained in patients' medical charts. Van Veen's responses to Plaintiffs'

requests to admit and discovery requests are outlined in detail in Pages 13-15 of the January 10, 2016 Order.

The trial court properly found that "the documents hidden by Van Veen in violation of its Order would never have been voluntarily produced without the Plaintiffs catching Dr. Van Veen hiding documents" and that his "conduct in hiding these documents was willful, intentional, and deliberate." (P. 17, Order). This conclusion is supported by the record. If Plaintiffs' counsel had not stumbled upon a single Clinical Complaint Log which was accidentally included in a patient's medical chart, Dr. Van Veen would not have produced any additional documents. Dr. Van Veen devoted a significant amount of time to determining which patients had ectasia caused by LASIK surgery at TLC Piedmont. In fact, in emails authored by him, that he failed to produce, but were submitted by TLC in its belated 130,000 pages, he claimed that he worked with these ectatic patients "daily." Dr. Van Veen, as the records prove, worked closely with Dr. Potter to avoid malpractice claims. Under these circumstances he had to have known about the existence of the information at issue.

B. Dickerson's and Luce's Right to a Fair Trial Has Been Impaired

"The entire thrust of the discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party. Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." Samples v. Mitchell, 329 S.C. 105, 113–14, 495 S.E.2d 213, 217–18 (Ct. App. 1997) (citations omitted).

The record establishes not only that Dr. Van Veen never searched his computer but also, as mentioned above, that other documents were generated by him but have never been produced. These documents include Clinical Complaint Logs, Complex Case forms, Advocacy logs,

monthly updates, and related correspondence generated by Van Veen which relate to ectasia patients including Dickerson and Luce. The databases produced by TLC which were related to the Piedmont ectasia patients, were derived solely from Dr. Van Veen and Van Veen's own deposition testimony show that Van Veen was providing such information to TLC and intentionally keeping it outside of the standard medical charts which would have been available to the patients. However, Van Veen has only produced a fraction of the information known to exist but to have been destroyed or withheld.

Full and fair discovery is firmly rooted in our civil justice system in South Carolina. "[W]hen [discovery rights] are not accorded, prejudice must be presumed." Id. Here, the record supports the trial court's finding that Dr. Van Veen has not permitted full and fair discovery and that numerous relevant documents existed but have been destroyed or withheld. Furthermore, the history in this litigation and Van Veen's counsel's own admission at the May 2014 hearing show that if Van Veen had produced the New Documents in 2012 when he originally responded to discovery, then the additional 130,000 pages of documents would have been produced by TLC at that time. (Pp. 52:23-53:9, May 21, 2015 Transcript of Hearing). Dr. Van Veen has failed to acknowledge in his Brief that he generated and maintained numerous documents relating to his diagnosis and tracking of patients, including Dickerson and Luce, and discussed his findings with TLC corporate. Those documents have never been produced. Furthermore, Dr. Van Veen fails to give a reasonable explanation for why he never checked his own computer when he it was a key instrument used by him in generating, maintaining, and sharing patients' information. The trial court properly recognized that the documents were not hidden, misplaced, or located in areas of limited access. (P. 11, Order). Finally, Dr. Van Veen fails to offer any compelling argument supported by the record as to how Dickerson's and Luce's right to a fair trial has *not*

been impaired. The presumption is that it has been. To the contrary, when questioned under oath about the New Documents, he claimed a complete lack of memory due to the lapsed time he created by hiding the documents.

Dr. Van Veen now argues that such documents were not in his custody in control and that, if they were destroyed, they were destroyed by someone other than Van Veen. This is contrary to Dr. Van Veen's own deposition testimony in which he admits that he was the person responsible for generating and maintaining such records. Furthermore, the record establishes that TLC Piedmont was a hotbed for LASIK-induced ectasia and that Dr. Van Veen was in charge of controlling those cases. In other words, Dr. Van Veen was the key individual who maintained control of TLC Piedmont records from 2003 to the present. If they are being withheld or destroyed, it is no person's responsibility other than Dr. Van Veen. There is no evidence to suggest that TLC corporate would have any information related to TLC Piedmont patients *except for information provided by Dr. Van Veen.*

C. The Sanctions Imposed by the Circuit Court are Supported by the Record

Van Veen appears to advocate for a rule that requires a circuit court to warn a party that its answer will be stricken and provide an additional opportunity to comply before doing so. This begs the question: What would Van Veen have done differently if the trial court had warned him in its January 10, 2014 Orders that it would strike his Answer if he did not fully comply with the Order? In other words, any party, including Van Veen, should be expected to comply with an unequivocal court order such as the January 10, 2014 Order without the Court having to repeatedly warn the party of its consequences of violating the Order. Litigants are on notice of the rules, including Rule 37, SCRCP. From a policy standpoint, Van Veen's proposition is troublesome. If the rule suggested by Van Veen is adopted by this Court, litigants will have little

incentive to obey court orders until the point at which the court warns specifically of the sanctions that the party will face if it fails to comply. Furthermore, the record in this case establishes that such a warning would have been futile. Dr. Van Veen denied, under oath, the existence of documents for approximately a decade until he was caught in a deposition and could no longer plausibly deny the existence of documents that he had generated, maintained, and shared with TLC corporate. Van Veen ostensibly takes the position that he did not know he was supposed to take the Circuit Court's January 10, 2016 Order seriously. Van Veen fails to show what he would have done differently if such a warning had been included in the Order compelling discovery.

D. The Sanctions Imposed are Supported by South Carolina Precedent

The rules providing for sanctions for discovery abuse are established in Rule 37, SCRCP, and factors to be considered in fashioning an appropriate sanction have been discussed on a number of occasions by our appellate courts. In this case, the trial court accurately relied upon Rule 37 and accurately cited and weighed the factors set forth in precedent dealing with sanctions for discovery abuse. Furthermore, it is clear that trial courts are given discretion to consider evidence, weigh the factors, and order appropriate sanctions. The trial court in the instant case did precisely that.

Van Veen argues that there has been no showing of bad faith, willful disobedience, or gross indifference to the Plaintiffs' rights. However, Van Veen's assertion ignores the trial court's conclusion that Van Veen only produced the documents because he got caught in a deposition and that he would not have otherwise produced them. This finding by the trial court is supported by the record.

Plaintiffs are unaware of any South Carolina precedent involving a situation where a party was actively involved in generating, maintaining, and discussing important, relevant documents over a period of many years but denied their existence under oath in depositions and discovery responses until the witness was confronted with the fact that the opposing party was in possession of such a document. Van Veen had constant knowledge from approximately 2003 to present that the documents existed and that they were being sought by patients. The history of Van Veen's involvement supports the trial court's finding that Van Veen's withholding of information was intentional and with gross indifference to the rights of the Plaintiffs.

Our appellate courts have upheld trial court orders striking pleadings and dismissing actions due to a party's failure to cooperate in discovery. See Davis v. Parkview Apartments, 409 S.C. 266 (2014), Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999), McNair v. Fairfield Cty., 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008). Our appellate courts have also found that certain trial courts abused their discretion by imposing sanctions that were too lenient and not sufficient to deter others from engaging in discovery abuse. See Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997) and Downey v. Dixon, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987). The relevant cases establish that the consideration of evidence and weighing of the relevant factors is within the authority and discretion of the trial court and that Van Veen bears the burden of establishing that the trial court abused its discretion.

Another important point in this case is that there is nothing in the record to suggest that Van Veen was making *any effort whatsoever* to comply with the trial court's 2012 and January 10, 2014 Order between the time the Orders was entered and his first deposition on March 31, 2014. In fact, there is no evidence that Van Veen made any reasonable effort to locate

responsive information from the time he originally responded to discovery in 2012 until after the March 31, 2014 deposition. When Van Veen did respond to discovery requests, he stated that no further responsive documents existed. At the time that Van Veen made such representation, he had to have known that the representation was false.

Each case must be considered on its own facts, and those facts must be considered within the legal framework established by the South Carolina Rules of Civil Procedure and the factors established through South Carolina case law. The trial court applied the appropriate standard, analyzed the facts, and properly determined that the factors weighed in favor of striking Van Veen's Answer, awarding attorney's fees, and a imposing a fine.

III. The Circuit Court Does Not Sanction Van Veen for Other Parties' Conduct or Conduct in Other Cases

Van Veen's assertion that he is being punished for other parties' conduct or for his conduct in prior cases is not supported by the record. While it is true that the Circuit Court's Order references Dr. Van Veen's role as a key witness in the prior cases of Hollman and Carter, the Court does not punish Van Veen for his conduct in those cases. The history is important, however, to show Van Veen's knowledge. He was not blindsided with a request for information for the first time in 2012. Instead, he had been an active participant in this litigation since approximately 2004, and his participation continues today. In fact, the record proves that the entity sued in the prior and current litigation, TLC Piedmont, was the local center of TLC under his direct and complete control from 2003, forward. The Court properly found as follows:

> "Dr. Van Veen cannot credibly contend he was unaware of these documents. As to each patient, he was the 'owner' of all vision complaints emanating from the surgery at his surgery center. Many of the documents were authored by him, updated by him, or referenced meetings or activities in which he was personally involved. In e-mails to other TLC employees, he confirmed that he dealt with these ectatic patients 'on a daily basis.' Taken as a whole, his documents, and the others produced by TLC/Dr. Potter, demonstrate Dr. Van Veen had constant and

active involvement in the management of the risks posed by the Plaintiffs and fellow Piedmont ectasia patients. The Court finds under these circumstances Dr. Van Veen would have been fully aware of the documents withheld."

P. 16, Order.

Dr. Van Veen admitted in his deposition that, once documents were generated, he would not have deleted them or ordered others to delete them. Accordingly, the same documents that were in existence in the 2003-2006 time frame should be available today. This leads to the conclusion that Dr. Van Veen is either lying about destruction of the documents or he is still withholding them. Regardless, the record supports a finding that Van Veen failed to make any effort to search his own computer or produce relevant documents other than those produced in the Hollman and Carter cases until he got caught in his deposition. The discovery requests served on Van Veen specifically requested documents and electronically stored information.

IV. The Sanctions Were Procedurally Proper

A. The Motion For Sanctions Was Sufficient, and Dr. Van Veen Has Not Shown Prejudice Resulted from a Purported Violation of Rule 7(b)(1)

Dickerson's and Luce's Motions for Sanctions moved the Circuit Court "pursuant to Rule 37(b) of the South Carolina Rules of Civil Procedure, to (1) inquire into the matter, (2) find that Defendants TLC, Van Veen, and Potter have willfully disobeyed court orders relating to discovery and have acted with gross indifference to the rights of Plaintiffs in the litigation, vis-à-vis the withholding, destruction, and other spoliation of material evidence; and (3) issue an Order imposing sanctions on Defendants and granting other appropriate relief." The Motion for Sanctions went on to outline the specific relief sought. Furthermore, Dickerson and Luce submitted a 28-page Memorandum in Support of the Motion which outlined in detail the grounds for the Motion. At the first hearing on the Motion, Dickerson's and Luce's counsel presented numerous documents and arguments to support the Motion. Following the hearing, the Circuit

Court provided Dr. Van Veen nearly two months to prepare and present a rebuttal to the Plaintiffs' Motion, which was heard on May 21, 2015. Dr. Van Veen never filed a Memorandum in response to the Motion and never requested additional time to prepare and present a response. Furthermore, at the May 2015 hearing, Van Veen was heard through counsel in oral argument but did not present affidavits or exhibits or request additional time to present additional materials or arguments in support of his position. Furthermore, this issue is not preserved for review in Van Veen's Rule 59(e) motion.

"As a general rule, a party must establish prejudice as the result of another's failure to comply with Rule 7(b)(1), SCRCP. To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish if he or she had received appropriate notice, he or she would have done something different, thereby affecting the decision of the trial court and advancing his or her case." Chastain v. Hiltabidle, 381 S.C. 508, 517, 673 S.E.2d 826, 831 (Ct. App. 2009) (citations omitted).

Dr. Van Veen has failed to establish that he would have done something different if he had received more notice and that it would have affected the decision of the trial court and advanced his case. Dr. Van Veen was provided a full and fair opportunity to respond to Plaintiffs' Motion, and if he had an objection to it, he should have moved for a continuance of the May 21, 2015 hearing or at the very least raised the issue at the May 21st hearing and requested additional time to respond. He failed to do so. Furthermore, Dr. Van Veen filed a Motion to Alter or Amend on January 7, 2016 and raised seven grounds in his motion. None of those raised the objection pursuant to Rule 7(b)(1) that Van Veen now argues in his appeal, and the issue is not preserved. Accordingly, Dr. Van Veen's argument pursuant to Rule 7(b)(1), SCRCP must fail because it is without merit and because it is not preserved for review.

B. The Circuit Court Acted within its Authority in Imposing Monetary Fines

Rule 37, SCRCP does not limit the sanctions that a trial court may issue in cases of discovery abuse. Rule 37 provides that "[i]f a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending **may make such orders in regard to the failure as are just, and among others the following . . .**" (emphasis added). Accordingly, Rule 37 grants trial courts broad discretion in determining what sanction should be issued for a particular violation.

In the South Carolina Court of Appeals decision in Downey v. Dixon, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987), this Court reversed a trial court which ordered a party who failed to answer interrogatories and submit to a deposition to pay a $50 fine because the fine was too lenient of a sanction. The Court did not fault the trial court for imposing a fine but found the relatively small fine was too lenient. Specifically, the Court held "[t]he sanction imposed in the instant case did no more than minimally enrich the county tax coffers. The rights of discovery provided by the Rules were not protected in any way. Neither was Ms. Downey accorded the rights of discovery provided by the Rules, nor was the sanction imposed against Mr. Dixon a meaningful deterrent to those who might fail to submit to discovery in the future. (It is perfectly obvious that few, if any, litigants would willingly submit to the discovery provided by the Rules if the alternative were simply paying $50.)" Downey v. Dixon, 294 S.C. 42, 45–46, 362 S.E.2d 317, 318 (Ct. App. 1987).

Given the gravity of the situation and the fact that Dr. Van Veen only produced documents because he got caught, the Circuit Court acted well within its discretion to impose a fine that the trial court believes will deter others from similar conduct.

C. Exhibits Were Properly Introduced by the Plaintiffs and Considered by the Court

Van Veen argues exhibits referred to in the Circuit Court's Order were never made a part of the hearing record and, therefore, the Court's Order was "procedurally unsound." The Appellant's position fails, however, because the Exibits were entered in accordance with the court's instructions, the Appellant has waived this argument; and the Appellant's argument is inconsistent with South Carolina law.

i. The Respondent Entered the Exhibits in Accordance with the Trial Judge's Instructions

Following production of over 130,000 pages of documents by Dr. Van Veen and TLC, the Respondents filed the Motion for Sanctions at issue in this appeal and the Circuit Court set a hearing for March 24, 2015. In preparation for the hearing, the Respondents identified as exhibits over 100 documents (the vast majority of which were part of the above referenced 130,000 pages) which were presented to the trial court at the hearing and discussed at length by the parties.

Initally at the March hearing, Defendant TLC made a curious and unmeritorious objection that the exhibits were not properly authenticated, although they had just produced the 130,000 documents. To remedy this objection, the Judge clearly stated on-the-record how he expected the numerous exhibits to be entered into evidence:

MR. PATRICK: This is a document, Judge ----
MR. QUATTLEBAUM: Your Honor, I'm sorry.
THE COURT: Yeah.
MR. QUATTLEBAUM: I just want to make sure I'm protected in all of this. I mean, I don't know how we're doing this, if these are going to be offered into evidence, but I want to make sure that the evidentiary issues that I raised before ---- I ---- I want to ----I want to let Mr. Patrick ---I don't want to interrupt, but ----
THE COURT: Okay. Well let him ----
MR. QUATTLEBAUM: I would appreciate it, just so I'm protected, if you'd tell me ---this is a request ----if you could say, "Please, don't object," ----"I ---- I understand those are your objections, please, don't object every time." If ----

THE COURT: I do. And *I think to continue to the next ---- what I envision to be the next hearing, you all can perhaps agree on what is authenticated or, you know, come to some agreement. If not, then, you can present your objections to these documents.*

MR. CRANSHAW: Your Honor ----

THE COURT: And the same goes ---- to all the Defendants in here.

MR. CRANSHAW: ---- if I may, I'd ask that any ---- any document ---- I don't know if the gentleman can enter into the record the PowerPoint or the presentation. If not, then, *I'd ask that each document be identified so that we can ---- so that we can adequately respond to it later.*

THE COURT: Okay.

MR. PATRICK: *Judge, every document that has been provided to us will be entered as an exhibit.*

THE COURT: Okay.

MR. PATRICK: All 130,000 pages and six ---- because six of them came from Dr. Van Veen, who broke this thing open ---- will be introduced into evidence.

And we talked a little bit about authentication. I don't want to get down that slope too far.

MR. PARKINSON: Can I take pictures of them ----

MR. PATRICK: Not pictures ----

MR. PARKINSON: ---- as he's presenting them? 130,000 documents, that's no answer.

MR. PATRICK: It's ----

THE COURT: Well, wait. Wait a minute. What ---- well, wait. All of this is on a ---- in a PowerPoint type presentation?

MR. PATRICK: *Your Honor, we're going to ---- we're going to offer that document and every document that I'm going to show in this PowerPoint, or this presentation, as an exhibit, so that they will have them. We will copy those.*

We will give them CDs. And they will have everything. This one is marked essentially as an exhibit. It actually comes from Dr. Van Veen's deposition.

And ---- and I appreciate his ---- I really do; I appreciate his response of 130,000 pages is no answer. And, quite frankly, that's what got dumped on us and after 10 years.

And ---- and, you know, this ---- this fairness concept is a little troubling, you know.

THE COURT: Okay.

MR. PATRICK: So ---- so bear with me here. And I don't want to ----

THE COURT: Just ---- *just so we're clear, you're going to provide a CD* ----

MR. PATRICK: Absolutely.

THE COURT: ---- *of everything to each Defendant?*

MR. PATRICK: Absolutely, Judge.

THE COURT: Okay. And your objection is stand ---- is continuing?

MR. CRANSHAW: Okay. And you ---- and just this is one thing my appellate guys told me so I'm protected.

THE COURT: Yes.

MR. CRANSHAW: You're telling me not to raise those evidentiary objections each time, because you ----
THE COURT: Yes.
MR. CRANSHAW: Thank you, Your Honor.
THE COURT: Yeah.
MR. PATRICK: Your Honor, actually ----
THE COURT: And that's true for all Defendants.

(March Tr. 32-34) (Emphasis Added)

The record is clear the Court anticipated another hearing at which the Defendants would have an opportunity to respond to the Respondents' motion and lodge objections to the exhibits presented at the March hearing. The Court asked Respondents' counsel to provide a CD containing all exhibits to each party (March Tr. 33-34). Pursuant to the Court's instruction, Respondents' counsel, by hand-delivery on March 27, 2015, provided an electronic copy "containing the Plaintiffs' exhibits" to the Court and all counsel of record (March 23, 2015 e-mail from Respondents' counsel to the Court and all counsel of record). At no time following the hand-delivery of the marked exhibits to the Court did Van Veen object to the exhibits.

ii. Van Veen has Waived any Argument that the Exhibits were Not Properly in evidence by Failing to Raise the Issue at the Subsequent Hearing, in his Objections to the Proposed Order, and in his Rule 59 Motion.

Van Veen failed to raise any objection to the documents at anytime prior to this current appeal. First, in accordance with the judges instructions, Van Veen had a duty to object to the exhibits in the May hearing. However, after receiving the exhibits, and with a chance to review them, the Appellant failed to lodge his objections.

Next, the Appellant had an opportunity to lodge objections to exhibits after receiving a copy of the proposed Order. Van Veen's counsel, in a response email, asked the Court for a time to file "formal written objections" to the proposed order. (Email from Appellant Counsel to trial Court dated 12-9-2015). Five days later, Appellant submitted to the Court a five-page letter

listing seven detailed objections to the proposed order. The appellant presented numerous objections regarding the substance of the Order, but failed to specifically object to the exhibits.

Last, the Appellant filed a Rue 59, SCRP Motion to Reconsider the order in which he renewed many of the arguments and objections previously asserted to the proposed order. For the third time, however, the Appellant failed to assert any objection specific to the exhibits.

In sum, Van Veen had numerous opportunities to object to the exhibits before this appeal. However, he belatedly waited until this appeal before making this objection. He missed opportunities to object at the hearing, to the proposed order, and in his Motion to Reconsider. Van Veen cannot now raise this issue for the first time, as his failure to preserve this argument is fatal to this issue.

iii. South Carolina Law is Clear that the Exhibits are Properly Considered when the Parties' Actions Demonstrate Reliance on the Exhibits and No Prejudice Results

In a dispute as to entered evidence, South Carolina law clearly instructs a court to look to the actions of the parties and resulting prejudice to determine the evidence is properly considered. Despite the clear record and conduct of the parties as discussed above, Appellant cites a Mississippi case, Illinois C.R. Co. v. Jackson, 179 So.3d 1037, 1045 (Miss. 2015), in support of his argument. However, Appellant's reliance Jackson is not only misplaced but also inconsistent with South Carolina law.

The Jackson case involved the trial court's denial of a motion for summary judgment and an interlocutory review of the denial. The Mississippi Supreme Court found that unsworn opinions in an expert designation could not be considered because they constituted inadmissible hearsay and, in addition, determined the unsworn opinions contained in one of the parties' supplemental responses was never filed in the record. Therefore, the opinions were incompetent

for consideration on summary judgment. The Court cited Rule 56(c), requiring parties to file all matters on which a party relies with the Clerk and served on the other party prior to the hearing. Id., 179 So. 3d at 1045.

The Jackson case is clearly distinguishable from the case at hand. The exhibits at issue in this case were presented to the Court at the March hearing and discussed throughout the hearing. In addition, as shown in the transcript cited above, the trial court required that the Respondents' counsel provide the Court and all parties with copies of all exhibits referenced at the hearing so that the Defendants (including the Appellant) could prepare responses and/or objections for the second hearing in May. Further, the Court instructed the parties that if they could not reach an agreement as to the authentication issue raised by TLC, the Defendants (including the Appellant) could raise objections at the next hearing. No objection was raised by the Appellant at the May hearing. Lastly, the trial court clearly considered the exhibits to be part of the record. The Court's Order contains numerous cites to the exhibits presented at the March hearing. The Order specifically references over 100 documents presented.

More appropriately, pursuant to the precedent set by South Carolina law, the documents are proper for consideration by the Court. In Alston v. Blue Ridge Transfer Co., 308 S.C. 292, 417 S.E.2d 631 (1992), the South Carolina Supreme Court held the trial judge did not err by considering unfiled depositions in deciding a motion for summary judgment. The Court based its holding on the fact that both parties referred to portions of the depositions and no objection was raised throughout either the process of the hearing or the court's consideration of the proposed order. The Court stated:

> "At the hearing, both parties referred to depositions and portions of the depositions were quoted by both parties. After the trial court issues its final Order, *Alston*, for the first time, asserted error in the use of the depositions because they had not been filed with the court. In its Order settling the record, the

> trial court pointed out its and the parties' reliance upon the depositions. It held "[the failure to file the original depositions] was not brought to the attention of the court throughout the process of the hearing, specifically, no one throughout the course of the hearing or the process of considering the proposed Order ever entered any objection to the Court's considering the deposition testimony." The trial court then ordered the depositions be made a part of the record of the case.
>
> Id. at 632-633.

The facts of the case at bar mirror the facts of Alston. As the record in this case clearly shows, the parties discussed the exhibits at length during the March hearing and the trial court required the Plaintiffs provide copies of the exhibits to the court and the other parties for the express purposes of responding to the presentation and raising objections, if any. Instead of lodging objections, all parties referenced and utilized the exhibits before the Court's ruling.

Additonally, the Appellant has shown no prejudice. In Alston, the Supreme Court noted the Appellant had not presented any evidence of how she was prejudiced by the use of the unfiled depositions. Likewise, the Appellant in this case has presented no evidence, and failed to argue, as to how he has been prejudiced by the use of the exhibits by the trial court. All of the exhibits were discussed at both hearings and the Appellant recieved copies of all documents presented to the court. In addition, over eight (8) months elapsed from the March hearing until Appellant first submitted his objections to the proposed order.

As such, the exhibits were properly considered by the lower court. South Carolina law is clear that when both parties rely on exhibits absent objections, a party cannot later allege the exhibits are not proper, absent some prejudice. Van Veen failed to assert obejctions to the exhibtis, relied on them, and can show no resulting prejudice.

D. Issues Regarding Set-Off and Apportionment are Not Ripe, and Regardless It is Proper for Van Veen to be Prohibited from Allocating Fault to Other Parties

As an initial matter, Plaintiffs do not understand the Circuit Court's Order to prevent Van Veen from arguing for set-off to the extent a judgment is entered against him for actual damages if compensation was provided for the same actual damages through the parties' settlement with TLC. This issue will be dealt with, if at all, in a post-trial hearing and at this stage, and this should not be of concern at this time. To the extent this Court believes it is appropriate to consider these matters, Van Veen's apportionment argument is addressed below.

This Court should reject Van Veen's argument that the Order will deprive him of the ability to argue apportionment and leave him "facing 100% of the liability in this case." (P. 49, Brief). First of all, Dickerson and Luce were TLC Piedmont patients. Accordingly, Dr. Van Veen was the Clinical Director who diagnosed them with LASIK-induced ectasia and deprived them of treatment available to them which would have improved their conditions during the time at which Dr. Van Veen was reviewing their information and discussing it with TLC corporate. Second, this Court should not be concerned with protecting Van Veen's rights to argue apportionment when such rights are not available to those whose conduct is wilful, wanton, reckless, grossly negligent, or intentional. See S.C. Code Ann. § 15-38-15(F).

Van Veen will have the right to cross examine witnesses and object to evidence at a damages hearing, and in the event actual damages are awarded against him, he will presumably have the right to argue set-off to the extent necessary to prevent a double recovery. "In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the

prayer for relief, but also with the proof that has been submitted. Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988) (citing Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978) and Lewis v. Congress of Racial Equality, 275 S.C. 556, 274 S.E.2d 287 (1981)).

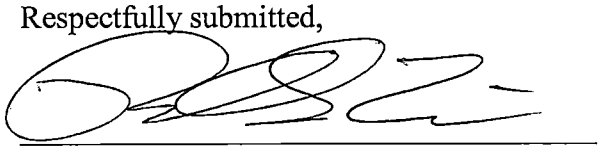
Although Van Veen's Answer is being stricken, he will maintain the right to participate in a damages hearing and, if applicable, argue for a set-off for duplicative actual damages. However, as stated above, this Court need not address this issue because it is not yet ripe for adjudication.[4]

CONCLUSION

For the reasons set forth above and, pursuant to Rule 220(c) of the South Carolina Appellate Court Rules, for any other reasons appearing in the record, the Circuit Court applied the proper standard, weighed the proper factors, and determined that Dr. Van Veen acted intentionally, deliberately, and with gross indifference to the rights of Dickerson and Luce and that Dickerson and Luce cannot receive a fair trial. The Circuit Court's Order striking Dr. Van Veen's Answer and awarding related relief and the Order denying Van Veen's Motion to Alter or Amend should be AFFIRMED.

[4] Van Veen's own brief illustrates this point by preserving his right to argue the applicability of set-off and apportionment before the Circuit Court if the trial court is affirmed and his Answer remains stricken.

Respectfully submitted,



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August 17, 2016

THE STATE OF SOUTH CAROLINA
In The 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..... Appellants.

And

Michael "Chad" Luce .....Respondent,

v.

TLC Corporate; TLC The Laser Center (Institute), Inc. f/k/a TLC The Laser Center (Piedmont), Inc., Jonathan Woolfson, 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..... Appellants.

PROOF OF SERVICE

I certify that on the 17th day of August, 2016, I served a copy of Initial Brief of Respondents and Designation of Matter in the above-entitled matters by sending a copy of the same by the methods of deliver specified below:

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August 17, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
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Re: Charles Benjamin "Ben" Dickerson and Gale M. Dickerson, v. Derek P. Van Veen, O.D.
Michael "Chad" Luce v. Derek P. Van Veen, O.D.
C.A. Nos.: 2010-CP-23-09954; 2010-CP-23-09956
Appellant Case No.: 2016-000583

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the Initial Brief of the Respondents and Designation of Matter along with an original and one copy of the Proof of Service. I have provided a self-addressed envelope for return of a filed copy of the Proof of Service.

Please do not hesitate to contact me should you have any questions.

With kindest regards, I am

Sincerely yours,

Paul S. Landis

PSL/pw
Enclosures (as stated)
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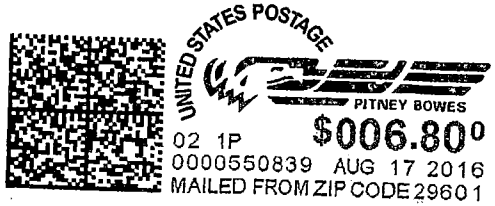

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