THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

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

Appellate Case No. 2016-000583

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

v.

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

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

And

Michael "Chad" Luce, ... Respondent,

v.

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

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

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ARGUMENT

Respondents' Brief confirms Derek Van Veen's argument that the drastic sanctions levied against him should be reversed. Respondents' Brief makes it all too clear that Dr. Van Veen was erroneously sanctioned for the conduct of other parties, not his own actions. Most crucially, Respondents fail to present record evidence of the sort of intentional conduct that must be shown with clarity to sustain the striking of an answer and the imposition of crippling monetary penalties.

What the record actually shows is that Dr. Van Veen did not initially search the computer his employer issued to him for documents. When he recognized this oversight and conducted a search, he located and produced a small and random collection of outdated documents that do not materially advance Respondents' case. This is inadvertence, not conspiracy, and it is the sort of discovery follow-up that occurs routinely.

Respondents attempt to augment this pedestrian record with a speculative narrative that assumes the conclusion that Dr. Van Veen "hid" documents. They rely on several leaps in logic that do not withstand scrutiny:

- Because Dr. Van Veen made entries in some of the documents he produced, Respondents say he must have been the custodian of all similar records. This is obviously incorrect; the only record evidence is that Dr. Van Veen did not have custody of any documents beyond the New Documents that he produced.
- Because one can infer the existence of other related documents, Respondents say Dr. Van Veen must have intentionally destroyed those other documents. Here again, the two-fold fallacy is clear. There is no evidence that Dr. Van

Veen controlled these assumed documents, nor any account of when and why they were destroyed, if they were. Spoliation cannot be presumed.

- By virtue of his role as Clinical Director, Respondents say that Dr. Van Veen assumes responsibility for all of TLC's acts and all patient care. In fact, Dr. Van Veen is a regional employee of a far-flung entity, with a limited role. He is not answerable for all of TLC's actions, nor was he the primary physician for either Respondent. Respondents' attempts to render him responsible for the actions of others by exaggerating his role are unsupported.

Without the aid of Respondents' presumption that Derek Van Veen masterminded a scheme to hide and destroy records, there is little to support these sanctions. The sanctions Order should be reversed, to allow this case to proceed on the merits.

I. Justice Requires Allowing This Case to Proceed on the Merits.

Before addressing the particulars of this appeal, we urge a step back to see the broad circumstance presented. These are two medical malpractice cases, alleging harm from LASIK surgeries that were performed in 1998 and 1999. If the Order stands, Derek Van Veen will be stripped of numerous meritorious defenses, and will face potential personal liability for all damages that these Respondents can prove arising from those surgeries. Our courts have a strong presumption in favor of allowing cases to be decided on their merits; that presumption is especially strong where there are substantial defenses.

There are numerous reasons that a verdict of the likely magnitude at stake here would be unjust to Dr. Van Veen. Derek Van Veen did not operate on either Respondent, nor did he participate in the decision to operate. Indeed, he was not employed by TLC when those operations occurred. The record shows that he did not have any material role

in treating them after their surgeries, as they had their own physicians at that time. (Dickerson Tr. 133-134, 248-250; Luce Tr. 129-130, 234) On the merits, then, the case for his liability is weak.

This weakness is multiplied by the fact that the three-year statute of limitations and six-year statute of repose provided by S.C. Code § 15-3-545(A) had run with respect to their surgeries before these actions were filed.[1] Mr. Dickerson's first surgery occurred in 1998 and Mr. Luce's in 1999. Mr. Dickerson testified that he noticed a vision problem as early as January 1999, and Mr. Luce testified he noticed a vision problem in early 2003. (Dickerson Tr. 134-135; Luce Tr. 132-133) Neither case was filed until December 7, 2010. Stripping Dr. Van Veen of meritorious defenses based upon these facts runs directly counter to public policy as enunciated by our Legislature. Despite all of that, because Dr. Van Veen overlooked searching a TLC computer that contained only a few immaterial documents, he faces the full brunt of liability for any damages Respondents can prove, resulting from surgeries that they say materially damaged their eyesight.

This is an extraordinarily punitive outcome. For punishment of this magnitude to be just and proper, there must be a clear record of intentional wrongdoing, and of prejudice. Such a record does not exist, and the sanctions Order should be reversed.

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[1] Respondents' Complaints bring causes of action for negligence, loss of consortium, fraud/negligent misrepresentation, civil conspiracy, violation of the Unfair Trade Practices Act, and breach of contract, but Respondents' alleged ***damages*** all stem from purported injuries arising out of their treatment by Defendants. As such, the claims sound in medical malpractice and are subject to the limitations and defenses applicable to medical malpractice claims. *See Smith v. Smith*, 291 S.C. 420, 426, 354 S.E.2d 36, 40 (1987) (recognizing that the medical malpractice statute of limitations and repose covers "***any action*** to recover damages for injury to the person arising out of ***any*** medical treatment" and affirming judgment for defendants on claims for breach of contract for allegedly negligent medical treatment (emphasis in original)).

II. The Record Shows Inadvertence, Not Intentional Malfeasance.

In Dr. Van Veen's opening brief, we demonstrated that Dr. Van Veen reasonably believed that he had complied with his discovery obligation, that he made an additional production when it became clear that the TLC computer assigned to him had not been searched, and that this additional production in fact yielded only sparse results. There is no evidence he "hid" the New Documents that he later produced, nor that he made a conscious decision not to produce those TLC documents on the TLC computer assigned to him.

Respondents make two primary arguments to shore up the Circuit Court's conclusion that Dr. Van Veen did something nefarious. Neither survives scrutiny.

First, Respondents characterize Dr. Van Veen's post-deposition search for documents as "getting caught." In fact, Dr. Van Veen was shown a sample in his deposition of a patient-tracking document from 2004 that was no longer in use. Specifically, the document in question was entitled "Patient Complaint Log" and listed one patient and certain general information about the patient's medical complaint. This refreshed Dr. Van Veen's recollection and led to his realization that it was possible that similar documents might be present on the computer issued to him by TLC. Such realizations are common in litigation. The document in question was 10 years old, and had not been in use for a similar period. The examining attorney in Dr. Van Veen's deposition succeeded in reminding Dr. Van Veen of something that was remote to his memory. This is not the same thing as "catching" him in the sort of conduct that Respondents claim.

What Dr. Van Veen found when he searched the TLC computer reinforces that he was not "caught." There was no arsenal of smoking guns. Dr. Van Veen located, and produced, a small and random collection of old documents. Dr. Van Veen was not

"caught" hiding documents, because he did not have custody of the sort of large and systematic collection of documents that would be worth hiding. His TLC computer housed a few random documents that he had, understandably, forgotten.

Faced with the fact that the few New Documents found on Dr. Van Veen's TLC computer do not support the narrative that Dr. Van Veen masterminded a scheme to keep documents away from them, Respondents shift focus. They stretch desperately to try to portray Dr. Van Veen as the custodian of all of TLC's patient records. He was not.

Respondents urge this Court to conclude that – because Dr. Van Veen made entries concerning patients in certain "Complex Case" and "Patient Advocacy" forms that were sent to his superiors at TLC – he must have been the primary person at TLC tasked with permanently "preserving" all of those records. (Resp. Br. p. 10) This is an obvious *non sequitur*. The record evidence is that, although Dr. Van Veen had a limited role in updating (not "generating") these forms and sending them to TLC's corporate office during the brief period when they were in use, it was not part of his job to preserve them on a permanent basis. (VV Aff. ¶ 4) This is particularly true after the forms were phased out. Respondents try to twist a single reference in a training module to the many TLC Clinical Directors as "owners" (with the quotation marks appearing in the original) of patient complaints into evidence of continuing custody of all documents concerning those patients. Nothing in the record supports this contention, and the Respondents' gloss on the single figurative reference to Clinical Directors as "owners" in a single document from 2003 certainly does not suffice to hold Dr. Van Veen responsible for every TLC document.

To the contrary, there is ***no*** record evidence tending to show that Dr. Van Veen was the custodian of the vast collection of documents later produced by TLC; the only evidence

is that TLC had these documents and produced them. (*See* App. Br. pp. 15-16) They were not Dr. Van Veen's documents to hide.

Dr. Van Veen plainly did not possess of the vast majority of TLC's documents that formed the basis for sanctions, so he could not be "caught" with them. He produced the few documents that were on his TLC laptop, when his recollection of them was refreshed, and so he was not "caught" with those either. The pejorative "caught" cannot substitute for actual evidence of intentional impropriety by Dr. Van Veen, and there is none.

III. Respondents Advocate Punishing Dr. Van Veen for the Conduct of Others.

Respondents also substitute their own narrative for the record in blurring, if not completely ignoring, the line between Dr. Van Veen's conduct and the conduct of TLC and other employees. The Circuit Court sanctioned Dr. Van Veen for the conduct of others, and Respondents are urging this Court to ratify that error.

This transfer of blame to Dr. Van Veen occurred in part because TLC remained a party to this litigation during the entire time the sanctions motion was filed, briefed, argued – and was being drafted. TLC settled with Respondents only shortly before the sanctions Order issued. At the forefront of the Respondents' and the Court's minds, therefore, was the conduct of TLC, not Dr. Van Veen.

The most blatant example of this transfer of blame is Respondents' repeated urging that Dr. Van Veen should be sanctioned because TLC produced 130,000 pages after Dr. Van Veen produced the New Documents. (Resp. Br. pp. 1, 16, 22, 29) Respondents suggest that TLC made its production only because Dr. Van Veen's production somehow opened the floodgates and forced TLC to make that larger production. On Respondents' logic, this makes Dr. Van Veen responsible – and punishable – for TLC's failure to

produce. (Resp. Br. p. 29) This is obviously incorrect. Dr. Van Veen had no control over TLC's production. He and TLC were separately represented in this litigation, and he is not a high-ranking officer of TLC. Whatever the reason for the timing of TLC's production of 130,000 pages of documents, punishing Dr. Van Veen for the timing or contents of that production was improper.

More generally, even the documents that Dr. Van Veen did produce were not his. He produced only TLC documents that were on a TLC computer issued to him; those documents were duplicated in TLC's later, larger production. (App. Br. pp. 15-16; *see also* VV Depo. 196) Respondents are asking this Court to uphold a personally ruinous sanction against a corporate employee for a failure by his employer to make a production.

Time and again in their Brief, Respondents rely on documents that Dr. Van Veen neither authored nor produced to support their argument for sanctions against him. For example, they attempt to impugn Dr. Van Veen's character by alleging that, along with TLC, Dr. Van Veen "engaged in a deliberate scheme to covertly hide the nature (ectasia) and seriousness (incurable/progressive) of their patients' conditions," (Resp. Br. p. 4), citing to a collection of documents for this allegation. Yet only ***two*** of the documents Respondents cite appear to have involved Dr. Van Veen at all, and even these two are emails authored not by Dr. Van Veen but by Dr. John Potter and sent to ***all*** TLC clinical directors concerning exercising caution with email communications. (*See* Pl. Ex. 71, Tab 2; Pl. Ex. 74) And even these documents do not prove a conspiracy unless, like Respondents, one starts by assuming one. In one, Dr. Potter urges clinical directors not to "print out email about a patient and then put it in the patient's chart" but to keep such emails in a separate file because "people who correspond with you electronically don't

write as if their message will end up in the patient's chart." (Pl. Ex. 71, Tab 2) In another Dr. Potter urges clinical directors corresponding with him not to "render opinions in email" such as "'this is a really bad case'" because "[t]hese are opinions that you may be called upon to support and/or defend in deposition if it comes to that." (Pl. Ex. 74)

Respondents likewise accuse Dr. Van Veen of a parade of deceit and horribles "upon the identification of a patient with the clinical problem of ectasia," (Resp. Br. p. 11), but their reliance is nearly entirely upon documents that did not involve Dr. Van Veen. For example, they point to multiple emails that did not involve Dr. Van Veen at all (Pl. Ex. 65, 67, 70, 83 & 85 Tab 114): one of the emails referenced above that went to all clinical directors (Pl. Ex. 73); a brief email string involving Dr. Van Veen from the *Hollman* case that does not support Respondents' theories (Pl. Ex. 6);[2] and a TLC policy titled Management of Patient Complaints (Van Veen Depo. Ex. 3). Dr. Potter's alleged misconduct is indeed a recurring theme in Respondents' attempt to build a case against Dr. Van Veen: Respondents accuse Dr. Potter of lying in his depositions, taken in other cases, about TLC's response to ectasia. (Resp. Br. p. 13) But none of this is germane to Dr. Van Veen's conduct in this case.

Respondents also take Dr. Van Veen to task for the long and drawn-out discovery battles in this case. (Resp. Br. pp. 8 & 18) But as Respondents acknowledge, it was TLC,

[2] This email string from 2003 includes a communication from Dr. Van Veen concerning John Hollman in which Dr. Van Veen states to a TLC surgeon that Hollman is "trying an RGP [gas permeable contact] fit to buy some time for now." Respondents make much of this statement in their brief, implying that it suggests some conspiratorial or nefarious conduct by Dr. Van Veen. (Resp. Br. p. 5) Not so. As Dr. Van Veen explained in a deposition in the *Carter* case, the reference to "buying time" was to "postponing corneal transplant" which was a "last resort" treatment for ectasia at the time of the communication. Dr. Van Veen pointed out that if a patient can function with a more conservative type of treatment than corneal transplant, "that is usually better for the patient." (*Carter* Depo. pp. 102-104)

and not Dr. Van Veen, that waged these battles. Dr. Van Veen made an initial production on the basis of his understanding of the requests put to him and (presumably) guidance from his legal counsel, at which time he assuredly did not think further about the production until Respondents' counsel got around to deposing him. This set of facts cannot plausibly be interpreted as a long, active, and conscious recalcitrance by Dr. Van Veen. He, and his production efforts, were on the sidelines during a long interlocutory appeal. While we do not believe that a party may be sanctioned for raising and arguing tenaciously for any non-frivolous litigating position, surely a party may not be sanctioned for sitting by while ***another party*** makes such arguments. Respondents want Dr. Van Veen sanctioned because TLC resisted discovery.

Finally, Respondents embellish their speculation that TLC documents were improperly destroyed with the second-order speculation that it must have been Dr. Van Veen who carried out this imagined destruction. (Resp. Br. p. 30) As we have already argued, it does not follow from the fact that some old documents no longer exist that they were destroyed improperly, nor that they were destroyed at a particular time in response to litigation. It is even less plausible to infer that the supposed destruction was carried out by a particular employee who was not the custodian of the documents, particularly when Respondents themselves allege that "the culprit, in intentionally spoliating" certain TLC documents "was Dr. John Potter," not Dr. Van Veen. (Resp. Br. p. 18)

The focus of this appeal must be on what Dr. Van Veen did. The appeal cannot turn on the worst accusations that Respondents can direct toward him, and even less on the worst accusations that Respondents can direct toward TLC or its other employees. When

the conduct of others is removed from Respondents' argument, the sanctions imposed on Dr. Van Veen must be reversed.

IV. Respondents Advocate Punishing Dr. Van Veen for Events in Other Cases.

Respondents do not contest our demonstration that the Circuit Court sanctioned Dr. Van Veen for conduct in the previously settled *Hollman* and *Carter* cases. Indeed, Respondents embrace this approach, beginning their brief with a lengthy discussion of their perceptions of discovery impropriety in those cases. (Resp. Br. pp. 5-6)

The Circuit Court's Order treats Dr. Van Veen as though he were at the center of a years-long concerted effort to block discovery, explaining that "Dr. Van Veen has had a decade of opportunities as either a witness or named defendant to be forthright about the existence of these materials and the knowledge of relevant documents." (Order at p. 9) To paint this picture, it points back to the earlier cases (to which Dr. Van Veen was not a party) and holds Dr. Van Veen accountable for the time during which TLC appealed discovery orders to which it objected. In fact, those orders had to do with documents completely distinct from those on Dr. Van Veen's computer. This is another example of ignoring important distinctions between what Dr. Van Veen did in these cases, and what other parties did in other cases.

Respondents echo this theme. In their Brief, they condemn Dr. Van Veen for "having been the Clinical Director of TLC Piedmont for over eleven years, during which litigation concerning these issues had been constantly ongoing." (Resp. Br. p. 15) It is facile, and wrong, to punish Dr. Van Veen for TLC's discovery conduct in prior cases.

V. Respondents Exaggerate Dr. Van Veen's Authority and Role, and Attribute to Him Motives and Conduct Not Shown in the Record

Because what Dr. Van Veen actually did, and the documents that he actually produced, will not support the crippling sanctions imposed on him, Respondents devote considerable time and effort to portraying him as a "bad guy," and to exaggerating his role and power.[3]

A. Dr. Van Veen Did Not Lie About the Existence of the New Documents.

A repeated theme in the Order and Respondents' Brief is the incorrect assertion that Dr. Van Veen lied under oath about the existence of the New Documents. This claim is pinned on the fact that Dr. Van Veen's discovery responses contained the statement that his answers were "complete and responsive in accordance with [his] understanding of the Interrogatories, as drafted, and are based upon records or other information in [his] possession, or reasonably available to [him] at the time they were made . . . ." (VV Answers to Discovery Requests p. 1) What this was meant to convey, of course, is that Dr. Van Veen had produced the responsive documents that he had located in his search. As we have already set forth in detail, that search did not include the TLC computer in his possession. The statement in Dr. Van Veen's discovery responses is ***not*** the equivalent of

[3] In a similar manner, Respondents attempt to paint TLC-Piedmont as a hotbed of ectasia, suggesting that "the incidence of ectasia was as high as 400 times the national rate." (Resp. Br. p. 3) Respondents' math is faulty. One of the two documents Respondents rely upon suggests that there were 16 ectasia patients at TLC – Piedmont between 1998 and 2005 out of a total of approximately 8400 patients, for a rate of ".20%." (Pl. Ex. 85, Tab 122) A second internal TLC email states that "the actual risk" is "closer to 1/2000 (.0005%)" and that the rate TLC instructs doctors to use "verbally" so that "patients will understand there ***is*** a risk" has always been "1/1000 (.001%)." (Pl. Ex. 85, Tab 123) But apples are not being compared to apples here; the second set of numbers are not "percentages" at all. Converted to percentages, 1/2000 is actually .05% and 1/1000 is actually ".1%". In other words, if these two documents are accurate, the rate of ectasia cases at TLC Piedmont was approximately twice (and at most four times) the average rate, not "400 times."

saying "I have searched the TLC computer issued to me." Here, by contrast, the recitation in the discovery responses is simply another manifestation of the fact – a fact that will not support the sanctions imposed here – that Dr. Van Veen had at that point overlooked that computer.

Respondents also flatly mischaracterize Dr. Van Veen's deposition testimony in prior cases, suggesting that he denied "knowing of other ectasia patients," "attending meetings concerning" patients with ectasia, and "filling out required reports under Complex Case and Advocacy Programs." (Resp. Br. p. 13) That is not what those prior depositions show. Dr. Van Veen actually stated in his deposition in *Hollman* that he guessed there had been "under 10" patients that he could recall who had undergone LASIK and developed ectasia, he discussed the "Complex Case" form he had filled out on Mr. Hollman and recalled the use and purpose of this form, and he explained the use and purpose of the patient advocacy log. (*Hollman* Depo. Tr. at 35, 50-52). Moreover, in his deposition in *Carter*, Dr. Van Veen testified that although he could not recall an internal meeting "just for ectasia," the issue of ectasia "[had] certainly been a topic at several meetings." (*Carter* Depo Tr. 112-113) In short – and while it is important to bear in mind that this is all window-dressing, in the sense that Dr. Van Veen was not sanctioned for "lying in his deposition" – Respondents' characterizations of his testimony are inaccurate.[4]

Respondents similarly state – misleadingly – that Dr. Van Veen "denied the existence of the monthly complaint logs." (Resp. Br. p. 14) What Dr. Van Veen actually

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[4] The testimony we have identified here reinforces another fundamental flaw in Respondents' attempts to portray the New Documents as some sort of turning point in this litigation. The underlying facts suggested by the New Documents were known, and had been known, long before they were ever produced. As we have noted before, they are even alleged in the Complaint.

stated was that he did not "recall" a document entitled "patient complaint log" unless that had been the same thing as the "patient advocacy log," which he did recall and did testify about in some detail. (VV Depo. 76-77) He later agreed in his second deposition that although he could not be certain, he thought the patient complaint log had "turned into" what TLC termed the "patient advocacy log." (VV Depo. 207)

This prior testimony further shows that the supposed watershed that occurred with Dr. Van Veen's production of the New Documents was nothing of the sort.

B. Dr. Van Veen Did Not Hide "Secret" Documents.

As Dr. Van Veen showed in his opening brief, Respondents substitute pejoratives for analysis in accusing Dr. Van Veen of "hiding" a cache of "secret" documents.

First, Dr. Van Veen did not "hide" documents concerning the Complex Case and Advocacy systems. He was not the custodian of the vast majority of those documents – TLC was – so he could not hide them. The few documents concerning those systems that were on his work computer were forgotten by him, not hidden.

Nor were those documents "secret," in the nefarious sense Respondents attempt to imply. First, they are mentioned in Respondents' Complaints (Luce Compl. ¶¶ 50-53; Dickerson Compl. ¶¶ 55-58), so their existence was known throughout this litigation. Second, these systems (which were discontinued years before the lawsuits commenced) were reasonable and normal internal tracking documents. The Advocacy System was simply a means of tracking patient concerns, of whatever nature. (VV Depo. Tr. 76, 78) And the Complex Case document was used whenever a patient was referred to another physician. (*Hollman* VV Depo. Tr. 35, VV Depo Tr. 275-276) Neither of these was the "secret journal" of a conspiracy to keep patients in the dark that Respondents imagine.

They were simply back-office records that tracked complaints and referrals. They were not part of the patient's medical file for the plain and unexciting reason that they were administrative documents. This does not make them "secret."

On a related point, Respondents are likewise wrong to suggest that the computer on which these documents were found was under Dr. Van Veen's "exclusive control." (Resp. Br. p. 15) The computer containing the documents was a TLC-issued laptop that TLC had replaced multiple times during Dr. Van Veen's employment. (VV Depo. 119; VV Aff. ¶ 7) At each replacement, TLC's IT department transferred some old information to the new computer but, as Dr. Van Veen admitted in his first deposition, he was not sure whether all the information from prior computers would be transferred each time. (VV Depo. 119-120) Dr. Van Veen ultimately found certain of the New Documents "in a folder titled 'Old Laptop,' which was itself subsumed within several other folders and directories created by the TLC Information Technologies Department and utilized when old files and extension are transferred . . . ." (VV Aff. ¶ 7)

It is further important to notice, when one reviews the documents in question, that they do not contain significant new or different information about the patients in question. (*See* App. Br. pp. 14-15) For example, the "Patient Advocacy Log" included among the New Documents lists seven patients, none of them a plaintiff in this matter, and includes details like the dates of each patient's surgery, descriptions of complaints such as "persistent dryness" or "blur," the "source" of each complaint, and a "description of resolution planned, in process or completed." (GCC_LUCE 000105) These documents do not add materially to one's understanding of the merits of this case, nor to the patient's medical condition. These Respondents were aware that their surgeries had not gone

perfectly; that was not a secret from them. It is, in fact, why they were seeking continuing treatment.

C. Dr. Van Veen Was Not the Primary Physician of Either Respondent.

In understanding what the New Documents were – and were not – one must understand that Dr. Van Veen was not the primary care provider for either Respondent at any time. A casual reader of Respondents' Brief might be excused for assuming that Dr. Van Veen operated on both Respondents and consulted exclusively with them thereafter. (Resp. Br. pp. 9-10) After all, these cases purport to be about surgical malpractice, and Dr. Van Veen is characterized as the "preserver" of all documentation. (Resp. Br. p. 10)

In fact, Dr. Van Veen did not perform surgery on either Respondent (nor on Messrs. Hollman or Carter), and was not even employed by TLC when their surgeries were performed. Dr. Van Veen never examined Mr. Dickerson at all, and did not serve as primary physician for Mr. Luce at any time. It is important that TLC was a ***surgical*** center. Once surgery was completed, a patient was returned to the care and supervision of his optometrist or ophthalmologist. This occurred with Mr. Dickerson and Mr. Luce. (Dickerson Tr. 133-134; Luce Tr. 129-130) Thereafter, a patient's primary interaction with TLC would be in the context of assessing whether he had post-surgical issues that made him a candidate for further surgery. This is the only sort of treatment that TLC offered. Dr. Van Veen was not the primary eye-care provider for Respondents; that was not his job. Dr. Van Veen had no monopoly on information about the post-surgery conditions of either Respondent.[5]

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[5] There is a dispute between Dr. Van Veen and Respondent Luce concerning whether Dr. Van Veen informed Mr. Luce that he had ectasia. Dr. Van Veen says he did, which is consistent with the notes in Mr. Luce's own patient chart; Mr. Luce denies this. (*Compare*

Respondents exaggerate Dr. Van Veen's role to try to make it appear more likely that he should have remembered the old records concerning their care. But he was not their surgeon or primary care physician, and much of his contact with them consisted of filling out forms to send to TLC headquarters. It is neither surprising nor unbelievable that he did not recall those forms years later.

D. Dr. Van Veen Was Not TLC's Records Custodian and He Did Not Control TLC's Production in this Case.

Respondents also exaggerate Dr. Van Veen's responsibility for the records that TLC ultimately produced. They seek to argue that because these records were somehow his responsibility, he can be punished because the records no longer exist.

Here again, Respondents' account relies exclusively on their own speculative narrative, and not on the record. While Dr. Van Veen had a role in updating Advocacy Logs and sending them to TLC headquarters, there is no evidence that it was his job to maintain those logs. To the contrary, the only record evidence is that he was not the custodian of these documents. (VV Aff. ¶¶ 4-5)

Respondents ask this Court to ignore the distinction between updating and transmitting a spreadsheet, on the one hand, and archiving and permanently preserving it, on the other. The fact that it was Dr. Van Veen's job to update Advocacy Logs and fill out Complex Case forms will not support the inference that it was therefore also his job to keep them, and to keep them for all time. Particularly since these documents were updated

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GCC_Luce 0003 *with* Luce Affidavit ¶ 3) Respondents of course take Mr. Luce's side in this debate and say this is further evidence of untruthfulness by Dr. Van Veen that supports sanctions. (Resp. Br. p. 12) In fact, this is a credibility fight that goes to the finder of fact, to the extent it is relevant. Dr. Van Veen cannot be sanctioned for a differing recollection of events. It bears emphasis, too, that Mr. Luce knew that he had post-surgery vision difficulties and was being treated for them. (Luce Tr. 131-141) Respondents try to create the impression that Dr. Van Veen had a stranglehold on all information concerning Respondents' conditions, and that is false.

periodically – making prior versions of no interest – it is unsurprising that all versions were not kept. (VV Depo. 116-118) And it is equally unsurprising that someone like Dr. Van Veen, whose job was to make entries and transmit the document to headquarters, would not make a practice of maintaining copies. Indeed, the actual production of documents makes this clear. TLC produced 130,000 pages of documents. TLC plainly had the documents, and Dr. Van Veen did not.

Respondents' claim that relevant documents were spoliated is pure speculation. And given the absence of proof that it was Dr. Van Veen's job to maintain those records, their attempt to lay any spoliation at Dr. Van Veen's feet falls flat.

VI. Impact on Right to a Fair Trial

Dr. Van Veen demonstrated in his opening brief that the linchpin of the sanctions Order against him – that Respondents' right to a fair trial had been "impaired" – was erroneous. Discovery is still proceeding in this case, and there is ample time before trial to react to the New Documents. The notion that, if Dr. Van Veen had produced the New Documents earlier, some other unspecified documents would have been produced, is pure speculation. Moreover, that notion punishes Dr. Van Veen for TLC's conduct.

Respondents do little to rebut this argument. Perhaps recognizing the absence of prejudice, they rely on *Samples v. Mitchell*, 329 S.C. 105, 113-114, 495 S.E.2d 213, 217-18 (Ct. App. 1997) for the proposition that "prejudice must be presumed" when discovery rights are not accorded. *Samples*, though, is readily distinguishable. In both *Samples* and in *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987), on which *Samples* relies, the appeal was taken ***after a trial***. And in both cases, the appellant was arguing that it had suffered prejudice ***during the trial*** as a result of discovery violations.

Indeed, the language from *Samples* quoted by these Respondents makes the point. The Court of Appeals observed that discovery "give[s] the trial lawyer the means to prepare for ***trial***, and when those rights are not accorded, prejudice must be presumed." 329 S.C. at 114, 495 S.E.2d at 217 (emphasis added). As we have noted, these Respondents do have the means to prepare for trial. The New Documents, and the many documents produced by TLC, are now available to them. The presumption of prejudice discussed in *Samples* does not apply here because this Court is not looking backwards at a record that cannot be changed. Indeed, *Samples* and numerous other cases recognize this, holding that in considering sanctions a court must consider "the discovery posture of the case." *Id.* at 112, 495 S.E.2d at 216; *see also Davis v. Parkview Apartments*, 409 S.C. 266, 283, 762 S.E.2d 535, 544 (2014) (citing *Samples* for the same proposition). This case is still in pretrial discovery. In finding prejudice, both the Circuit Court and Respondents fail to follow the dictates of *Samples* and ignore the discovery posture of the case. When that posture is considered, there is no prejudice.

VII. The Sanctions Order Ignores South Carolina Precedent

A. Cases Upholding Severe Sanctions Require Conduct Far More Egregious Than What Has Been Shown Here

Sanctions "should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 719 (Ct. App. 1999). Further, "[w]here the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." *Id.* at 198-99, 511 S.E.2d at 719. Dr. Van Veen showed in his opening brief that this bar has not been met.

The cases cited by Respondents (Resp. Br. p. 32) do not change the conclusion that the sanctions imposed on Dr. Van Veen are inconsistent with South Carolina precedent. The facts and reasoning of two of these, *Griffin Grading* and *McNair v. Fairfield County*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008), were discussed at length in Dr. Van Veen's opening brief, and Respondents make no attempt to refute Dr. Van Veen's argument that neither case supports the sanctions at issue here. (*See* App. Br. at 35-38). And as we explained above, *Samples* and *Downey* are inapplicable because they dealt with discovery abuse that had impaired a litigant's rights ***at trial***. Those cases require a court to "consider the discovery posture of the case" before imposing sanctions; doing so supports reversal.

Dr. Van Veen overlooked a small number of documents housed on the computer issued him by TLC. When he realized this, he produced them, and Respondents have time to react to that production. No South Carolina case has upheld the striking of an answer and the imposition of crippling fines on the basis of such a record.

B. Cases Upholding Severe Sanctions Have Featured a Warning of the Severity of the Sanctions That Could Follow Noncompliance.

Respondents do not contest our demonstration that most South Carolina cases affirming a severe sanction like this one involved an express warning from the trial court of the consequence of further recalcitrance. *See, e.g., Davis*, 409 S.C. at 277, 762 S.E.2d at 541. Indeed, the Fourth Circuit joins a number of other federal circuits in concluding that due process requires such a warning. *Hathcock v. Navistar Intern. Transp. Corp.*, 53 F.3d 36, 40 (4th Cir. 1995).

Respondents brush past this constitutional concern by falling back again on their assumption that Dr. Van Veen was conscious of these documents and had been actively hiding them "for approximately a decade." (Resp. Br. p. 31) Since he knew he was hiding

documents, they reason, what good would a warning have done? This ignores, or obscures, the actual narrow scope of Dr. Van Veen's oversight. While he believed that he had complied with discovery – and his responses in various settings reflected this – he had overlooked searching the TLC computer issued to him. Once it was established that he had not searched that computer, he did so. If he had refused to conduct that search, and if the Court had warned him that a continued failure might result in the striking of his pleadings, that warning could have had considerable effect.

Respondents ask this Court to treat the Circuit Court's January 10, 2014 Order as if it were a specific warning. It was not. Instead, it was a directive to the parties, after a considerable pause while some parties fought over discovery, to recommence discovery. It was in no way directed to the particular oversight that became the basis for sanctioning Dr. Van Veen. An order to "comply with discovery" could be issued in every case, but such an order is too general to meet the concern that has led the courts to require a warning before striking a pleading. There was no warning of imminent severe sanctions here.

VIII. The Procedure Followed in Sanctioning Dr. Van Veen Was Improper.

A. Rule 7(b)(1)Requires a Particular Statement of the Grounds for Relief.

As Dr. Van Veen has shown, the Circuit Court and Respondents' counsel effectively acknowledged that the motion for sanctions did not meet the requirement of a particular statement. *See* SCRCP 7(b)(1). Only at oral argument were documents shown – not entered into the record, but flashed on a screen – and arguments made. The Circuit Court sought to cure this irregularity by adjourning the proceeding to allow Dr. Van Veen and the other targets of the motion to consider what they had seen at argument.

This was inadequate. Respondents argue that an appellant must show prejudice from a violation of Rule 7(b)(1), but prejudice is abundantly clear here. As we discuss

further hereinafter, the documents on which Respondents relied in their lengthy argument to the Circuit Court were neither separately marked nor entered as exhibits in the record. This unclarity – which Appellant submits lingers into this appeal – made it impossible to fashion a full response. The sanctions Order adopts the sweeping characterizations of the New Documents and other documents produced by TLC in sanctioning Dr. Van Veen. Because the Sanctions Motion violated Rule 7(b)(1) in failing to specify what Dr. Van Veen supposedly did wrong, and because the chaotic status of the record after oral argument means that this defect was not cured by bifurcating the argument, Dr. Van Veen can show prejudice.

The burden is on the party advocating for severe sanctions to create a clear record. *Cf. Davis*, 409 S.C. at 282, 762 S.E.2d at 544 ("where the sanction would be tantamount to granting a judgment by default, the moving party ***must show*** bad faith, willful disobedience, or gross indifference to its rights to justify the sanction." (emphasis added)). That did not happen here. Instead, a boilerplate motion was followed by an oral presentation that did not create a clear record for rebuttal or review. The Circuit Court accepted Respondents' rhetoric of conspiracy in the place of a clear record of willful misconduct and prejudice to their cases. The Circuit Court's willingness to proceed on that record did prejudice Dr. Van Veen, and it supports reversal under Rule 7(b)(1).

Finally, Respondents assert that Dr. Van Veen did not preserve this issue for appellate review. That is incorrect. The issue was briefed in a memorandum submitted by counsel for TLC prior to the first sanctions hearing. (Memorandum in Partial Response at 7-12) The issue was then extensively argued by counsel for TLC at the first sanctions hearing, and Dr. Van Veen's counsel expressly adopted those arguments. (March Tr. 24-

26) The Court also engaged in a discussion with defense counsel and elected to proceed with the hearing over objections about the procedures involved. (March Tr. 26-30) Subsequent letters dated October 2, 2015, and December 14, 2015, from Dr. Van Veen's prior counsel responded to a proposed sanctions order from Respondents and incorporated by reference all prior arguments against sanctions including "those of [Dr. Van Veen's] Co-defendants." (Letters of October 2, 2015 and December 14, 2015) Dr. Van Veen's Motion to Alter or Amend then requested that the Circuit Court reconsider its sanctions Order to "include a reasoned opinion addressing certain arguments and objections," including arguments Dr. Van Veen adopted by reference, those raised in the first sanctions hearing, and those set forth in the his letters to the Court. (Motion to Alter or Amend p. 2) Finally, the Circuit Court's order denying Dr. Van Veen's Motion to Alter or Amend recounted this same history of argument and stated that the Court had "considered the same." (Order of March 4, 2016). Based on the foregoing, this issue was preserved for review. Even if that were not the case, it was not required to be reasserted to be preserved. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (motion to alter or amend judgment is not necessary to preserve an issue for appellate review when the issue has been raised and ruled upon).

B. The Fine Imposed on Dr. Van Veen Was Erroneous

Dr. Van Veen's opening brief explained in detail why the $77,800 fine imposed on him by the Circuit Court (i) constituted criminal contempt and was therefore procedurally improper; and (ii) was a miscalculation, if it had been proper at all.

Respondents do not answer either argument. Instead, they rely on *dictum* in *Downey v. Dixon* to the effect that a $50 fine may have been too small. *Downey* is not

controlling here, or even relevant. It did not involve a challenge to a fine as an improper criminal penalty. Respondents have done nothing to rebut Dr. Van Veen's argument.

C. *The Failure to Mark and Admit Exhibits Prejudiced Dr. Van Veen.*

Respondents do not dispute that the documents on which they relied in arguing for sanctions to the Circuit Court were not formally entered as exhibits.[6] Instead, they point to Respondents' counsel's statement to the Circuit Court that "all 130,000 pages . . . will be introduced into evidence." (Resp. Br. p. 38) They then go on to note that they provided "a CD containing all exhibits to each party." (*Id.* p. 39)

By allowing the entire evidentiary process to be farmed out in the fashion, the Circuit Court abdicated its responsibility to analyze and rule on a clear record. The Circuit Court uncritically adopted the narrative offered by Respondents, leaving Dr. Van Veen to try to sift through the record to identify the basis for the sanctions. Being forced to comb the tangled record for rebuttal evidence constitutes prejudice.

A substantive point is in order here, as well. Respondents have said they relied on all 130,000 documents, and that "over 100 documents" were presented to the Circuit Court at the hearing. *Id.* 37. Since Dr. Van Veen produced approximately eight New Documents, this is further confirmation that the record below was drawn primarily from documents that he did not produce, and that did not relate to him. The procedural sloppiness reinforces the substantive point that neither Respondents nor the Circuit Court

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[6] The undersigned counsel for Dr. Van Veen have worked cooperatively with counsel for Respondents to identify and include in the Record on Appeal all documents that Respondents say they relied on for their arguments and that Respondents believe should be treated as exhibits. The undersigned counsel believe it is appropriate for this Court to have as clear a picture as possible of what those documents are. However, by so doing, we do not concede either that the documents are properly viewed as formal exhibits, or that the record was at all clear at the time the Circuit Court ruled as to what documents were being relied on.

made any serious effort to separate Dr. Van Veen's conduct from that of his co-defendants before sanctioning him for the entirety of that conduct.

Respondents incorrectly assert that the failure to introduce exhibits is not preserved for appeal. Again, Respondents are mistaken. For the same reasons set forth in Section VIII.A, *supra*, this issue is also preserved. In addition, counsel for TLC stated unequivocally at the second sanctions hearing that the Respondents had previously made "a bunch of arguments and interpretations of documents" but that "none of those documents" had been "properly in evidence" and "no foundation" had been laid for them. Once again, these arguments were adopted by Dr. Van Veen. (May Tr. pp. 29, 66)

Respondents ask this Court to uphold the most severe of sanctions against Dr. Van Veen, but they say they should be excused from the basics of record-creation that allow for orderly argument and review. The procedural and substantive hurdles to striking a party's pleading are high for good reasons. Those standards are not met by tossing hundreds, or hundreds of thousands, of documents onto a disk and treating that as the "record."

IX. The Sanctions Order Should Be Reversed for Failing to Take Into Account the Culpability of Other Parties.

While Respondents appear to concede that Dr. Van Veen would be entitled to a set-off against damages for previous settlements in the case, they argue that he should not be able to seek allocation of fault to other persons and entities. (Resp. Br. pp. 43-44)

In making this argument, Respondents attempt to minimize its importance by suggesting that Dr. Van Veen is essentially responsible for all of Respondents' claimed damages anyway. Those assertions are incorrect, and they are no substitute for giving a party a right to make a showing that fault should be allocated. Once again, Respondents try to use Dr. Van Veen's title of Clinical Director as a substitute for any analysis of what

he actually did. His role was limited and justice requires that he be allowed to show this. Both Respondents had their own post-operative doctors; Dr. Van Veen examined Mr. Luce twice and never treated Mr. Dickerson at all. (Dickerson Tr. 248-249; Luce Tr. 222) Allocation of fault is a very real issue in this case, and one that should not have been resolved through the sanctions Order.[7]

CONCLUSION

Respondents seek recovery for problems they attribute to two failed surgeries. Dr. Van Veen did not perform those surgeries, and he was not employed by TLC when the surgeries occurred. Claims arising from those surgeries are barred by the statute of repose. Dr. Van Veen has substantial defenses to these claims.

The sanctions Order would strip him of those defenses and expose him to potentially ruinous personal liability on the basis of a single oversight that has not prejudiced Respondents. The Circuit Court sanctioned Dr. Van Veen on the basis of the conduct of other parties. It sanctioned him for a delayed production that is attributable to oversight. It did so with no clear record of the significance of the New Documents that Dr. Van Veen produced. The sanctions Order should be reversed.

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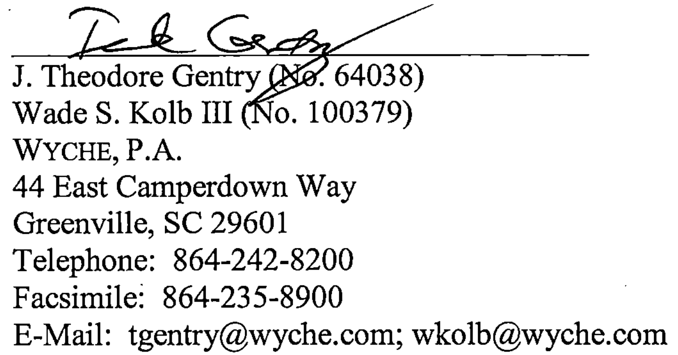
[7] Respondents also assert that their lack of knowledge of the diagnosis of ectasia "deprived them" of available treatment that would have improved their conditions. Putting to one side the disputed question of whether Respondents or their physicians knew of this diagnosis, this assertion by Respondents assumes away another significant dispute. We understand there is substantial evidence that, at the time in question, there were no accepted treatments for ectasia beyond what was offered to Respondents. Respondents' blithe assertion on this point assumes a huge array of factual and expert evidence that has not yet been put into the record.

Respectfully submitted,

By: 

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September 19, 2016

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SC Court of Appeals

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 .... Appellant.

And

Michael "Chad" Luce, ... Respondent,

v.

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

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

PROOF OF SERVICE

The undersigned certifies that he is employed with the law firm of Wyche, P.A, attorneys for the Appellant, Derek P. Van Veen, O.D., and that he has caused a copy of Appellant's Initial Reply Brief and Supplemental Designation of Matter to be served on counsel listed below this 19th day of September 2016.

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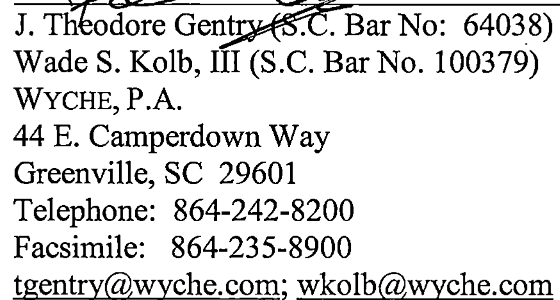

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